

CORPORATE MEETINGS MINUTES *AND* RESOLUTIONS

THIRD EDITION



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**CORPORATE MEETINGS,
MINUTES, AND RESOLUTIONS**

NOTE

The forms contained in this book have been carefully selected in order to cover the situations and problems of the subject matter as completely as possible. They will be useful for adaptation to specific situations in connection with which they are to be used. Laymen will find them informative on the contingencies and problems that should be considered, but should consult their own legal counsel before entering into any contract or business arrangement based on these forms.

CORPORATE MEETINGS, MINUTES, AND RESOLUTIONS

CONTAINING FORMS AND PRECEDENTS AS WELL
AS A COMMENTARY UPON THE LEGAL PRIN-
CIPLES INVOLVED IN QUESTIONS
REQUIRING CORPORATE ACTION

BY

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THIRD EDITION

Englewood Cliffs, N. J.
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① Public meetings
② Industries

CALL

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PREFACE TO THIRD EDITION

IN THE revision of *Corporate Meetings, Minutes, and Resolutions*, it has been necessary to add resolutions, to delete some that represented obsolete practices, and to make substitutions to meet current requirements. The numerous laws directly affecting corporate action, such as the Securities Act, the Securities Exchange Act, the Public Utility Holding Company Act, the amendments of the Bankruptcy Act, and the Trust Indenture Act, are reflected in the resolutions included in this volume.

The principles of corporation law presented in the text have been annotated with the most recent court decisions. The discussions have been extended to give effect to the new laws and new principles that concern the secretary, directors, and other officers in the handling of corporate matters.

The authors are not unmindful of the contributions made by the corporations and attorneys whose resolutions are anonymously presented in this volume. We say "thank you" to the hundreds of individuals, most of whom are unknown to us, who drew the resolutions that have found their way into this revised edition. We are also grateful to Miss Besse May Miller who assisted in the preparation of the Third Edition.

L. D.
E. J. F.

PREFACE TO FIRST EDITION

IN THIS book we aim to explain to those who are responsible for preparing the minutes of corporate meetings, the elementary principles of corporation law, a knowledge of which is essential to a proper authorization of corporate action and to a proper record of action taken. We aim also to present precedents of minutes and resolutions that meet the usual legal requirements, that are carefully drawn, and readily adaptable to the needs of the average business corporation.

No set of resolutions can be prepared that will meet every situation and satisfy every statutory requirement. This is especially true of resolutions that authorize action that must be taken pursuant to statutory requirements. For example, a resolution that is adequate to authorize an increase of capital stock of a corporation organized under the laws of one state may be entirely inadequate for a corporation organized under the laws of another state, because of a different statutory method for increasing stock. For such situations, several forms of resolutions are presented, and one who is familiar with the statutory requirements can easily select the resolution to be followed or adapted.

In the preparation of this volume, excerpts from the minute books of hundreds of corporations were used. This does not mean that hundreds of corporations turned over their minute books for our examination. Minute books are the most private of corporate records and corporation officials are loath to surrender them regardless of the purpose for which they are sought. But minute books that are brought before official investigating committees or into the courts as evidence in lawsuits are available to whoever will seek them out. The records of these investigations and lawsuits—in the latter case in the form of the case on appeal—have been diligently sought out in the preparation of this volume. It must be admitted that several of them yielded nothing but suggestions of resolutions that may be needed. Others yielded resolutions that could be used only after careful editing. Many, however, contained resolutions that had been skillfully drawn.

Another source for the resolutions contained in this volume

has been the opinions of courts in cases that directly or indirectly involved resolutions. In many instances, the resolutions passed upon by the courts were too poorly constructed to be included in this book. In other cases, careful editing was required before the resolution could be presented as a precedent. Where the resolution was taken from an opinion and changed before it was included in the manuscript, the citation shows that the resolution has been adapted. Where the resolution appearing in the opinion could be used verbatim, the citation is given without comment.

We are grateful indeed to those corporations that were good enough to permit us to make excerpts from their minute books and regret that, because the number is so large, we are unable to acknowledge our gratitude to each corporation by name in this preface.

Anyone who has been fortunate enough to have worked closely with Dr. Charles W. Gerstenberg knows the great advantage the authors of this book enjoyed in being able to go to him without restraint for suggestions. To those who have not met Dr. Gerstenberg as professor, attorney, business executive, or friend, let us say that to have had his encouragement and assistance in the writing of this book has been to have had the greatest help obtainable.

L. D.

NEW YORK

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CHAPTER 1

STOCKHOLDERS' MEETINGS

Introduction. At least two kinds of meetings must be held by every corporation organized for profit: (1) stockholders' meetings, often called corporate meetings, and (2) directors' meetings. Meetings of committees, such as the executive, finance, investment, and other committees, may also be held, particularly in large corporations. The validity of business transacted at these meetings depends generally upon compliance with the requirements of the statutes of the state in which the corporation is organized, upon the charter and by-laws of the corporation, or, in the absence of express regulations, upon the rules established through decisions of the courts. It is apparent, therefore, that officers of a corporation charged with the duty of calling and conducting meetings and recording action taken must be familiar with the elementary principles governing the legality of meetings. The purpose of this chapter and of the chapters immediately following is to present these principles, to show why the officers should keep an accurate account of the proceedings at a meeting, and to indicate how action taken at the meeting should be recorded.

Necessity for holding stockholders' meetings. The stockholders of a corporation are given certain rights and powers by the statute under which the corporation has come into existence, by the corporate charter, and by the by-laws.¹ These rights and powers can be exercised in one of three ways: (1) at a regular meeting of stockholders; (2) at a special meeting of stockholders; and (3) by written consent, without a meeting. The method by which the stockholders may exercise their rights—

¹ For example, stockholders are given the right to elect annually a board of directors. The approval of stockholders representing a certain proportion of the capital stock must generally be obtained for an amendment of the corporate charter, for a mortgage of the corporation's property, for a lease or sale of the company's entire assets, for merger or consolidation of the corporation with another company, and for dissolution of the corporation—in general, for any act that tends to divert the use of the stockholders' investment from its original purpose.

that is, whether at a meeting or by written consent—is in most instances prescribed by statute. Even where a statute requires consent of the stockholders in writing, it is frequently expedient to hold a formal meeting of stockholders to obtain such written consent. If the statute is not clear as to whether written consent may be obtained without a meeting, the corporate action should be taken at a meeting.

The courts generally hold that the stockholders must act concurrently. They cannot bind the corporation if they act individually, even if a majority of the stockholders concur and express their consent in writing,² unless, of course, consent in writing is sufficient under a governing statute. To be sure, there are cases which show that the validity of a corporate act, even one of major importance, does not necessarily depend upon a meeting of the corporate body in a formal way.³ Irregularities in the holding of meetings do not necessarily invalidate the proceedings of the meeting; before an objecting stockholder can succeed in nullifying the proceedings at a meeting, he must show that, by the irregularity in the meeting, his rights were affected.⁴ Stockholders participating in a meeting without dissent will not thereafter be permitted to deny the regularity of such meeting.⁵

Kinds of stockholders' meetings. Meetings of stockholders are either regular or special.⁶ The regular meeting is usually the annual meeting required to be held for the election of directors,⁷ and the time for holding this meeting is generally fixed by the by-laws. Regular meetings are frequently called "general meetings" or "stated meetings." Special meetings are sometimes

² *Kappers v. Cast Stone Const. Co.*, (1924) 184 Wis. 627, 200 N. W. 376; *Stott v. Stott*, (1932) 258 Mich. 547, 242 N. W. 747.

³ *Kearneysville Creamery Co. v. American Creamery Co. et al.*, (1927) 103 W. Va. 259, 137 S. E. 217, and cases there cited.

⁴ The failure of stockholders to consent to authorization of a sale is a matter about which only the stockholders can complain. Defective authorization cannot be used as a defense in an action by the assignee against third persons. *Boston Acme Mines Development Co. v. Clawson*, (1925) 66 Utah 103, 240 P. 165.

⁵ *State ex rel. Blackwood v. Brast*, (1924) 98 W. Va. 596, 127 S. E. 507, and cases there cited.

⁶ Some corporations, as part of a program for building better stockholder relations, hold regional, informal meetings to give information to stockholders who could not attend the annual meeting. No company business is transacted at these meetings.

⁷ The election of directors at a special meeting is valid if the meeting is called in accordance with statute. *In re Warns*, (1941) *New York Law Journal*, 11/10/41. p. 1448, col. 2.

termed "general extraordinary meetings" or "called" meetings.

A corporation may not transact any extraordinary business at a regular meeting of the stockholders without proper notice having been given to the stockholders, but it may transact any ordinary business that may come before the meeting. For example, consideration of the financial statement is a proper item of business to be taken up at the regular meeting.⁸ The corporation cannot transact at a general meeting business which the statute requires to be transacted at a special meeting. At a special meeting of the stockholders, no business other than that specified in the call for the meeting may be considered or transacted unless all the stockholders entitled to vote are present in person or represented by proxy, and unless all consent to the transaction of the business.⁹

The statute, charter, or by-laws may require that the consent of the stockholders to a particular transaction be given (1) in writing, (2) in writing expressed at a special meeting, (3) at any meeting called to consider the question, or (4) at any meeting. Under the first provision, no meeting is necessary, though, of course, consent may be given in writing at a meeting. Under the second provision, apparently, consent may be given only at a special meeting called for the purpose. Under the third provision, consent may be given at a regular or a special meeting, provided notice of the meeting contains a statement of the purpose of the meeting. Under the fourth provision, consent is sufficient if given at any meeting.

Calling stockholders' meetings. The by-laws generally indicate who may call regular and special meetings of stockholders. Occasionally, the provisions governing the calling of meetings are found in the certificate of incorporation. In many states, the manner of calling meetings is fixed by statute. If there is a conflict between the by-laws and the statute as to who shall make the call, the statute controls.¹⁰ If neither the by-laws nor the statute designates who shall call meetings of the stockholders, the directors, acting as a board, are the proper officers to do so,¹¹ and they may call a meeting whenever they deem it necessary.

Should the corporate officers, whose duty it is to call a meeting,

⁸ Frankel v. 447 Central Park West Corp., (1941) 176 N. Y. Misc. 701, 28 N. Y. Supp. (2d) 505.

⁹ Naftalin v. LaSalle Holding Co., (1922) 153 Minn. 482, 190 N. W. 887.

¹⁰ Grant v. Elder, (1918) 64 Colo. 104, 170 P. 198.

¹¹ Walsh v. State ex rel. Cook, (1917) 199 Ala. 123, 74 So. 45.

wrongfully refuse to do so, a stockholder may bring a suit for mandamus to compel the calling of a meeting.¹² Many of the statutes specifically provide that, in case the election of directors is not held on the day designated by the by-laws, a meeting for the election of directors may be called by a certain number of stockholders themselves, upon giving notice as prescribed in the statute. Where a special meeting of stockholders is called by a stockholder, strict compliance with the by-laws or statutes governing the calling of the meeting is particularly important.¹³ It has been held that a stockholder who is not a stockholder of record can call a meeting.¹⁴

In order to make the stockholders' meeting legal, mandatory provisions in the certificate of incorporation or by-laws of the corporation as to the method of call must be observed.¹⁵ Substantial compliance is all that is necessary.¹⁶ If the by-laws require that the meeting be called by the directors or by those stockholders holding a certain percentage of stock, it cannot be called by the president or by another officer;¹⁷ nor may any other officer call a meeting when only the president is authorized to call it.¹⁸ If the by-laws specify that a meeting be called in writing, an oral call is insufficient. However, attendance and participation in the meeting by all the stockholders constitute a waiver of any objection either to the regularity of the call or to

¹² *Michel v. Michel*, (1922) 151 La. 541, 92 So. 50; *Walsh v. State*, supra (Note 11). See also *Dedrick v. California Whaling Co.*, (1936) 16 Cal. App. (2d) 284, 60 P. (2d) 551, holding that the president and secretary of the corporation cannot defeat the statutory procedure to compel calling of stockholders' meeting by resigning.

¹³ See *Glahe v. Arnett*, (1924) 38 Idaho 736, 255 P. 796, in which a meeting was held ineffective where it was called by less than the number of stockholders required by the by-laws.

¹⁴ *Matter of Bloch*, (1947) 272 N. Y. App. Div. 218, 70 N. Y. Supp. (2d) 530.

¹⁵ *Matthews v. Columbia Nat. Bank et al.*, (1897) 79 F. 558. A call for a meeting issued by a de facto officer is a valid call, provided it would be valid if the officer were a de jure one. *Moon v. Moon Motor Car Co.*, (1930) 17 Del. Ch. 176, 151 A. 298. See also *Riggs v. Polk County*, (1907) 51 Ore. 509, 95 P. 5; *State ex rel. Benson v. Kylmanen*, (1930) 181 Minn. 281, 232 N. W. 262; *Bushway Ice Cream Co. v. Fred H. Bean Co.*, (1933) 284 Mass. 239, 187 N. E. 537; *State v. Bellin*, (1935) 55 R. I. 374, 181 A. 804.

¹⁶ *Boericke v. Weise*, (1945) 68 Cal. App. (2d) 407, 156 P. (2d) 781.

Where the statute provides that the president shall call the meetings, sending out cards without evidence as to who sent them is not substantial compliance. *Shell v. Conrad*, (1941) (Mo. App.) 153 S. W. (2d) 384.

¹⁷ *Westcott v. Minnesota Min. Co.*, (1871) 23 Mich. 144; *Grant v. Elder*, (1918) 64 Colo. 104, 170 P. 198.

¹⁸ A special meeting of stockholders called by the vice-president without authority was held illegal in *Kersjes v. Metzger*, (1940) 292 Mich. 83, 290 N. W. 336.

the manner in which it is made.¹⁹ Thus, those who are present and vote at a meeting cannot later attack its validity on the ground that those who called the meeting lacked the authority to do so.²⁰ Subsequent ratification by all the stockholders of the business transacted at a meeting that has been improperly called will also waive the irregularity.

Necessity for giving notice of stockholders' meetings. Notice of stockholders' meetings should be given exactly in the manner provided in the statute, charter, or by-laws.^{20a} However, substantial compliance with by-law requirements is sufficient.²¹ If the statute prescribes a method of giving notice and a time at which notice should be given that vary from the provisions of the by-laws, the statute should be followed.²² If no notice is required, and the charter or by-laws fix the time and place at which regular meetings are to be held, the by-laws themselves are sufficient notice to all stockholders and no further notice is necessary.²³ However, if a statute requires that notice be given, the fact that the by-laws fix the time and place of the meeting does not dispense with the necessity for sending notice to stock-

¹⁹ *Guaranty Loan Co. v. Fontanel*, (1920) 183 Cal. 1, 190 P. 177; *First Mortgage Bond Homestead Ass'n v. Baker*, (1929) 157 Md. 309, 145 A. 876.

²⁰ *Simon Borg & Co. et al. v. New Orleans City R. Co. et al.*, (1917) 244 F. 617.

^{20a} *People v. Batchelow*, (1860) 22 N. Y. 128; *In re Keller*, (1906) 116 N. Y. App. Div. 58, 101 N. Y. Supp. 133; *Moon v. Moon Motor Car Co.*, (1930) 17 Del. Ch. 176, 151 A. 298; *In re Mississippi Valley Utilities Corp.*, (1933) 2 F. Supp. 995; *Alexander v. Quality Leather Goods Corp.*, (1934) 150 N. Y. Misc. 577, 269 N. Y. Supp. 499; *Shell v. Conrad*, (1941) (Mo. App.) 153 S. W. (2d) 384.

In Toombs v. Citizens Bank of Waynesboro, (1930) 281 U. S. 643, 50 S. Ct. 434, the Supreme Court of the United States said that even in the absence of a provision in the statute or by-laws requiring notice, common law principles require corporate meetings to be called by reasonable notice to stockholders.

The Utah statute requires personal service of notice upon each stockholder. Notice by mail is "personal service" under the statute. *Merrion v. Scorup-Somerville Cattle Co.*, (1943) 134 F. (2d) 473, writ of certiorari denied, 6/1/43, 319 U. S. 760, 63 S. Ct. 1317.

In Mills v. Tiffany's, Inc., (1938) 123 Conn. 631, 198 A. 185, stockholder who was not given notice of a meeting transferring the assets of the corporation was held to be entitled to recover damages against directors and others responsible for the proceedings.

²¹ *Boericke v. Weise*, (1945) 68 Cal. App. (2d) 407, 156 P. (2d) 781. In this case the by-laws required call of meeting at request of holders of one-third of stock. The meeting was called by the president with approval of two directors who owned almost 50 per cent of the stock. The notice recited that the meeting was called by "directors," and was specific as to time, place, and purpose of the meeting. The notice substantially complied with the by-law requirements.

²² *Piedmont Press Assn. v. Record Pub. Co.*, (1930) 156 S. C. 43, 152 S. E. 721.

²³ *Morrill v. Little Falls Mfg. Co.*, (1893) 53 Minn. 371, 55 N. W. 547; *State v. Kreutzer*, (1919) 100 Ohio St. 246, 126 N. E. 54.

holders.²⁴ If the time and place are not fixed, notice must be sent to the stockholders.²⁵ Special meetings, therefore, require that notice be given to the stockholders, and, if notice is not given, no action that will be binding upon the corporation may be taken at the meeting unless notice is waived as indicated on page 9.²⁶ This rule applies also to close corporations.^{26a} Supplying copies of the notice to brokers for their clients who are stockholders is not an adequate method of notifying stockholders of a meeting.²⁷ It is necessary to give notice *only* to those stockholders who are *entitled to vote*,²⁸ unless, of course, the statute expressly provides otherwise. The list of stockholders (see page 21) determines who is entitled to receive notice and to vote.²⁹

Great care should be exercised to give the notice in due time.³⁰ The by-laws or statutes usually indicate how many days before the meeting notice must be given, and such requirements must be strictly observed. Thus, where the by-laws require thirty days' notice, a meeting will be invalid if only twelve days' notice is given.³¹ If the statute requires twenty days' notice and the by-laws permit *less*, twenty days' notice must be given; but the

²⁴ *People v. Matthiessen*, (1915) 269 Ill. 499, 109 N. E. 1056, aff'g 193 Ill. App. 328.

²⁵ *Asbury v. Mauney*, (1917) 173 N. C. 454, 92 S. E. 267; *Close v. Britson Mfg. Co.*, (1930) 43 F. (2d) 869.

²⁶ Note, however, that statutes requiring notice of special meetings of stockholders are for the benefit of stockholders, and when all are present and acting, notice may be dispensed with. *First Mortgage Bond Homestead Ass'n v. Baker*, (1929) 157 Md. 309, 145 A. 876. See also *Guaranty Loan Co. v. Treadwell*, (1921) 53 Cal. App. 538, 200 P. 653; *Scranton Axle & Spring Co. v. Scranton Bd. of Trade*, (1921) 271 Pa. 6, 116 A. 838; *Dixie Cab Co. v. Black & White Cab Co.*, (1949) 214 Ark. 624, 217 S. W. (2d) 602.

^{26a} *J. A. Maurer, Inc.*, (1947) 118 *New York Law Journal* 1185.

²⁷ *Bryan v. Western Pac. R. Corp.*, (1944) (Del. Ch.) 35 A. (2d) 909.

²⁸ *In re S. & S. Mfg. & Sales Co.*, (1917) 246 F. 1005; *Gray v. Bloomington & Normal Ry.*, (1905) 120 Ill. App. 159. Notice of a meeting to one who has subscribed for stock, but is not a stockholder entitled to vote, is a mere gratuity. *Goodisson v. North American Securities Co.*, (1931) 40 Ohio App. 85, 178 N. E. 29. See page 19 as to who may vote.

²⁹ *In re Northeastern Water Co.*, (1944) (Del. Ch.) 38 A. (2d) 918.

³⁰ Five days' notice of a special meeting of stockholders was held sufficient where an amendment of the by-laws changing the five days' notice requirement to ten days was invalid. *Moon v. Moon Motor Car Co.*, (1930) 17 Del. Ch. 176, 151 A. 298. See also *Hanrahan v. Andersen*, (1939) 108 Mont. 218, 90 P. (2d) 494.

³¹ *In re Keller*, (1906) 116 N. Y. App. Div. 58, 101 N. Y. Supp. 133. See also *Davison v. Parke, Austin & Lipscomb, Inc.*, (1937) 165 N. Y. Misc. 32, 299 N. Y. Supp. 960, in which it was held that where the certificate of incorporation and stock certificate required thirty days' notice of the meeting, the giving of twelve days' notice as required by the statute was insufficient; modified in other respects, (1939) 256 N. Y. App. Div. 1071, 12 N. Y. Supp. (2d) 358.

directors may fix a period of *more* than the statutory twenty days.³² The day of mailing the notice and the day of the meeting are both excluded in counting the number of days.³³ If the statute requires publication of the notice for ten days, it means that the notice is to continue in the publication for a period of ten days. In a daily paper this would require ten different inserts; in a weekly paper, two inserts.³⁴

Where the statute does not specifically require publication of the notice, newspaper notices are usually omitted.

Notice given respecting a meeting extends to all adjournments of the meeting, and, if proper notice of the original meeting has been given, notice of the adjourned meeting is unnecessary, unless the by-laws otherwise provide.³⁵ In order that the notice of the prior meeting shall extend to the adjourned meeting, however, the latter must be held for the same purpose, and be virtually a continuation of the first meeting.³⁶

Contents of notice of stockholders' meeting. Notice of a meeting need not be in any particular form, unless the charter or by-laws prescribe one.³⁷ It should, however, specify the time, the place, and the hour at which the meeting is to be held,³⁸ and should show that it is being given by competent authority. If it does not show who is calling the meeting, it is not a proper notice.³⁹ The holding of the meeting should not be made conditional upon the happening of any event.

Notice of a regular meeting need not contain a statement of the business to be transacted at the meeting, unless the statute, charter, or by-laws require it.⁴⁰ Some corporations choose to

³² MacCrone et al. v. American Capital Corp. et al., (1943) 51 F. Supp. 462.

³³ Ibid.

³⁴ State ex rel. Webber v. Shaw, (1921) 103 Ohio 660, 134 N. E. 643.

³⁵ People ex rel. Loew v. Batchelor, (1860) 22 N. Y. 128.

³⁶ Ibid.

³⁷ Citrus Growers' Development Assn. v. Salt River Valley Water Users' Assn., (1928) 34 Ariz. 105, 268 P. 773.

³⁸ Sam Buenaventura, etc., Mfg. Co. v. Vassault, (1875) 50 Cal. 534. See also Boericke v. Weise, (1945) 68 Cal. App. (2d) 407, 156 P. (2d) 781.

³⁹ Shell v. Conrad, (1941) (Mo. App.) 153 S. W. (2d) 384.

⁴⁰ Des Moines Life & Annuity Co. v. Midland Ins. Co., (1925) 6 F. (2d) 228; Johnson v. Tribune Herald Co., (1923) 155 Ga. 204, 116 S. E. 810; Koplar v. Warner Bros. Pictures, (1937) 19 F. Supp. 173. It was held in Bushway Ice Cream Co. et al. v. Fred H. Bean Co. et al., (1933) 284 Mass. 239, 187 N. E. 537, that where the by-laws and the statute made imperative a statement in the call for the annual meeting, as well as for every other meeting of the stockholders, of the business to come before such meeting, a change in the by-laws could not properly be made at a meeting, the notice of which limited action to the election

include the purposes of a regular meeting in the notice. If so, a clause, such as "and to transact such other business as may properly come before the meeting," should follow the statement of purposes. This leaves the door open for consideration of business not included in the notice. If some unusual business is to be transacted at the regular meeting, such as a sale of all the corporate property, or an amendment of the corporate charter,⁴¹ or a radical change in the method of electing directors,⁴² notice of such unusual business should always be given. When ratification of specific acts is to come before the meeting, the notice should refer to the acts.⁴³ A statement of the object of the meeting is sufficient; details need not be specified.⁴⁴

In the case of special meetings, the notice must state the purpose of the meeting in such a way that the stockholders will have a fair understanding of the business to be transacted.⁴⁵ A notice that the purpose of the meeting is to consider "all questions relating to the property, management and business policy of the corporation * * * and to take such action as may be deemed expedient and necessary in connection therewith," was held to be sufficient to notify stockholders that a change of officers and directors might be considered.⁴⁶ From the standpoint of policy, a clearer indication of the purpose would be advisable. Business not embraced in the notice of the meeting

of officers and to action properly coming before the meeting in respect to such election.

⁴¹ *Des Moines Life & Annuity Co. v. Midland Ins. Co.*, supra (Note 40).

⁴² *Klein v. Scranton Life Ins. Co.*, (1940) 139 Pa. Super. 369, 11 A. (2d) 770. Amendment proposed at annual meeting in 1938 provided that directors should be elected in classes. This made it impossible for minority stockholders to elect any directors, as they could when all members of the board were elected in a group. The call for the 1939 meeting contained no notice of the proposed amendment. The court held adequate notice was not given to the stockholders.

⁴³ For form of clause, see Index under "Forms, purpose clause in notice of meeting."

⁴⁴ *Rogers v. Hill*, (1932) 60 F. (2d) 109, aff'd (1933) 62 F. (2d) 1079, rev'd (1933) 289 U. S. 582, 53 S. Ct. 731, on other grounds.

⁴⁵ *Citrus Growers' Development Assn. v. Salt River Valley Water Users' Assn.*, (1928) 34 Ariz. 105, 268 P. 773; *Starrett Corporation v. Fifth Ave. & 29th St. Corp.*, (1932) 1 F. Supp. 868; *Noremac Inc. v. Centre Hill Court*, (1935) 164 Va. 151, 178 S. E. 877; *Schwartz v. Inspiration Gold Mining Co.*, (1936) 15 F. Supp. 1030; *Klein v. Scranton Life Ins. Co.*, (1940) 139 Pa. Super. 369, 11 A. (2d) 770.

Notice of meeting which substantially informs stockholders of the purpose of the meeting is sufficient. *Bruckmann v. Bruckmann Co.*, (1938) 12 Ohio Opinions 44. See also *Jones v. Commonwealth Edison Co.*, (1938) 297 Ill. App. 513, 18 N. E. (2d) 113; *Sutherland v. Garbutt*, (1942) 132 F. (2d) 208.

⁴⁶ *Lawrence v. I. N. Parlier Estate Co.*, (1940) 15 Cal. (2d) 220, 100 P. (2d) 765.

cannot be transacted,⁴⁷ unless all the stockholders are present and give their consent.

Proof of notice. Proof of the mailing of notice is established by an affidavit of the secretary, and where notice is required to be published in a newspaper, the affidavit of the publisher is sufficient.⁴⁸ (See page 123 for a form of affidavit.) Proof of actual receipt is not necessary when evidence of the mailing of notices, properly addressed and stamped, is submitted.⁴⁹

Waiver of notice of stockholders' meetings. Notice of a meeting of stockholders, whether required by the statute, charter, or by-laws, may be waived by the stockholders.⁵⁰ Waivers may be either in writing or by action. A person who is present in person or by proxy, and who participates without dissent in a meeting, thereby waives defects in the notice.⁵¹ But mere presence at the meeting without participation is not a sufficient waiver of notice.⁵² A stockholder may not participate in one matter of business and at the same time object to the legality of the meeting when another matter is considered.⁵³ While the presence of all the stockholders at, and their participation in, the meeting is sufficient to constitute a waiver of notice,⁵⁴ it is advisable to note, in the minutes of the meeting, where notice

⁴⁷ *Asbury v. Mauney*, (1917) 173 N. C. 454, 92 S. E. 267; *Logie v. Mother Lode Copper Mines Co. of Alaska*, (1919) 106 Wash. 208, 179 P. 835; *Vogtman v. Merchants' Mortgage & Credit Co.*, (1935) 20 Del. Ch. 364, 178 A. 99.

⁴⁸ *Dolbear v. Wilkinson*, (1916) 172 Cal. 366, 156 P. 488; *Callahan v. Chilcott Ditch Co.*, (1906) 37 Colo. 331, 86 P. 123.

⁴⁹ *Ashley Wire Co. v. Illinois Steel Co.*, (1895) 60 Ill. App. 179.

⁵⁰ *In re Hammond*, (1905) 139 F. 898; *In re Goldville Mfg. Co.*, (1902) 118 F. 892; *Kenton Furnace R. R. & Mfg. Co. v. McAlpin*, (1880) 5 F. 737.

⁵¹ *Beggs v. Myton Canal & Irrigation Co.*, (1919) 54 Utah 120, 179 P. 984; *Sherrard State Bank v. Vernon*, (1926) 243 Ill. App. 122; *Frankel v. 447 Central Park West Corp.*, (1941) 176 N. Y. Misc. 701, 28 N. Y. Supp. (2d) 505; *In re Electric Meter Corp.*, *New York Law Journal*, 10/9/42, p. 972, col. 5.

⁵² *People v. Matthiessen*, (1915) 269 Ill. 499, 109 N. E. 1056, aff'g 193 Ill. App. 328. A stockholder who attends an annual meeting merely to demand that no business be transacted and then withdraws from the meeting after failing to secure a pledge from the chairman that no business will be transacted will not be deemed to have participated in the meeting to the extent of waiving his right to statutory notice.

⁵³ *Frankel v. 447 Central Park West Corp.*, (1941) 176 N. Y. Misc. 701, 28 N. Y. Supp. (2d) 505. In this case a stockholder objected to the election of directors on the ground that he had not received sufficient notice, but later took part in the consideration of the financial statement.

⁵⁴ *Guaranty Loan Co. v. Treadwell*, (1921) 53 Cal. App. 538, 200 P. 653; *Larkin v. Maclellan*, (1922) 140 Md. 570, 118 A. 181; *Scranton Axle & Spring Co. v. Scranton Bd. of Trade*, (1921) 271 Pa. 6, 113 A. 838; *First Mortgage Bond Homestead Assn. v. Baker*, (1929) 157 Md. 309, 145 A. 876.

has not been given, that notice of the meeting has been waived.

Most large corporations give notice of meetings and therefore find it unnecessary to obtain waivers from the stockholders. In small, close corporations, however, notice of the meeting is frequently waived. Where the meeting is held pursuant to waiver of notice, a form of waiver is prepared and signed by all the stockholders present at the meeting, and is inserted either before or after the minutes of the meeting.

The statutes in some states expressly provide that a waiver may be signed after the meeting. Even in the absence of such a statutory provision, a waiver signed after the meeting would probably be effective.⁵⁵ The better practice, however, is to obtain the signature of stockholders on the waiver either before or at the meeting. Stockholders can waive notice of the meeting by proxy.⁵⁶ Business transacted at a meeting for which notice has not been properly given may be ratified subsequently by the stockholders at a legal meeting called by proper notice.⁵⁷

Place of stockholders' meetings. Meetings of stockholders, both annual and special, must be held within the state, unless otherwise provided by statute.⁵⁸ The statutes in many states permit the stockholders to hold their meetings outside the state. Under some statutes, meetings may be held outside the state only if the charter or by-laws so provide. Under other statutes, they may be held within or without the state unless restricted by the charter or by-laws. The statutes in some states merely provide that the place for holding stockholders' meetings shall be fixed by the by-laws.⁵⁹

Statutory directions as to the place of stockholders' meetings must be followed. If the statute prohibits the corporation from holding meetings outside the state, proceedings at a meeting held outside the state are void, and a board of directors elected at such a meeting will have no more power than if no election had been held.⁶⁰ The prohibition as to the performance of acts out-

⁵⁵ *Prentice v. Knickerbocker L. Ins. Co.*, (1879) 77 N. Y. 483.

⁵⁶ *Opinion of Attorney General*, (1935) (Mo.).

⁵⁷ *Howard v. Tatum*, (1918) 81 W. Va. 561, 94 S. E. 965.

⁵⁸ *In re Wilson's Estate*, (1917) 85 Ore. 604, 167 P. 580.

⁵⁹ For statutory provisions in each state, see *Prentice-Hall Corporation Service*.

⁶⁰ *Franco-Texan Land Co. v. Laigle*, (1883) 59 Tex. 339; *Op. Atty. Gen.*, (Mont.), (1939) 18 Ops. Atty. Gen. No. 68 (stockholders' meetings, whether regular or special, must be held within the state); *Golden Rod Min. Co. v. Bukvich*, (1939) 108 Mont. 569, 92 P. (2d) 316 (failure to hold stockholders' meetings within the state does not automatically dissolve the corporation); *Smith v. Hedenberg*, (1940) 189 Ga. 678, 7 S. E. (2d) 234.

side the state of incorporation refers to acts of a strictly corporate character, such as the original organization and the election of directors.⁶¹

In the absence of statutory provisions, the place at which a stockholders' meeting and an incorporators' meeting (sometimes called the "first meeting of stockholders") is to be held is determined by common law principles. The common law rule is that both stockholders,⁶² and incorporators' ⁶³ meetings must be held within the state of incorporation.⁶⁴

If the charter or statute makes no specific provision that the meeting must be held within the state, action taken at a meeting held outside the state will be valid if all the stockholders participate in the meeting.⁶⁵ Those who are present and take part in the meeting, or who accept the benefits of the meeting, may not deny the validity of the proceedings of such meeting.⁶⁶ Furthermore, informalities of meetings held outside the state may be waived by the stockholders, or the acts done at the meeting may be ratified by their subsequent consent and acquiescence.⁶⁷ Persons who have dealt with a corporation on the basis of the validity of such acts cannot afterwards set up their invalidity.⁶⁸ As a matter of practice, if the governing statute requires stockholders' meetings to be held within the state, and a meeting at such place is inconvenient at the time, the meeting may be held at the most convenient place, and all transactions concluded at the meeting may subsequently be ratified at a meeting held within the state by dummies acting on stockholders' proxies.

⁶¹ *Franco-Texan Land Co. v. Laigle*, supra (Note 60). See also *Hening & Hagedorn v. Glanton*, (1921) 27 Ga. App. 339, 108 S. E. 256.

⁶² *Hodgson v. Duluth, H. & D. R. Co.*, (1891) 46 Minn. 454, 49 N. W. 197; *Jones v. Pearl Min. Co.*, (1894) 20 Colo. 417, 38 P. 700; *Harding v. Am. Glucose Co.*, (1899) 182 Ill. 551, 55 N. E. 577.

⁶³ See *Hasbrouck v. Rich*, (1905) 113 Mo. App. 389, 88 S. W. 131.

⁶⁴ *Bank of Augusta v. Earle*, (1839) 13 Pet. 519, 10 L. Ed. 274. See also *Miller v. Ewer*, (1847) 27 Me. 509; *Boyette v. Preston Motors Corp.*, (1921) 206 Ala. 240, 89 So. 746; *Gorman v. A. B. Leach & Co.*, (1926) 11 F. (2d) 454; *Fowler v. Chillingworth*, (1927) 94 Fla. 1, 113 So. 667.

⁶⁵ *Handley v. Stutz*, (1890) 139 U. S. 417, rev'g on other grounds 41 F. 531. See also *Ellsworth v. National Home and Town Builders*, (1917) 33 Cal. App. 1, 164 P. 14; *American Clearing Co. v. Walkill Stock Farms Co.*, (1923) 293 F. 58.

⁶⁶ *Handley v. Stutz*, supra (Note 65).

⁶⁷ *In re Wilson's Estate*, (1917) 85 Ore. 604, 167 P. 580. See also *Smith v. Hedenberg*, (1940) 189 Ga. 678, 7 S. E. (2d) 234.

⁶⁸ *Hasbrouck v. Rich*, (1905) 113 Mo. App. 389, 88 S. W. 131.

Where a corporation is chartered in more than one state, a meeting in any one of the states is valid for all of them, and there is no necessity for a repetition of the meeting in any other of the states.

Time of stockholders' meetings. The regular annual meetings of stockholders should be held on the day fixed by the by-laws or charter. Generally, the by-laws indicate when such meetings shall be held, and the time so fixed can be changed only by a proper amendment of the by-laws.⁶⁹ If the date is fixed in the by-laws adopted by the stockholders, and no authority is conferred upon the directors to change it, the directors cannot change the date of the annual meeting by passing a resolution or a by-law.⁷⁰

The statutes of many states indicate what will happen if the regular annual meeting fails to take place. Generally, where an annual meeting of stockholders is not held at the time specified, directors may call a meeting within a reasonable time thereafter,⁷¹ and they must call it whenever it is demanded by any stockholder.⁷²

The meeting should be held at the place designated in the notice and at the time specified, but it is not essential that it start on the stroke of the clock; it is sufficient if it convenes within a reasonable time after the hour fixed in the notice.⁷³

The meeting cannot legally be convened before the hour specified in the notice,⁷⁴ unless, of course, all the stockholders are present.

Quorum at stockholders' meetings. The amount of stock necessary to be represented at a meeting of the stockholders for the transaction of business is generally fixed by the by-laws,⁷⁵ though frequently the statute or charter designates the amount required. If the statute fixes the amount of stock necessary to

⁶⁹ *Walsh v. State ex rel. Cook*, (1917) 199 Ala. 123, 74 So. 45; *State ex rel. Carpenter v. Kreutzer*, (1919) 100 Ohio St. 246, 126 N. E. 54.

⁷⁰ *Ibid.*

⁷¹ *Walsh v. State ex rel. Cook*, *supra* (Note 69).

⁷² *State v. Wright*, (1897) 10 Nev. 167; *Walsh v. State ex rel. Cook*, *supra* (Note 69).

⁷³ *People v. Albany, etc., R. R.*, (1869) 55 Barb. (N. Y.) 344; *Michel v. Michel*, (1922) 151 La. 541, 92 So. 50.

⁷⁴ *People v. Albany, etc., R. R.*, *supra* (Note 73).

⁷⁵ Where a corporation by its by-laws defines what shall constitute a quorum, it means a quorum for the transaction of business. *Beale v. Columbia Securities Co.*, (1926) 256 Mass. 326, 152 N. E. 703.

constitute a quorum, a by-law that conflicts with the statute is void;⁷⁶ otherwise, the by-law provision is valid.⁷⁷

Where express provision is made by the statute, charter, or by-laws concerning a quorum, a valid meeting cannot be held unless a quorum is present.⁷⁸ If, after waiting a reasonable time, no quorum appears, the chairman merely adjourns the meeting;⁷⁹ that is the only legal action that can be taken.⁸⁰

In some states the statutes are silent on the question of what constitutes a quorum. Where this is the case, and neither the charter nor the by-laws make any provision concerning a quorum, it is not necessary that a majority of the stockholders or a majority of the stock be present for the transaction of business. If proper notice of the meeting has been given, any number present, provided there are at least two, may proceed with the meeting.⁸¹ This rule is different from that governing meetings of the board of directors or of the executive committee.⁸²

The term "majority," used in defining a quorum, means more than one half. In determining the quorum, stockholders represented by proxy are included.⁸³ Where the statute states that a quorum is present when members owning a majority of the stock are present or are represented, except when otherwise specially provided by law or by the articles of incorporation, the amount of stock which has been subscribed and not paid for is not included in determining whether a majority of the stock is present, the issued stock only being taken into consideration.⁸⁴

⁷⁶ *Gentry-Futch Co. v. Gentry*, (1925) 90 Fla. 595, 106 So. 473. See also *In re Rapid Transit F. Co.*, (1897) 15 N. Y. App. Div. 530, 44 N. Y. Supp. 539; *Darrin v. Hoff*, (1904) 99 Ind. 491, 58 A. 196; *Lutz v. Webster*, (1915) 249 Pa. 226, 94 A. 834.

⁷⁷ *In re Warns*, (1941) (N. Y. S. Ct.) *N. Y. Law Journal*, 11/10/41, p. 1448, col. 2.

⁷⁸ *Morton v. Talmadge*, (1928) 166 Ga. 620, 144 S. E. 111; *Hill v. Town*, (1912) 172 Mich. 508, 138 N. W. 334.

⁷⁹ See page 18 for discussion of adjourned meetings.

⁸⁰ *Kauffman v. Meyberg*, (1943) 59 Cal. App. (2d) 730, 140 P. (2d) 210.

⁸¹ *Green v. Felton*, (1908) 42 Ind. App. 675, 84 N. E. 166; *Gilchrist v. Collopy*, (1904) 119 Ky. 110, 82 S. W. 1018. See also *Morrill v. Little Falls Mfg. Co.*, (1893) 53 Minn. 371, 55 N. W. 547. It was held in this case that, where the person present held the proxies for other stockholders and voted their shares as well as his own, it was immaterial whether the number present was one or more than one.

⁸² See page 143.

⁸³ *Franklin Trust Co. v. Rutherford Elec. Co.*, (1898) 57 N. J. Eq. 42, 41 A. 488; 58 N. J. Eq. 584, 43 A. 1098.

⁸⁴ *Schwemer v. Fry*, (1933) 212 Wis. 88, 249 N. W. 62.

A provision in a by-law that "three fifths of all the stockholders shall constitute a quorum" applies to stockholders per capita, and not stockholders in interest.⁸⁵ And a by-law provision that "a majority of the stock issued and outstanding shall constitute a quorum, and all questions shall be decided by a majority of the votes cast," means that quorum members must be voting members.⁸⁶ The stock of a parent corporation registered in the name of a subsidiary cannot be counted in determining a quorum,⁸⁷ nor can treasury stock.⁸⁸

The rule of parliamentary law that a quorum will always be presumed unless it is questioned at the meeting, or unless the record shows that a quorum in fact is not present, applies to corporate meetings.⁸⁹ When inspectors of an election⁹⁰ report that a quorum is not present, they may amend their report at an adjourned meeting if a quorum was actually present on the previous occasion.⁹¹

A quorum, as specified in the statute, charter, or by-laws, must be present not only to begin a meeting but to transact business.⁹² Thus, if, during the meeting, a number of the stockholders depart, leaving less than a quorum present, the meeting must be discontinued by adjournment. However, if a meeting is once organized and all the parties have participated, no person or faction, by withdrawing capriciously and for the sole purpose of breaking a quorum, can then render the subsequent proceedings invalid.⁹³ If stockholders have withdrawn for the purpose of breaking a quorum, because of whim, caprice, or chagrin, the law will consider the action as unavailing, and will permit the meeting to proceed.⁹⁴

The persons conducting a meeting should establish at the outset of such meeting the number present either in person or by proxy and not wait until the votes have been cast for the

⁸⁵ *State ex rel. Schwab v. Price*, (1929) 121 Ohio 114, 167 N. E. 366.

⁸⁶ *Italo Petroleum Corp. v. Producers' Oil Corp.*, (1934) 20 Del. Ch. 283, 174 A. 276. See also *Kemp v. Levinger*, (1934) 162 Va. 685, 174 S. E. 820.

⁸⁷ *Italo Petroleum Corp. v. Producers' Oil Corp.*, (1934) 20 Del. Ch. 283, 174 A. 276.

⁸⁸ *Atterbury v. Cons. Coppermines Corp.*, (1941) (Del. Ch.) 20 A. (2d) 743.

⁸⁹ *Coombs v. Harford*, (1904) 99 Me. 426, 59 A. 529.

⁹⁰ See page 51.

⁹¹ *Atterbury v. Consolidated Coppermines Corp.*, (1941) (Del. Ch.) 20 A. (2d) 743.

⁹² *In re Gulla*, (1921) 13 Del. Ch. 23, 115 A. 317, 13 Del. Ch. 1, 114 A. 596.

⁹³ *Com. v. Vandegrift*, (1911) 232 Pa. St. 53, 81 A. 153.

⁹⁴ *Hexter v. Columbia Baking Co.*, (1929) 16 Del. Ch. 263, 145 A. 115; *Duffy v. Loft, Inc.*, (1930) 17 Del. Ch. 376, 152 A. 849.

election of directors, or on some other question, to determine how many shares are represented.⁹⁵ Those who are present at a meeting solely for the purpose of protesting against its legality, and who do not take part in it, should not be counted to determine whether a quorum, as required by the statute, charter, or by-laws, is present.⁹⁶

Who has the right to be present at stockholders' meetings. The general rule is that whoever has the right to vote has the right to be present at a meeting. Holders of nonvoting stock, therefore, are not entitled to be present at a meeting. To be sure, persons may be permitted to attend even though they have no legal right to do so. Even outsiders may attend unless there is some objection to their presence. If an objection is made, the matter is generally put to a vote and decided in the same way that other questions are settled. Some corporations feel that it is better to permit holders of nonvoting stock to attend meetings, for the administration may be able to convince such stockholders at a meeting that its viewpoint is correct, and thus avoid subsequent opposition. If it is anticipated that nonvoting stockholders will object at the meeting to action in which they have no voice, the meeting can be adjourned and a subsequent meeting called at which only stockholders having the right to vote may be admitted. In the meantime, the objections of the nonvoting stockholders can be carefully weighed.

A stockholder who has the right to be at a meeting as a voting stockholder and also in another capacity must be regarded as present in both capacities. Thus, where a stockholder is present at a meeting as attorney for other stockholders, his individual shares are also counted.⁹⁷

Officer presiding at stockholders' meetings. The by-laws generally give the president or some other officer the power to preside at all stockholders' meetings. Occasionally the provision appears in the corporate charter. Provisions in the charter or in

⁹⁵ *Com. v. Vandegrift*, (1911) 232 Pa. St. 53, 81 A. 153. It is a good plan always to count the quorum at the outset of the meeting, although it has been held that in the absence of any such requirement in the by-laws or statute, it is proper to proceed with the voting and let the vote disclose whether or not a quorum is present. *In re Gulla*, (1921) 13 Del. Ch. 23, 115 A. 317.

⁹⁶ *Leamy v. Sinaloa Exploration & Development Co.*, (1925) 15 Del. Ch. 28, 130 A. 282.

⁹⁷ *Atterbury v. Cons. Coppermines Corp.*, (1941) (Del. Ch.) 20 A. (2d) 743. See also *Duffy v. Loft, Inc.*, (1930) 17 Del. Ch. 140, 151 A. 223, *aff'd*, 17 Del. Ch. 376, 152 A. 849 (persons authorized to appear as shareholders and also as proxy committee for other shareholders are present in both capacities).

the by-laws as to who shall preside at a meeting of stockholders must be observed.⁹⁸ If no provision is made either in the charter or in the by-laws, anyone has the right to call the meeting to order and to preside until a chairman is elected.

To avoid any unnecessary disturbance in getting the meeting started, if several persons attempt to call the meeting to order, the order of precedence should be as follows: chairman of the board; president; vice-presidents in order of nominal designation of authority (first vice-president, second, etc.), or if no designation has been made, then in order of seniority of service, or where coequal in that regard, then in order of seniority of age; secretary; treasurer; assistant secretary; member of executive committee; directors (executive committeemen and directors are to be preferred in the order of seniority of service in the committee or on the board, or when coequal in that regard, then in order of seniority of age); stockholders, in the order of the amount of their stockholdings, or if coequal in that regard, then in the order of seniority of age.

Stockholders present at a meeting may select a chairman or a presiding officer by a viva voce vote, a stock vote not being required to give validity to the meeting in the absence of a statute or by-law otherwise providing.⁹⁹ Where a valid by-law states that "at stockholders' meetings each stockholder shall cast one vote for each share of stock owned by him," the by-law applies to the election of a chairman as well as to the proceedings after the meeting has been regularly organized.¹⁰⁰

Selection of secretary for stockholders' meetings. When a secretary must be selected because the person or persons designated by the by-laws to act as secretary at stockholders' meetings are not present, the chairman may appoint a secretary. Any stockholder may, however, require an election to be held immediately.

Conduct of stockholders' meetings. In the absence of express regulation by statute or by-law, stockholders' meetings, including

⁹⁸ *People v. Peck*, (1834) 11 Wend. (N. Y.) 604.

⁹⁹ *Com. v. Vandegrift*, (1911) 232 Pa. St. 53, 81 A. 153.

¹⁰⁰ *Proctor Coal Co. v. Finley*, (1895) 98 Ky. 405, 33 S. W. 188. Where the by-laws provide that the vote in the election of directors, and, upon the demand of a stockholder present in person or by proxy, the vote on any question, shall be by a stock vote and by ballot, the stockholder, on the basis of the by-law, has the right to demand a stock vote for the election of a chairman, and in the absence of such a demand, a chairman may be elected by a viva voce vote. *Duffy v. Loft, Inc.*, (1930) 17 Del. Ch. 376, 152 A. 849.

those for the election of directors, are controlled largely by accepted usage and custom. The fundamental rule is that all who are entitled to take part shall be treated with fairness and good faith.¹⁰¹ Most corporations conduct their meetings with considerable informality. The rules of parliamentary law need not be observed, but generally the ordinary parliamentary usages are applied.¹⁰² Thus, the chairman recognizes members who are entitled to address the meeting, states the questions and puts them to a vote, calls for nominations in elections, announces the results of all votes, preserves order, and has the right to refuse to put a motion to a vote if the matter proposed by the motion is not within the legal powers of the meeting.¹⁰³ If the by-laws provide that the meetings shall be conducted according to the rules prescribed by a manual of parliamentary procedure, the requirement must be enforced.¹⁰⁴ While formality is not essential, some method of obtaining the assent of the stockholders is necessary in order to bind the corporation.¹⁰⁵

As to who presides at stockholders' meetings, see page 15.

It is advisable to have an executive officer present at the meeting, but there is no requirement that the directors or officers attend. In large corporations, general counsel usually attends the meetings to act as adviser to the chairman. Several clerks (or sometimes the inspectors) act as ushers. As each person arrives, a clerk asks his name and address, whether he is a stockholder, or whether he has been appointed proxy for a stockholder. The clerk immediately checks the information with the transfer agent or from the list of stockholders and filed proxies that have been brought to the meeting room.

Meetings may be adjourned to a day certain, or they may be adjourned *sine die*—that is, without naming a day and finally terminating the meeting—or they may be adjourned subject to the call of the chair. The motion to adjourn specifies which form of adjournment will be taken, and if none is specified, the adjournment is final.¹⁰⁶

¹⁰¹ *Young v. Jebbett*, (1925) 213 N. Y. App. Div. 774, 211 N. Y. Supp. 61.

¹⁰² *Com. v. Vandegrift*, (1911) 232 Pa. St. 53, 81 A. 153.

¹⁰³ *Alliance Co-op. Ins. Co. v. Gasche*, (1914) 93 Kan. 147, 142 P. 882.

¹⁰⁴ *People v. American Inst. of N. Y.*, (1873) 44 How. Pr. (N. Y.) 468.

¹⁰⁵ *Landers v. Frank St. M. E. Church of Rochester*, (1889) 114 N. Y. 626, 21 N. E. 420.

¹⁰⁶ The motions will be made thus: Move to adjourn without further notice, to, 19 . . . , at o'clock . . . M. at (state place of meeting). Move to adjourn, or move to adjourn *sine die*. Move to adjourn without further notice subject to the call of the chairman. It would seem that although the latter form

Adjourned meetings of stockholders. If the holders of the amount of stock necessary to constitute a quorum fail to attend, the meeting must adjourn to another time, in the manner fixed by the statute, charter, or by-laws.¹⁰⁷ In the absence of provision in the statute, charter, or by-laws to the contrary, a meeting that has been regularly convened is not legally adjourned unless the motion to adjourn has been passed by a majority of the stock represented at the meeting, even though passed by a majority of those present.¹⁰⁸ Any business that could have been transacted at the original meeting can be transacted at an adjourned meeting if a quorum is present;¹⁰⁹ but no business can come before the adjourned meeting that could not have come before the meeting as originally notified.¹¹⁰ This rule does not apply if all stockholders are present and consent to the transaction of other business. Business begun but not concluded at the original meeting may be considered at the adjourned meeting.¹¹¹

As to voting at adjourned meetings of stockholders, see page 19. As to notice of adjourned meetings, see page 7.

Revocation and reconsideration of action by stockholders. The stockholders, while they are still in session, may alter or change any resolution or motion adopted by them at the

of motion provides that no notice need be given, the call of the chair must be communicated in some way; the effect of the motion therefore is to waive strict compliance with statutory or by-law requirements, but not to dispense with whatever is reasonable in communicating the call of the meeting.

¹⁰⁷ Under statutory provision, but more often under by-law provision, meetings that cannot be held at the time noted because a quorum is not present may be adjourned, and may be held at the adjourned hour without subsequent notice.

¹⁰⁸ *State v. Gray*, (1925) 20 Ohio App. 26, 153 N. E. 187. See also *State ex rel. Webber v. Shaw*, (1921) 103 Ohio 660, 134 N. E. 643, holding that, in the interim between the annual meeting and the adjourned meeting, stockholders may not legally call another meeting.

¹⁰⁹ *Sagness v. Farmers Co-operative Creamery Co. of Baltic & Dell Rapids*, (1940) 67 S. D. 379, 293 N. W. 365.

¹¹⁰ A meeting of stockholders was adjourned to a named date for the express purpose of putting into effect a resolution increasing the capital stock. It was held that at the adjourned meeting the resolution could not lawfully be rescinded by a majority of the stockholders only, since the business thereof, by the terms of the adjournment, was limited to such acts as would carry out and effectuate the purpose of the resolution but would not repeal or rescind. The rescinding resolution was subject to ratification at a subsequent general meeting of the corporation, provided the substantial rights of objecting or minority stockholders were not materially prejudiced thereby. *Naftalin v. La Salle Holding Co.*, (1922) 153 Minn. 482, 190 N. W. 887, and cases there cited.

¹¹¹ *Sagness v. Farmers Co-operative Creamery Co.*, *supra* (Note 109).

meeting.¹¹² They may also undoubtedly reconsider and repeal any vote or any resolution after the meeting, unless such action will disturb rights which have vested as a result of the action.¹¹³

Order of business at stockholders' meeting. The business to be transacted at a meeting need not follow any particular order, even though one is prescribed by the by-laws. A logical order of business, however, expedites the meeting. The order generally followed at an annual meeting of stockholders is:

1. Call to order.
2. Election of a chairman and appointment of a temporary secretary, if necessary.
3. Presentation of proofs of the due calling of the meeting.
4. Presentation of list of stockholders.
5. Presentation and examination of proxies.
6. Announcement of a quorum present.
7. Reading and settlement of the minutes of the previous meeting.
8. Reports of officers and committees.
9. Appointment of inspectors of election.
10. Opening of polls.
11. Election of directors.
12. Closing of polls.
13. Report of inspectors.
14. Declaration of election of directors.
15. Ratification of directors' and executive committee's acts.
16. New business.
17. Adjournment.

Voting at Stockholders' Meetings

Who may vote at stockholders' meetings. Every owner of capital stock has, as an incident to the ownership of the shares, the right to vote his stock at all meetings of the stockholders, unless such right is denied by some statutory or charter provision, or by an agreement under which he holds his shares.¹¹⁴

¹¹² *Cumberland Coal & Iron Co. v. Sherman*, (1863) 20 Md. 117.

¹¹³ *Terry v. Eagle Lock Co.*, (1879) 47 Comm. 141. See also footnote 110.

¹¹⁴ *Talbot J. Taylor & Co. v. Southern Pac. Co.*, (1903) 122 F. 147; *Lord v. Equitable Life Assur. Soc.*, (1905) 47 N. Y. Misc. 187, 94 N. Y. Supp. 65; *Hall v. Woods*, (1927) 325 Ill. 114, 156 N. E. 258; *In re Wallace's Estate*, (1929) 131 Ore. 597, 282 P. 760; *Reimer v. Smith*, (1932) 105 Fla. 671, 142 So. 603; *Personal Industrial Bankers v. Citizens Budget Co.*, (1935) 80 F. (2d) 327; *Christmas v. Kennedy*, (1937) 129 Pa. 80, 194 A. 773; *State ex rel. Johnson v. Heap*, (1939)

This right attaches to preferred as well as to common stock, unless the voting power is expressly withheld by the terms under which the stock is issued.¹¹⁵ The right of the corporation to place restrictions on the voting power of the stock issued by the corporation is discussed on page 407.

The right to vote belongs to the one who holds legal title to the shares.¹¹⁶ Wherever the legal title rests, the right to vote also rests.¹¹⁷ It follows that if title is transferable, without reference to the recording thereof on the books of the company, evidence of ownership of the legal title is all that is required to enable the owner to establish his right to vote.¹¹⁸ Since the determining of ownership in a questionable case might place the officers of the corporation in the embarrassing position of having to decide a judicial question, it is generally provided in the by-laws that the right to vote rests with the person who appears as the registered owner of the stock on the books of the corporation. In some instances, the statutes or charter makes this provision. Under such circumstances, the right to vote is determined by the books of the company.¹¹⁹

A mere record holder, without any beneficial interest in the stock, can vote it without instructions from the real owner. This is the rule even if the record holder is a brokerage house.¹²⁰ However, if the legal owner delivers the stock to the record holder for a limited use, to be returned upon request, the record

1 Wash. (2d) 316, 95 P. (2d) 1039; *In re Giant Portland Cement Co.*, (1941) (Del. Ch.) 21 A. (2d) 697; *Drob v. National Memorial Park, Inc.*, (1945) (Del. Ch.) 41 A. (2d) 589.

¹¹⁵ *Millspaugh v. Cassedy*, (1920) 191 N. Y. App. Div. 221, 181 N. Y. Supp. 276; *Phenix Mut. Fire Ins. Co. v. Rouillard*, (1942) 92 N. H. 228, 29 A. (2d) 134.

A corporation's charter may contain any provision with respect to voting rights of its stock that is not against public policy. *Ellingwood v. Wolf's Head Oil Refining Co., Inc.*, (1944) (Del.), 38 A. (2d) 743.

¹¹⁶ *Dedrick v. California Whaling Co.*, (1936) 16 Cal. App. (2d) 284, 60 P. (2d) 551; *State ex rel. Johnson v. Heap*, (1939) 1 Wash. (2d) 316, 95 P. (2d) 1039; *People ex rel. Courtney v. Botts*, (1941) 376 Ill. 476, 34 N. E. (2d) 403.

¹¹⁷ For right to create voting trusts, see page 37.

¹¹⁸ *People ex rel. Pickering v. Devin*, (1855) 17 Ill. 84.

¹¹⁹ *State ex rel. Breger v. Rusche*, (1942) 219 Ind. 559, 39 N. E. (2d) 433; *Tracy v. Brentwood Corp.*, (1948) (Del. Ch.) 59 A. (2d) 708.

¹²⁰ *McLain v. Lanova Corp.*, (1944) (Del. Ch.) 39 A. (2d) 209. An equitable owner of shares who permits them to stand in his broker's name impliedly authorizes the broker to vote them. *In re Pressed Steel Car Co. of New Jersey*, (1936) 16 F. Supp. 329.

holder cannot vote the stock over the legal owner's objection.¹²¹

Unless there is some provision to the contrary, a stockholder's right to vote at a meeting is to be determined as of the time when the meeting is held.¹²²

List of stockholders to determine eligibility to vote—Closing transfer books. On occasions, just prior to a meeting, corporations were inundated with demands for transfers of stock, in order that the true owners might assert their right to be present and to vote at a meeting. This meant that until the last moment before the meeting, the corporation could not prepare its list of stockholders who were entitled to vote. Out of this difficulty grew the practice, sanctioned by the statutes in the various states, of either: (1) closing the stock transfer books a certain number of days before the meeting of stockholders and allowing only stockholders of record at the time the books are closed to vote, or (2) keeping the stock transfer books open, but permitting only stockholders of record upon a certain day, generally a week or more before the meeting, to vote at the meeting.

The officer or agent of the corporation having charge of the transfer of stock prepares a list of the stockholders, showing the number and class of shares held by each as shown on the books on the day fixed for the closing of the books of transfer, or, if the books are not closed, a list of the stockholders on record on the day fixed for determining the stockholders eligible to vote. So far as the corporation is concerned, the record owner is the real owner.¹²³

In some of the states, the statute requires the corporation to prepare a complete alphabetical list of the stockholders a certain number of days before the meeting and to file the list in the principal office of the corporation for inspection by the stockholders. The books of the corporation, or the list prepared, are considered *prima facie* evidence of the ownership of the stock;¹²⁴ they are binding upon inspectors of elections as to who has the

¹²¹ *Larkin v. Enright*, (1941) 312 Ill. App. 184, 37 N. E. (2d) 905 (stockholder received stock for qualifying purposes, without consideration).

¹²² *Bernheim v. Louisville Property Co. et al.*, (1914) 221 F. 273; *McLain v. Lanova Corp.*, (1944) (Del. Ch.) 39 A. (2d) 209.

¹²³ *In re Giant Portland Cement Co.*, (1941) (Del. Ch.) 21 A. (2d) 697.

¹²⁴ *Com. v. Dalzell*, (1893) 152 Pa. 217, 25 A. 535; *Hall v. Woods*, (1927) 325 Ill. 114, 156 N. E. 258; *Swaim v. Martin*, (1946) 302 Ky. 381, 194 S. W. (2d) 855.

right to vote, but not upon the courts.¹²⁵ The courts have frequently held that a duly qualified stockholder does not lose his right to vote if his name fails to appear on the proper stock record book or on the list of stockholders because of negligence or ignorance of the corporation in maintaining its record.¹²⁶

If the corporation or its transfer agent deliberately and for an ulterior purpose prevents registration of a transfer on the books of the corporation, the right to vote at the meeting is not lost.¹²⁷

Who may vote at adjourned meetings of stockholders. In determining who may vote at an adjourned meeting, the chairman may disregard the fact that the meeting is a continuation meeting. Thus, new stockholders of record and stockholders who were not present or represented at the original meeting, but who are present or represented at the adjourned meeting, will be permitted to vote.¹²⁸

Right of subscribers to vote at meetings. The fact that a stockholder has not paid in full for his shares,¹²⁹ or that no certificate of stock has been issued to him,¹³⁰ does not disfranchise him, unless there is a provision to that effect in the charter or by-laws. Thus, if there is no provision to the contrary, those subscribers to the capital stock of a corporation who are in fact stockholders are entitled to vote at a meeting of the stockholders, even though no certificates of stock have been issued to them.¹³¹ If the subscription to the stock is such that it does not make the subscriber a stockholder—as, for example, where his

¹²⁵ *Lawrence v. I. N. Parlier Estate Co.*, (1940) 15 Cal. (2d) 220, 100 P. (2d) 765; *Double O Mining Co. v. Simrak*, (1942) 61 Nev. 431, 132 P. (2d) 605. See also *Tracy v. Brentwood Village Corp.*, (1948) (Del. Ch.) 59 A. (2d) 708.

¹²⁶ *In re Timen*, (1923) 120 N. Y. Misc. 815, 200 N. Y. Supp. 488; *Hall v. Woods*, (1937) 316 Ill. 183, 156 N. E. 258; *Swaim v. Martin*, *supra* (Note 124).

¹²⁷ *Italo Petroleum Corp. et al. v. Producers' Oil Corp. et al.*, (1934) 20 Del. Ch. 283, 174 A. 276; *Beck v. Beck Inv. Co.*, (1946) 249 Wis. 5, 23 N. W. (2d) 454.

¹²⁸ *Sagness v. Farmers Co-operative Creamery Co. of Baltic & Dell Rapids*, (1940) 67 S. D. 379, 293 N. W. 365, citing *Bridgers v. Staton*, (1909) 150 N. C. 216, 63 S. E. 892, 894.

¹²⁹ *Price v. Holcomb*, (1893) 89 Iowa 123, 56 N. W. 407; *American Pig Iron Storage Co. v. State*, (1894) 56 N. J. Law 389, 29 A. 160; *Haskell v. Read*, (1903) 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007; *Georgia Life Ins. Co. v. Bell*, (1914) 141 Ga. 502, 80 S. E. 765; *Cummings v. State ex rel. Wallower*, (1915) 47 Okla. 627, 149 P. 864.

¹³⁰ *Beckett v. Houston*, (1869) 32 Ind. 303; *Sherburne v. Meade*, (1939) 303 Mass. 356, 21 N. E. (2d) 946 (stock was paid for but was not issued until after the meeting); *Swaim v. Martin*, (1946) 302 Ky. 381, 194 S. W. (2d) 855.

¹³¹ *In re Timen*, (1923) 120 N. Y. Misc. 815, 200 N. Y. Supp. 488; *Kauffman v. Meyberg*, (1943) 59 Cal. App. (2d) 730, 140 P. (2d) 210; *Swaim v. Martin*, (1946) 302 Ky. 381, 194 S. W. (2d) 855.

subscription is merely a contract with the corporation to purchase stock—he is not entitled to vote.¹³²

Right of transferee to vote. If a stockholder has sold his shares to another, and the transfer has not been registered, the transferee may not vote until the transfer has been entered on the books of the corporation.¹³³ The purchaser, however, although not registered as a stockholder, may get a proxy from the seller and thus obtain the right to vote.¹³⁴ In fact, he can *compel* the transferor to give him a proxy.¹³⁵ Failure to register the stock in his name indicates that the transferee is willing to have the record holder vote the stock.¹³⁶

A transferee who comes into possession of stock otherwise than by sale and purchase should also have the stock transferred to his name on the corporate records. Provisions of the bankruptcy act that require the trustee to make all necessary transfers do not, by themselves, take away the right of the bankrupt to vote stock still standing in his name.¹³⁷

If a stockholder waives his right to vote, the stock is transferred subject to that waiver.¹³⁸ An option to purchase stock does not give the optionee the right to vote it.¹³⁹

Right of minors and incompetents to vote their stock. The general rule is that minors cannot personally vote their shares. This rule appears to have been so generally accepted that it has not been questioned in litigation.¹⁴⁰ The right of a stockholder

¹³² *Owensboro Seating & Cabinet Co. v. Miller*, (1908) 130 Ky. 310, 113 S. W. 423. See also *Goodisson v. North American Securities Co.*, (1931) 40 Ohio App. 85, 178 N. E. 29. The distinction between subscribers who become shareholders and those who do not is brought out in *Baltimore City Pass. Railway Co. v. Hambleton*, (1893) 77 Md. 341, 26 A. 279.

¹³³ *Morrill v. Little Falls Mfg. Co.*, (1893) 53 Minn. 371, 55 N. W. 547; *Double O Mining Co. v. Simrak*, (1942) 61 Nev. 431, 132 P. (2d) 605.

¹³⁴ *Thompson v. Blaisdell*, (1919) 93 N. J. Law 31, 107 A. 405; *Commissioner of Int. Rev. v. Southern Bell Tel. & Tel. Co.*, (1939) 102 F. (2d) 397; *McLain v. Lanova Corp.*, (1944) (Del. Ch.) 39 A. (2d) 209.

¹³⁵ *In re Giant Portland Cement Co.*, (1941) (Del. Ch.) 21 A. (2d) 697.

¹³⁶ *In re D. J. Salvator, Inc.*, (1944) 268 N. Y. App. Div. 919, 51 N. Y. Supp. (2d) 342.

¹³⁷ *Kresel v. Goldberg*, (1930) 111 Conn. 475, 150 A. 693.

¹³⁸ *Trefethen v. Amazeen*, (1944) 93 N. H. 110, 36 A. (2d) 266. See also *Ecclestone v. Indialantic, Inc.*, (1947) 319 Mich. 248, 29 N. W. (2d) 679.

¹³⁹ *Martindell v. Fiduciary Counsel, Inc.*, (1943) 133 N. J. Eq. 408, 30 A. (2d) 281; *Stoelting Bros. Co. v. Stoelting*, (1944) 246 Wis. 109, 16 N. W. (2d) 367.

¹⁴⁰ But see the following cases suggesting that a minor can personally vote his shares. *Chicago Mutual Life Indemnity Assn. v. Hunt*, (1889) 127 Ill. 257, 20 N. E. 55; *In re United Towns Building & Loan Assn.*, (1909) 79 N. J. Law 31, 74 A. 310. Neither of these cases involved a private business corporation, nor were they decided under provisions of a general corporation law.

in a private business corporation to vote his shares of stock at a stockholders' meeting is in the nature of a property right. Like other property rights of minors, it should be exercised by the guardian and not by the minor.¹⁴¹ Statutes on the point are all to this effect.

A stockholder who has been adjudged mentally incompetent should be represented at corporate meetings by his guardian.¹⁴² If the guardian has stock in his own name, he may vote it as well as the stock that he votes in his capacity as guardian.¹⁴³

Who may vote, as between pledgor and pledgee. As between the pledgor and the pledgee, the pledgor has the right to vote, since he retains legal title to the stock pledged.¹⁴⁴ A pledgor may imply by his acts that the pledgee has authority to vote the stock. For example, if the pledgor attends the meetings year after year and lets the pledgee vote the stock, he cannot later say that the pledgee did not have the right to vote.¹⁴⁵ Or if the pledgor permits the pledgee to register the latter's name on the books of the corporation as the owner of the stock without reservation, the corporation will be justified in recognizing the pledgee as having the right to vote.¹⁴⁶ It has been held that if the pledgor fails to appear at a meeting in person or by proxy, the pledgee has the right to be represented at the meeting.¹⁴⁷

¹⁴¹ Where the statute provides that the shares of stock of an estate of a minor or insane person may at all elections and meetings of corporations be represented by his guardian, it refers to the guardian appointed by law. *State v. Farmers' Bank in Leonard*, (1931) 61 N. D. 427, 238 N. W. 122.

¹⁴² *State v. Farmers' Bank in Leonard*, *supra* (Note 141).

¹⁴³ *Gow v. Consolidated Coppermines Corp.*, (1933) 19 Del. Ch. 172, 165 A. 136.

¹⁴⁴ *State ex rel. White v. Ferris*, (1875) 42 Conn. 560; *Hoppin et al. v. Buffum*, (1870) 9 R. I. 513; *Haskell v. Read*, (1903) 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007; *Ocean City Title & Trust Co. v. Strand Properties, Inc.*, (1930) 107 N. J. Eq. 594, 153 A. 906, *aff'g* 106 N. J. Eq. 25, 149 A. 817; *Lawrence v. I. N. Parlier Estate Co.*, (1940) 15 Cal. (2d) 220, 100 P. (2d) 765; *Fisk Discount Corp. v. Brooklyn Taxicab Trans. Co., Inc.*, (1946) 270 N. Y. App. Div. 491, 60 N. Y. Supp. (2d) 453.

¹⁴⁵ *Carter v. Curlew Creamery Co.*, (1943) 16 Wash. (2d) 476, 134 P. (2d) 66.

¹⁴⁶ *Com. v. Dalzell*, (1893) 152 Pa. 217, 25 A. 535; *Italo Petroleum Corp. v. Producers' Oil Corp.*, (1934) 20 Del. Ch. 283, 174 A. 276; *In re Argus Printing Co.*, (1891) 1 N. D. 435, 48 N. W. 347. But see *Benkard v. Leonard*, (1931) 231 N. Y. App. Div. 625, 248 N. Y. Supp. 497, where the court said: "Undoubtedly, for the mere purpose of voting the stock at an election, the inspectors of the election do not inquire into any equity under which the shares were held, or look behind what the corporate books disclose, but where it appears, as appears by the agreed statement of facts, that the pledgee of this stock in question held the same under a limited authority, the Court may properly determine as to where the voting power of said stock rests." See also *Seward v. American Hardware Co.*, (1933) 161 Va. 610, 171 S. E. 650.

¹⁴⁷ *Michaels v. Pacific Soft Water Laundry*, (1930) 104 Cal. App. 366, 286 P. 172.

Who may vote at death of owner of stock. Property cannot exist without a legal owner, and therefore, when an owner of stock dies, title to the stock passes immediately to the deceased owner's legal representatives. When the representatives are able to establish their appointment, for example, as administrator or executor, they may vote the stock even without causing a change in the corporate records.¹⁴⁸ When the legal title to shares is vested in more than one executor, they can vote only as co-owners,¹⁴⁹ or as a unit.¹⁵⁰ Stock voted by one executor over the protest of another is illegal and should not be counted.¹⁵¹ (See below as to right of co-owners to vote.) Letters testamentary that are issued by competent authority to an executor or trustee are conclusive proof of title to the shares of stock of the corporation and of the right to vote in respect thereof.¹⁵² After delivery of the shares to the heirs, the administrator does not have the right to vote the stock in defiance of the transferees' wishes, even though the transferees failed to register the transfer of the stock to themselves.¹⁵³

Right of trustee or cestui to vote. On the basis of the fundamental rule that the right to vote stock follows the legal title thereto, the trustee, not the beneficiary, has the voting power.¹⁵⁴ Even if the statute gives the right to vote to the beneficiary, his right will not accrue unless his name appears on the company's records.¹⁵⁵ The instrument creating the trust may give voting

¹⁴⁸ *Market St. Ry. Co. v. Hellman*, (1895) 109 Cal. 571, 42 P. 225; *Townsend et al. v. Winburn et al.*, (1919) 107 N. Y. Misc. 443, 177 N. Y. Supp. 757; *In re Schirmer's Will*, (1931) 231 N. Y. App. Div. 625, 248 N. Y. Supp. 497; *Davidson v. American Paper Mfg. Co.*, (1937) 188 La. 69, 175 So. 753; *Inv. Associates, Inc. v. Standard Power & Light Corp.*, (1946) (Del. Ch.) 48 A. (2d) 501, aff'd, *Standard Power & Light Corp. v. Inv. Associates, Inc.*, (1947) (Del.) 51 A. (2d) 572.

An executor who obtains control of a corporation because the decedent owned all the stock of the corporation can vote the stock without the formality of a transfer of the shares to his name on the books of the company. *In re Steinberg's Estate*, (1934) 153 N. Y. Misc. 339, 274 N. Y. Supp. 914.

¹⁴⁹ *Townsend et al. v. Winburn et al.*, (1919) 107 N. Y. Misc. 443, 177 N. Y. Supp. 757.

¹⁵⁰ *Sellers v. Joseph Bancroft & Sons Co.*, (1941) (Del. Ch.) 17 A. (2d) 831.

¹⁵¹ *Ibid.*

¹⁵² *Elevator Supplies Co. v. Wylde*, (1930) 106 N. J. Eq. 163, 150 A. 347.

¹⁵³ *In re Canal Const. Co.*, (1936) 21 Del. Ch. 155, 182 A. 545.

¹⁵⁴ *In re Barker*, (1830) 6 Wend. (N. Y.) 509; *In re Ebbetts' Will*, (1931) 139 N. Y. Misc. 250, 248 N. Y. Supp. 179; *Reimer v. Smith*, (1932) 105 Fla. 671, 142 So. 603; *Lawrence v. I. N. Parlier Estate Co.*, (1940) 15 Cal. (2d) 220, 100 P. (2d) 765; *Sutliff v. Aydelott*, (1940) 373 Ill. 633, 27 N. E. (2d) 529.

¹⁵⁵ *Hoppin v. Buffum*, (1870) 9 R. I. 513. Where the trust is a mere dry trust, the beneficiary may compel the trustee to give him a proxy, in order that the

power to one trustee, but if it simply provides that one trustee shall get proxies from the other trustees, the instrument will not be binding on the corporation if the proxies are not in fact executed and delivered.¹⁵⁶ A trust instrument requiring the trustee to give an unrestricted proxy to the president of the corporation has been upheld.^{156a} Where there is more than one trustee, the trustees hold title to stock jointly. To vote such stock, they must act jointly, either in person or by proxy.¹⁵⁷

Right of co-owners to vote. Co-owners of stock must unanimously agree as to the manner in which the stock shall be voted; otherwise their vote will not count.¹⁵⁸ But one co-owner may vote the stock if the other owner does not object.¹⁵⁹ In actual practice, one co-owner may present proxies from the other co-owners and exercise the right to vote on that basis. (See page 30 as to validity of partnership proxies.) Where one partner alone attends a meeting, he may vote the stock in behalf of his partner. Upon the death of a partner, the surviving partner may vote the stock standing in the name of the partnership.¹⁶⁰

Corporation's right to vote. The right of a corporation to vote stock in another corporation depends upon its authority to hold such stock.¹⁶¹ Where stock appears in the name of a corporation, it is voted by proxy authorized by the corporation owning the stock. A corporation's directors cannot vote the company's own treasury stock, either directly or indirectly;¹⁶² nor can they vote stock in the company held by one of the

former may protect his interests. *Am. Nat. Bank v. Oriental Mills*, (1891) 17 R. I. 551, 23 A. 795; *Vowell v. Thompson*, (1829) 3 Cranch (C.C) 428.

¹⁵⁶ *Tunis v. Hestonville, etc. R. R. Co.*, (1892) 149 Pa. St. 70, 24 A. 88; *Lafferty's Estate*, (1893) 154 Pa. St. 430, 26 A. 388.

^{156a} *Edson v. Norristown-Penn Trust Co.*, (1948) 59 Pa. 82, 59 A. (2d) 82.

¹⁵⁷ *People ex rel. Courtney v. Botts*, (1941) 376 Ill. 476, 34 N. E. (2d) 403.

¹⁵⁸ See *Townsend et al. v. Winburn et al.*, (1919) 107 N. Y. Misc. 443, 177 N. Y. Supp. 757.

¹⁵⁹ *Sellers v. Joseph Bancroft & Sons Co.*, (1941) 25 Del. Ch. 268, 17 A. (2d) 831.

¹⁶⁰ *Kenton Furnace, etc. Co. v. McAlpin*, (1880) 5 F. 737.

¹⁶¹ *Rogers v. Nashville, etc. Ry. Co. et al.*, (1898) 91 F. 299; *Bigelow v. Calumet & H. Min. Co. et al.*, (1909) 167 F. 721; *Aldridge v. Franco Wyoming Oil Co.*, (1939) 24 Del. Ch. 126, 7 A. (2d) 753, aff'd (1940) 24 Del. Ch. 349, 14 A. (2d) 380. A corporation owned 78 per cent of the stock in another corporation; it had the right to vote that stock. *Blaustein v. Pan American Petroleum & Transport Co.*, (1941) 263 N. Y. App. Div. 97, 31 N. Y. Supp. (2d) 934, aff'd, (1944) 293 N. Y. 281, 56 N. E. (2d) 705, reargument denied, (1944) 293 N. Y. 763, 57 N. E. (2d) 841.

¹⁶² *Lawrence v. I. N. Parlier Estate Co.*, (1940) 15 Cal. (2d) 220, 100 P. (2d) 765; *Vanderlip v. Los Molinos Land Co.*, (1943) 56 Cal. App. (2d) 747, 133 P. (2d) 467.

corporation's subsidiaries, for this is a mere circumvention of the rule that a corporation cannot vote its own stock.¹⁶³

Right of interested stockholders to vote. A stockholder is not disqualified from voting on a question because he has a personal interest in the subject matter that is opposed to or different from the interests of the company.¹⁶⁴ This rule applies to a corporate as well as an individual stockholder.¹⁶⁵ A director, on the other hand, occupies a fiduciary relation to the corporation and may not vote at directors' meetings on matters in which he is personally interested. (See page 147 for a further discussion of this subject.) If the interested director is also a stockholder, he may vote at a stockholders' meeting upon a matter in which he has a personal interest.¹⁶⁶ On the general principle that courts of equity will defend minorities from the self-seeking practices of large and centralized majorities, the courts will scrutinize carefully the actions of a corporation owning a majority of the stock of another corporation.¹⁶⁷ However, a majority stockholder is not a fiduciary of the other stockholders.¹⁶⁸

Proxies and Voting Trusts

Validity of proxies. Absent stockholders are generally given the right, by statute, charter, or by-laws,¹⁶⁹ to vote at a meeting by written proxy. The statutory provisions concerning voting

¹⁶³ *O'Connor v. International Silver Co.*, (1904) 68 N. J. Eq. 67, 59 A. 321; *Italo Petroleum Corp. of Amer. v. Producers' Oil Corp. of Amer.*, (1934) 20 Del. Ch. 283, 174 A. 276; but see *Vanderlip v. Los Molinos Land Co.*, (1943) 56 Cal. App. (2d) 747, 133 P. (2d) 467, where it was held that shares in a parent corporation acquired in good faith by a subsidiary are not "treasury shares" of the parent.

¹⁶⁴ *Rogers v. Nashville, C. & St. L. Ry. Co. et al.*, (1898) 91 F. 299; *Hellier v. Baush Mach. Tool Co. et al.*, (1927) 21 F. (2d) 705; *Heil v. Standard Gas & Electric Co.*, (1930) 17 Del. Ch. 214, 151 A. 303.

¹⁶⁵ *Wilson v. Rensselaer & Saratoga Railroad Co.*, (1945) 184 N. Y. Misc. 218, 52 N. Y. Supp. (2d) 847.

¹⁶⁶ *Gamble v. Queens County Water Co.*, (1890) 123 N. Y. 91, 25 N. E. 201, citing the English case, *North-West Transportation Company, Limited* *advs. Beatty*, (1887) L. R. 12 App. Cas. 589.

¹⁶⁷ *Farmers' Loan & Trust Co. v. N. Y. & North. Ry. Co.*, (1896) 150 N. Y. 410, 44 N. E. 1043; *Wool Growers Service Corp. v. Ragan*, (1943) 18 Wash. (2d) 655, 140 P. (2d) 512. See also *Blaustein v. Pan American Petroleum & Transport Co.*, (1944) 293 N. Y. 281, 56 N. E. (2d) 705.

¹⁶⁸ *Wilson v. Rensselaer & Saratoga Railroad Co.*, (1945) 184 N. Y. Misc. 218, 52 N. Y. Supp. (2d) 847.

¹⁶⁹ A by-law placing a restriction upon the number of shares to be voted by proxy is invalid in view of the Illinois statute. *People v. Younger*, (1925) 238 Ill. App. 502.

by proxy vary throughout the states. The usual provisions are (1) that the proxy shall be in writing; (2) that it is revocable at the pleasure of the person executing it; (3) that it will expire after a certain number of months or years from the date of its execution unless the stockholders executing the proxy indicate the length of time it is to continue in force; and (4) that the term of the proxy shall be limited to a definite period.

At common law, a proxy was not recognized.¹⁷⁰ Voting by stockholders must therefore be in person unless the right to vote by proxy is granted by statute, charter, or by-laws.¹⁷¹

The word "proxy" is applied both to the document evidencing the authority of another person to vote for a stockholder, and to the person acting as representative. The relationship created is governed generally by the rules of principal and agent.¹⁷² Unless the statute or by-laws otherwise provide, it is not essential that the person to whom the proxy is given should himself be a stockholder.¹⁷³ Proxies need not be drawn up in any particular form,¹⁷⁴ nor need they be dated,¹⁷⁵ witnessed,¹⁷⁶ or sealed,¹⁷⁷

¹⁷⁰ *Perry v. Tuskaloosa, etc. Co.*, (1891) 93 Ala. 364, 9 So. 217; *People v. Twaddell*, (1879) 18 Hun. (N. Y.) 427; *Commonwealth v. Bringham*, (1883) 103 Pa. 134; *Manson v. Curtis*, (1918) 223 N. Y. 313, 119 N. E. 559. See *State ex rel. McKay v. Board of Directors of H. F. Danzberg Land & Live Stock Co.*, (1941) 60 Nev. 382, 110 P. (2d) 212.

¹⁷¹ *McKee v. Home Savings & Trust Co.*, (1904) 122 Iowa 731, 98 N. W. 609; *Walker v. Johnson*, (1900) 17 App. Cas. (D. C.) 144; *Sagness v. Farmers Co-operative Creamery Co. of Baltic & Dell Rapids*, (1940) 67 S. D. 379, 293 N. W. 365.

¹⁷² For the distinction between a proxy holder and a trustee under a voting trust agreement, see *Tompers v. Bank of America*, (1926) 217 N. Y. App. Div. 691, 217 N. Y. Supp. 67, and also 247 N. Y. 290, 160 N. E. 374, wherein it was pointed out that the usual proxy merely establishes the relation of principal and agent, terminable by the principal at will, either through revocation or through the sale of his stock, whereas a voting trust agreement vests the trustee with the title to the stock, which the original owner obviously is unable to nullify by any sale of stock, and which he cannot otherwise cancel except through an attempted breach of contract. On the other hand, the holder of a proxy has no control over the stock itself, whereas the voting trustee has not only the possession of the stock but the legal title to it as well. See also *Chandler v. Bellanca Aircraft Corp. et al.*, (1932) 19 Del. Ch. 57, 162 A. 63; *Johnson v. Spartanburg Fair Assn.*, (1947) 41 S. E. (2d) 599.

¹⁷³ *Gentry-Futch Co. v. Gentry*, (1925) 90 Fla. 595, 106 So. 473.

¹⁷⁴ *White v. N. Y., etc. Soc.*, (1887) 45 Hun. (N. Y.) 580. There is no reason for requiring the execution of a proxy by a corporation to be effected with all the formalities required for the execution of corporate acts. *Gow v. Consolidated Coppermines Corp.*, (1933) 19 Del. Ch. 172, 165 A. 136. Partnership proxies signed by the company name are acceptable; the fact that no member of the firm signs his name as the representative of all the other members cannot serve

unless otherwise provided by the statute, charter, or by-law provision. Moreover, in the absence of any statutory or corporate requirement, oral authorization of a proxy may be recognized.¹⁷⁸

A proxy presented in defiance of an injunction against the stockholder forbidding a vote of the stock is invalid¹⁷⁹ and a proxy voted for more shares than the stockholder owns may invalidate an election.^{179a}

It is generally considered contrary to public policy for a stockholder to sell his right to vote for a consideration by which he alone will benefit.¹⁸⁰ In some states, it is a crime for a stockholder to sell a proxy.

Since the proxy was not recognized at common law, statutory, charter, or by-law provisions permitting the appointment of a proxy must be strictly observed.¹⁸¹ Care should be taken to see that all proxies comply with the statutes and by-law regulations. Ordinarily the presiding officer is the person whose decision will be binding,¹⁸² although in large corporations the power to pass

to render the proxy invalid, where the authenticity of the proxy is not otherwise assailed. *Ibid.*

¹⁷⁵ *Banks v. Cosmopolitan Trust Co.*, (1925) 253 Mass. 205, 148 N. E. 609.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Hankins v. Newell*, (1907) 75 N. J. 26, 66 A. 929.

¹⁷⁸ *Hoene v. Pollak*, (1897) 118 Ala. 617, 24 So. 349. While there appears to be no case directly in point, it has been stated that probably *Gow v. Consolidated Coppermines Corporation*, (1933) 19 Del. Ch. 172, 165 A. 136, is some authority for the proposition that telegraphic proxies are valid. *Justinian of Brooklyn Law School*, Nov. 16, 1933.

¹⁷⁹ *Clarke v. Central Railroad & Banking Co.*, (1892) 50 F. 338.

^{179a} *In re Topping Bros.*, (N. Y. S. Ct., N. Y. Co., 1949) 121 *New York Law Journal* 2022, 6/7/49. Generally a void proxy does not invalidate an election, but in this case the contested vote of the proxy holder was crucial.

¹⁸⁰ *Stott v. Stott*, (1932) 258 Mich. 547, 242 N. W. 747; *Macht v. Merchants Mortgage & Credit Co.*, (1937) 22 Del. Ch. 74, 194 A. 19.

¹⁸¹ *Machen*, *Modern Law of Corporations*, §1256, citing several English cases. See also *Wellington Bull & Co. v. Morris*, (1928) 132 N. Y. Misc. 509, 230 N. Y. Supp. 122.

¹⁸² *People v. Crossley*, (1873) 69 Ill. 195. In New York, the rule seems to be that inspectors can pass only on forgery and the regularity of the face of the document; other questions are judicial in their nature and can be passed upon only by the courts. For an extensive discussion of various questions as to the regularity of proxies, see *Young v. Jebbett*, (1925) 213 N. Y. App. Div. 774, 211 N. Y. Supp. 61, and *Gow v. Consolidated Coppermines Corporation*, (1933) 19 Del. Ch. 172, 165 A. 136. See also *Atterbury v. Consolidated Coppermines Corp.*, (1941) (Del. Ch.) 20 A. (2d) 743; *Standard Power & Light Corp. v. Inv. Associates, Inc.*, (1947) (Del.) 51 A. (2d) 572.

on the validity of proxies is frequently delegated to a special committee of inspectors.¹⁸³

Who may vote by proxy. The right to vote by proxy may be exercised by an individual, a corporation owning stock in another corporation,¹⁸⁴ a partnership, or a fiduciary.¹⁸⁵ (See page 25 as to the right of a fiduciary to vote by proxy.) The stockholder of record, not the beneficial owner, appoints the proxy.¹⁸⁶ Thus, where the record holder is a brokerage house, without beneficial interest, the brokerage house gives the proxy to vote stock registered in its name.¹⁸⁷ If a stockholder sells his stock, he cannot later give a valid proxy, except to the purchaser, even if the stock was not transferred on the corporate books.¹⁸⁸

Designations and signatures. The person who is to act as proxy may be designated, as, for example, "any member of the firm of A, B, and Co.," without being specifically named.¹⁸⁹ A proxy is not invalid merely because the name of the corporation is incorrectly given, if it agrees with the name given in the notice of meeting.¹⁹⁰

A proxy should be counted at a meeting although the name of the stockholder as signed to it differs in some way from the name as registered on the corporate books.¹⁹¹ For example, stock was registered in the name of an individual as administrator; the administrator signed the proxy without putting "administrator" after his signature; the proxy was valid.¹⁹² A proxy signed by

¹⁸³ The inability to examine proxies of an opposing faction at the meeting should not in itself invalidate the election of directors held at such a meeting, if a majority of the stock is represented. *Duffy v. Loft, Inc.*, (1930) 17 Del. Ch. 376, 152 A. 849.

¹⁸⁴ *Bouree v. Trust Francais des Actions de La Franco-Wyoming Oil Co.*, (1924) 14 Del. Ch. 332, 127 A. 56; see also *Gow v. Consolidated Coppermines Corp.*, (1933) 19 Del. Ch. 172, 165 A. 136.

¹⁸⁵ *Gow v. Consolidated Coppermines Corp.*, supra (Note 184).

¹⁸⁶ *In re Mohawk & Hudson R. R. Co.*, (1838) 18 Wend. 135; *Dougherty v. Cross*, (1944) 65 Cal. App. (2d) 687, 151 P. (2d) 654. See also *McLain v. Lanova Corp.*, (1944) (Del. Ch.) 39 A. (2d) 209.

¹⁸⁷ *McLain v. Lanova Corp.*, supra (Note 186).

¹⁸⁸ *Swaim v. Martin*, (1946) 302 Ky. 381, 194 S. W. (2d) 855. This rule should be applied only as between the parties personally involved. The corporation and inspectors of election are ordinarily entitled to honor proxies signed by the record stockholder. But see page 22 footnote 126, Ch. I.

¹⁸⁹ *Machen, Modern Law of Corporations*, §1255, citing *Bombay-Burmah Trading Corp. v. Dorabji*, (1905) A. C. 213.

¹⁹⁰ *In re Election of Directors of St. Lawrence Steamboat Co.*, (1882) 44 N. J. Law 529.

¹⁹¹ *Atterbury v. Consolidated Coppermines Corp.*, (1941) (Del. Ch.), 20 A. (2d) 743.

¹⁹² *Ibid.*

only one of two executors, or only one of two joint owners, should be accepted.¹⁹³ A proxy signed with an initial instead of the Christian name should be counted.¹⁹⁴ A proxy in which the name of the stockholder is written in the body but not at the close of the proxy is void, and should not be accepted.¹⁹⁵

The mere fact that the signature on a proxy is not in the handwriting of the shareholder does not invalidate the proxy. There is no statute or rule of law that prevents a shareholder from authorizing a third party to sign his name to a proxy.¹⁹⁶ Where stock is registered in the name of both husband and wife, the proxy should be signed in the name of both. However, if it is signed as the names appear on the books, although both names are signed by the same person, the proxy should be counted.¹⁹⁷ Proxies signed by executors, administrators, agents, or attorneys, without other authority attached, are recognized, but the better practice is to attach a short certificate showing the appointment.¹⁹⁸

More than two proxies from the same stockholder. A corporation will sometimes receive more than one proxy from the same stockholder. In that case, the execution date and the postmark date become important.

Where execution and postmark dates are not in conflict, the execution date controls.¹⁹⁹ If two proxies are received from the same stockholder, and neither is dated, the one with the latest postmark date is counted.²⁰⁰ If both are mailed the same day, the one bearing the latest time of day on the postmark is counted.²⁰¹

Suppose one proxy is dated and the other is not. The undated proxy with a postmark date later than the postmark of the dated proxy should be counted, if the dated proxy is postmarked *prior* to its execution date. This is true even though the undated

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Schilling v. Car Lighting & Power Co., (1922) 289 F. 489.

¹⁹⁶ Standard Power & Light Corp. v. Inv. Associates, Inc., (1947) (Del.), 51 A. (2d) 572, aff'g, Inv. Associates, Inc. v. Standard Power & Light Corp., (1946) (Del. Ch.), 48 A. (2d) 501.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid., citing Atterbury v. Consolidated Coppermines Corp., (1941) (Del. Ch.), 20 A. (2d) 743.

¹⁹⁹ Inv. Associates, Inc. v. Standard Power & Light Corp., (1946) (Del. Ch.), 48 A. (2d) 501, aff'd, Standard Power & Light Corp. v. Inv. Associates, Inc., (1947) (Del.), 51 A. (2d) 572.

²⁰⁰ Ibid.

²⁰¹ Ibid.

proxy was mailed prior to the execution date of the other proxy.²⁰²

If a proxy without a postmark date has a later execution date than any of the postmark dates on other proxies given by the same stockholder, the one with the later execution date should be counted.²⁰³ But if the date of the proxy is obviously an error, the postmark date controls.²⁰⁴

When there is confusion as to which is the latest proxy, if the person who gave them is present, he may vote in person or declare which proxy was his latest one.²⁰⁵

Proxies in the name of several persons. In some of the larger corporations, a proxy committee is selected at the annual meeting of stockholders. This committee, in effect, represents those who control the corporation. The names of members of the proxy committee are placed on what is known as the official proxy, which is sent out with notices of meetings during the course of the year.²⁰⁶ The management has the right to prevent others from soliciting proxies on its behalf.²⁰⁷ Where several persons are named to act as proxy, and they are not named in the alternative, all those named must agree as to the vote; otherwise their vote will not be received.²⁰⁸

Proxies given by fiduciaries. The general rule is that a fiduciary cannot delegate his authority. Hence a trustee or an executor or administrator cannot vote by proxy unless he has specifically been given that power in the instrument creating his office, or unless the statute so provides.²⁰⁹ However, a fiduciary may give a proxy which directs how a vote shall be cast.²¹⁰

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ *Pope v. Whitridge*, (1909) 110 Md. 468, 73 A. 281.

²⁰⁶ *Lawyers, etc. Co. v. Consolidated Ry., etc. Co.*, (1907) 187 N. Y. 395, 80 N. E. 199.

²⁰⁷ *Empire Southern Gas Co. v. Gray*, (1946) (Del. Ch.), 46 A. (2d) 741.

²⁰⁸ *Sullivan v. Parkes*, (1902) 69 N. Y. App. Div. 221, 74 N. Y. Supp. 787.

²⁰⁹ *Noremac, Inc. v. Centre Hill Court*, (1935) 164 Va. 151, 178 S. E. 877; *Edson v. Norristown-Penn Trust Co.*, (1948) (Pa.) 59 A. (2d) 82. Unless specifically authorized, a voting trustee may not exercise his right through another, but only in person. *In re Green Bus Lines, Inc.*, (1937) 166 N. Y. Misc. 800, 2 N. Y. Supp. (2d) 556. See also *Gans v. Delaware Terminal Corp.*, (1938) 23 Del. Ch. 69, 2 A. (2d) 154, in which it was held that voting trustees could vote through proxies the shares held by them in trust.

²¹⁰ *State v. Voight*, (1913) 2 Ohio App. 145. In *Gans v. Delaware Terminal Corporation*, *supra* (Note 209), the court, citing *Gow v. Consolidated Coppermines Corp.*, (1933) 19 Del. Ch. 172, 165 A. 136, held that "though the fiduciaries, the trustees, are not stockholders of record, yet, the stock having been assigned to

When there are several trustees or executors or administrators, each one of them should sign the proxy; but if only one signs, the proxy should be accepted.²¹¹

Restrictions on solicitation of proxies. The Securities Exchange Act of 1934, as amended, prohibits the solicitation of proxies in respect of registered securities (other than exempted securities) in contravention of rules and regulations of the Securities and Exchange Commission. Under the authority granted to it by the Act, the Commission has issued regulations governing the solicitation of proxies by management or stockholders, designed to assure that the security holder whose proxy or consent is solicited will be afforded adequate information as to the action proposed to be taken, and as to the source of the solicitation and the interest of the solicitor.²¹² Proxies solicited in violation of Security Exchange Commission regulations are counted at meetings—it is not for the inspectors of elections to determine their validity.²¹³ If they are secured by false or misleading statements, the courts will enjoin their use.²¹⁴

The regulations require that a written "proxy statement" be furnished concurrently with or before the solicitation of the proxy, containing the items of information set forth in the regulations. The proxy statement need not be contained in a single document. Every proxy statement must state whether or not the proxy is revocable and, if revocable subject to conditions, what the conditions are. The required information also includes a statement of the names of the persons by whom, directly or indirectly, the cost of the solicitation is to be borne, the method of solicitation used, the names and interest of the persons soliciting the proxy, and a concise description of the

and held by them subject to the trust, they were entitled to vote through their proxies."

²¹¹ *Atterbury v. Consolidated Coppermines Corp.*, (1941) (Del. Ch.), 20 A. (2d) 743.

²¹² See Dean, "Non-compliance with proxy regulations; effect on ability of corporation to hold valid meeting," 24 *Cornell Law Quarterly* 483 (1939); "Regulation of Proxy Solicitation by the Securities and Exchange Commission," 33 *Illinois Law Review* 914 (1939); "Regulation of proxies by the Securities and Exchange Commission," 13 *St. John's Law Review* 297 (1939); Bernstein & Fischer, "The Regulation of the Solicitation of Proxies; Some Reflections on Corporate Democracy," 7 *Univ. of Chicago Law Rev.* 226 (1940).

²¹³ *Standard Power & Light Corp. v. Investment Associates, Inc.*, (1947) (Del.), 51 A. (2d) 572.

²¹⁴ *Securities and Exchange Commission v. O'Hara Re-election Committee*, (1939) 28 F. Supp. 523. See also *Kelley v. Am. Sugar Ref. Co.*, (1942) 311 Mass. 617, 42 N. E. (2d) 592.

substance of each of the various matters which, at the time of solicitation, are intended for consideration by the meeting at which the proxy is to be exercised. The proxy itself must contain a space wherein the person solicited may specify how his vote shall be cast on each matter or group of matters described in the proxy statement. However, the person to whom the proxy is given may have conferred upon him discretionary authority with respect to matters as to which no specification has been made by the person solicited, with respect to matters not known or determined at the time of the solicitation, and with respect to the election of directors or other officers. For a specimen of proxy statement and proxy complying with these requirements, see form No. 13.

Powers of proxies. Proxies may be either general or limited. A general proxy, like a general agent, can represent his principal in all ordinary business,²¹⁵ but not in extraordinary business, such as voting on the question of dissolution.²¹⁶ A limited proxy is one that gives the holder the right to vote on a specific subject only. When an unrestricted proxy is given, it is presumed that what the proxy does in the proper exercise of the power granted to him expresses the will of the stockholder.²¹⁷

Where a proxy is given limited power, or is given instructions as to how to vote, he must act within the limitations and according to the instructions.²¹⁸ Consequently, the secretary should accept a vote only if it is cast in accordance with the instructions; if a proxy attempts to vote otherwise, he acts outside the scope of his authority, and his vote is not valid. It would seem that the secretary cannot alter the proxy's vote to make it conform to the instructions contained in the proxy, for the vote is cast not by the written authorization but by the person. If the administration desired that the vote be in accordance with the instructions, the correct practice would be to adjourn the meeting, notify the stockholder to revoke the proxy, send a new proxy, and get the vote at the adjourned meeting. To save the time of the other stockholders, their proxies could be taken immediately, so that they might be voted

²¹⁵ Authorization of a chattel mortgage is general business on which a proxy can vote. *McLean v. Bradley*, (1924) 299 F. 379. See also *Shield v. Lone Star Life Ins. Co.*, (1918) (Tex. Civ. App.) 202 S. W. 211, 228 S. W. 196; *Fidelity B. & L. Ass'n v. Thompson*, (1930) (Tex. Civ. App.) 25 S. W. (2d) 247.

²¹⁶ *McKee v. Home Savings & Trust Co.*, (1904) 122 Iowa 731, 98 N. W. 609.

²¹⁷ *Hexter v. Columbia Baking Co.*, (1929) 16 Del. Ch. 263, 145 A. 115.

²¹⁸ *Bache v. Central Leather Co.*, (1911) 78 N. J. Eq. 484, 81 A. 571.

at the adjourned meeting in accordance with the administration's desires. A proxy limiting the holder to vote stock at a convened meeting does not authorize him to require the directors to call a meeting.²¹⁹

May a proxy waive irregularities in a meeting, such as a defect in the notice of meeting? The answer is that in connection with matters upon which the proxy has the power to vote, he may act in respect to subsidiary questions, such as the waiving of irregularities in form.²²⁰

Effect of vote by proxy. A vote by proxy is as effective as though the stockholder had voted in person.²²¹ The stockholder is bound by the proxy's acts²²² even if the former had no knowledge of the matter acted upon, for knowledge of the proxy is chargeable to the stockholder.²²³ The stockholder, however, may repudiate acts of the proxy committed in bad faith or in the exercise of unauthorized powers, if the interests of third parties are not adversely affected.²²⁴ If he fails to repudiate such acts within a reasonable time, he is presumed to have ratified the vote of the proxy.²²⁵ The stockholder is also bound by his proxy's ratification of action taken at a meeting.²²⁶

Duration and revocation of proxies. In some states the statutes provide that proxies shall be limited in duration to a definite period of time fixed by the statute, and shall be revocable.²²⁷ In other states the statutes provide that a proxy shall expire after a designated period from the date of its execution, unless it expressly designates the length of time it is to

²¹⁹ State ex rel. McKaig v. Board of Directors of H. F. Dangberg Land & Live Stock Co., (1941) 60 Nev. 382, 110 P. (2d) 212.

²²⁰ Columbia National Bank v. Mathews, (1898) 85 F. 934; Jones v. Turnpike Co., (1856) 7 Ind. 547.

²²¹ Goldboss v. Reimann, (1943) 55 F. Supp. 811, aff'd, (1944) 143 F. (2d) 594.

²²² Holmes v. Republic Steel Corp., (1946) (Ohio), 69 N. E. (2d) 396.

²²³ Gray v. Aspironal Laboratories, (1928) 24 F. (2d) 97. See also McLean v. Bradley, (1924) 299 F. 379; Wellington Bull & Co. v. Morris, (1928) 132 N. Y. Misc. 509, 230 N. Y. Supp. 122; Trinity-Universal Ins. Co. v. Maxwell, (1937) (Tex. Civ. App.), 101 S. W. (2d) 606; Seaman v. Ironwood Amusement Corporation, (1938) 283 Mich. 220, 278 N. W. 51; Chounis v. Laing, (1942) 125 W. Va. 275, 23 S. E. (2d) 628.

²²⁴ Blair v. F. H. Smith Co., (1931) 18 Del. Ch. 150, 156 A. 207; Lowman v. Harvey R. Pierce Co., (1923) 276 Pa. 382, 120 A. 404.

²²⁵ Fidelity Bldg. & Loan Ass'n v. Thompson, (1930) (Tex. Civ. App.), 25 S. W. (2d) 247. See also Rossing v. State Bank of Bode, (1917) 181 Iowa 1013, 165 N. W. 254.

²²⁶ Chounis v. Laing, *supra* (Note 223).

²²⁷ See Simpson v. Nielson, (1926) 77 Cal. App. 297, 246 P. 342.

continue in force.²²⁸ A proxy is, however, always revocable unless it is (1) coupled with an interest,²²⁹ or (2) given as part of a security.²³⁰ An irrevocable proxy or power of attorney to vote stock, if not coupled with an interest, is contrary to public policy.²³¹

Revocation need not be expressed or in writing. A proxy which is last given is deemed to be a revocation of all former proxies;²³² the sale by a stockholder of his shares in a corporation revokes any proxies made or given by the seller in respect to such shares.²³³ The voluntary dissolution of a corporation does not revoke a proxy given by it as stockholder in another corporation.²³⁴

If a stockholder who executed a proxy attends the meeting and asserts his right to vote, the proxy is considered revoked, unless it is irrevocable because it is coupled with an interest.²³⁵ If any question arises between a stockholder and his proxy, the corporation should, it would seem, always recognize the stockholder. Where, for example, the stockholder seeks to revoke a proxy, and the proxy claims to have an interest in the stock that makes his proxy irrevocable, the corporation should recognize the revocation and take the position that the proxy's complaint, even if valid, is against the stockholder for revoking the proxy.²³⁶

Voting trusts. A voting trust has been defined as the accumu-

²²⁸ For statutory provisions governing proxies in each state, see *Prentice-Hall Corporation Service*.

²²⁹ *Luthy v. Ream*, (1915) 270 Ill. 170, 110 N. E. 373; *In re Chilson*, (1933) (Del. Ch.), 168 A. 82. See also *Boyer v. Nesbitt*, (1910) 227 Pa. 398, 76 A. 103; *In re Delaware Riv. etc. Co.*, (1908) 76 N. J. Law 163, 68 A. 1104; *Chapman v. Bates*, (1900) 61 N. J. Eq. 658, 47 A. 638, aff'g 60 N. J. Eq. 17, 46 A. 591; *Tucker v. Russell*, (1897) 82 F. 263; *State ex rel. Everett Trust & Savings Bank v. Pacific Waxed Paper Co.*, (1945) 22 Wash. (2d) 844, 157 P. (2d) 707. An antedated proxy given to validate a meeting is not coupled with an interest and is revocable. *Stoelting Bros. Co. v. Stoelting*, (1944) 246 Wis. 109, 16 N. W. (2d) 367.

²³⁰ *State ex rel. Everett Trust & Savings Bank v. Pacific Waxed Paper Co.*, supra (Note 229).

²³¹ *Roberts v. Whitson*, (1945) (Tex. Civ. App.) 188 S. W. (2d) 875.

²³² *Pope v. Whitridge*, (1909) 110 Md. 468, 73 A. 281.

²³³ *Dennistoun v. Davis*, (1930) 179 Minn. 373, 229 N. W. 353.

²³⁴ *State ex rel. Everett Trust & Savings Bank v. Pacific Waxed Paper Co.*, (1945) 22 Wash. (2d) 844, 157 P. (2d) 707.

²³⁵ It has been held that an alternative proxy may vote the stock even though the principal proxy is present, if no one objects thereto. For form of proxy appointing two persons to act as alternates, see form No. 46.

²³⁶ *Matter of Long Island R. R. Co.*, (1837) 19 Wend. (N. Y.) 37; *Sullivan v. Parkes*, (1902) 69 N. Y. App. Div. 221, 74 N. Y. Supp. 787; *Sylvania, etc. Ry. Co. v. Hoge*, (1907) 129 Ga. 734, 59 S. E. 806.

lation in a few hands of shares of stock belonging to many owners, in order thereby to control the business of the corporation.²³⁷ Such centralization of control of the affairs of a corporation may be found necessary or desirable upon organization, upon reorganization, upon merger or consolidation, in raising capital, or in carrying out any other corporate plan. A voting trust can have for its sole purpose the keeping of a certain person in office.²³⁸

Voting trusts today are generally recognized as valid,²³⁹ provided the trust is based upon a sufficient consideration, does not contravene public policy²⁴⁰ or a positive prohibitory statute,²⁴¹ and is made in good faith.²⁴² The statutes of several states specifically authorize the creation of voting trusts by stockholders. These statutes vary in their provisions and should be consulted when a voting trust is being created, for it has been held that a trust which is not within the terms of the statute is not valid.²⁴³

Voting trust agreement. The voting trust is generally organized and operated under a voting trust agreement. No particular form is required. The statutes may limit the period of

²³⁷ *Alderman v. Alderman*, (1935) 178 S. C. 9, 181 S. E. 897; *Bankers' Fire & Marine Ins. Co. v. Sloss*, (1934) 229 Ala. 26, 155 So. 371; *Groub v. Blish*, (1926) 88 Ind. App. 309, 152 N. E. 609; *Manson v. Curtis*, (1918) 223 N. Y. 313, 119 N. E. 559. For a discussion of the subject of voting trusts, see Finkelstein, "Voting Trust Agreements," 24 *Michigan Law Review* 344; Cushing, "Voting Trusts," 40 *Harvard Law Review* 106; Case, "Legal Characteristics and Consequences of Voting Trusts," 20 *Washington Law Review* 129, (1945); "Voting Trusts Currently Observed," 24 *Minnesota Law Review* 347, (1940).

Whether a particular agreement is a voting trust must ordinarily be determined from the provisions of the instrument, read as a whole. *Aldridge v. Franco Wyoming Oil Co.*, (1939) 24 Del. Ch. 126, 7 A. (2d) 753. See also *Peyton v. William C. Peyton Corporation*, (1937) 22 Del. Ch. 187, 194 A. 106. A voting trust agreement is distinguished from a stock-pooling agreement in *Ringling v. Ringling Bros., etc. Corp.*, (1946) (Del. Ch.), 49 A. (2d) 603.

²³⁸ *Rice v. Fletcher Sav. & Trust Co.*, (1939) 215 Ind. 698, 22 N. E. (2d) 809.

²³⁹ *Alderman v. Alderman*, (1935) 178 S. C. 9, 181 S. E. 897; *Warner Bros. Pictures v. Lawton-Byrne-Bruner Ins. A. Co.*, (1935) 79 F. (2d) 804; *Machin et al. v. Nicolle Hotel, Inc.*, (1928) 25 F. (2d) 783, aff'g 10 F. (2d) 375; cert. denied, 278 U. S. 618, 45 S. Ct. 22.

²⁴⁰ *Chandler v. Bellanca Aircraft Corp.*, (1932) 19 Del. Ch. 57, 162 A. 63; *Alderman v. Alderman*, (1935) 178 S. C. 9, 181 S. E. 897; reviewed in 34 *Michigan Law Review* 727; *Redman v. Minnis*, (1932) 43 Ohio App. 371, 183 N. E. 299.

²⁴¹ *Chandler v. Bellanca Aircraft Corp.*, supra (Note 240).

²⁴² *Perrine v. Pennroad Corporation*, (1934) 20 Del. Ch. 106, 171 A. 733.

²⁴³ *Gertenbach v. Rodnon* (In re Lippman's Estate), (1939) 171 N. Y. Misc. 302, 12 N. Y. Supp. (2d) 518; *In re Will* (Will & Baumer Candle Co., Inc.), (1940) *New York Law Journal*, May 24, 1940, p. 2371, col. 5.

duration of the voting trust agreement; ²⁴⁴ may require the filing of a duplicate of the voting trust agreement in the office of the corporation, subject to inspection by stockholders and certificate holders; may prescribe the manner of voting the stock standing in the name of the trustees; and may contain other restrictive and regulatory provisions. The statutes require voting trust agreements to be in writing. ²⁴⁵

The voting trust agreement is entered into between the stockholders of the corporation and the voting trustees. The corporation may be a party to the agreement. ²⁴⁶ Other stockholders may become parties to the agreement by depositing their stock in the manner prescribed in the agreement. ²⁴⁷

Rights of parties to the voting trust agreement. Under the terms of the agreement, stockholders transfer their stock to the trustees, irrevocably conferring upon the latter the right to vote the stock for the period fixed in the agreement. ²⁴⁸ The trustees, in turn, issue to the stockholders certificates of interest, called "voting trust certificates." ²⁴⁹ The holder of a voting trust certificate does not have the rights of a stockholder—either those given by common law or by statute. He has only the rights

²⁴⁴ See footnote 262.

²⁴⁵ *Wygod v. Makewell Hats, Inc.*, (1942) 265 N. Y. App. Div. 286, 38 N. Y. Supp. (2d) 587, assumes "without deciding" that an extension of a voting trust should be in writing.

²⁴⁶ Where the corporation is not a party to the agreement, it cannot be held liable for the compensation of trustees. *Clark v. National Steel & Wire Co.*, (1909) 82 Conn. 178, 72 A. 930. It has been held that where the corporation is not a party to the agreement, it is not bound by a provision in the agreement that no officer or director of the corporation shall receive compensation for his services. *Thresher v. Cuddy-Gardner Co.*, (1933) 53 R. I. 175, 165 A. 438.

²⁴⁷ It has been held that the validity of a voting trust is subject to the limitation that all stockholders have an equal privilege of availing themselves of the trust agreement. *Warren v. Pim*, (1904) 66 N. J. Eq. 353, 59 A. 773. See also *In re Morse*, (1928) 247 N. Y. 290, 160 N. E. 374, rev'g 220 N. Y. App. Div. 830, 222 N. Y. Supp. 858.

²⁴⁸ Stockholders may tell the trustees for whom they should vote, but a voting trust agreement executed by common stockholders cannot provide for alteration of voting rights of preferred stockholders fixed by the charter, by-laws, and statute. *Seward v. American Hardware Co.*, (1933) 161 Va. 610, 171 S. E. 650.

It has been held that the trustees must accept the trust, and that, where it is required by the trust agreement that a certain number of trustees shall act, a lesser number cannot deal with the trust property. *Loughery v. Bright*, (1929) 267 Mass. 584, 166 N. E. 744. For a discussion of the right of the trustee to vote by proxy, see *Chandler v. Bellanca Aircraft Corp.*, (1932) 19 Del. Ch. 57, 162 A. 63.

²⁴⁹ These certificates are sometimes called "capital stock trust certificates." For the necessity of registering voting trust certificates with the Securities and Exchange Commission under the Securities Act of 1933, as amended, and for official forms required for registration, see *Prentice-Hall Securities Regulation Service*.

given by the voting trust. He cannot inspect corporate books unless the right is specifically given to him.²⁵⁰ He is bound by the acts of the voting trustees done in good faith and within the scope of their authority.²⁵¹ When the trust is terminated, the certificate holders are notified to exchange the trust certificates for certificates of stock.

Voting trustees occupy a fiduciary relation to stockholders,²⁵² but they are in fact and in law the legal holders of the stock.²⁵³ The stock must be transferred on the books of the corporation to the name of the trustee; mere deposit of the shares with the trustee does not keep the stockholder from voting his stock.²⁵⁴ Thus, the right to vote is separated from the beneficial owner but not from the registered holder.²⁵⁵ Legal title to the shares and the right to vote them are in the trustees as owner, not as proxy.²⁵⁶ Failure to deliver the stock to the trustees does not invalidate the voting trust.²⁵⁷ After a voting trust is terminated, the trustees cannot take any action under it;²⁵⁸ nor can they elect themselves directors just before its expiration date so that they will continue in control of the property.²⁵⁹

Provisions of the voting trust agreement; termination. Provision may be made for the appointment of a depository²⁶⁰ to receive the deposited stock, and for the appointment of a transfer agent and registrar to effect transfers²⁶¹ of the voting trust

²⁵⁰ State ex rel. Crowder v. Sperry Corp., (1940) 41 Del. 84, 15 A. (2d) 661; Babcock v. Chicago Rys. Co., (1927) 325 Ill. 16, 155 N. E. 773; Kann v. Rossett, (1940) 307 Ill. App. 153, 30 N. E. (2d) 204. But see Brentmore Estates, Inc. v. Hotel Barbizon, Inc., (1941) 177 N. Y. Misc. 11, 29 N. Y. Supp. (2d) 830, modified and aff'd, (1942) 263 N. Y. App. Div. 389, 33 N. Y. Supp. (2d) 331.

²⁵¹ Scott v. Arden Farms Co., (1942) (Del. Ch.), 28 A. (2d) 81.

²⁵² Wool Growers Service Corp. v. Ragan, (1943) 18 Wash. (2d) 655, 140 P. (2d) 512.

²⁵³ Barney v. First Nat. Bank of Monterey, (1939) (Cal.), 90 P. (2d) 584; Kann v. Rossett, (1940) 307 Ill. App. 153, 30 N. E. (2d) 204.

²⁵⁴ Smith v. First Personal Bankers' Corp., (1934) 20 Del. Ch. 89, 171 A. 839. This case criticizes a statement in *In re Chilson*, (1933) 19 Del. Ch. 398, 168 A. 82, that a voting trustee with whom stock was deposited could vote even if the stock had not been transferred on the books of the corporation.

²⁵⁵ Kann v. Rossett, (1940) 307 Ill. App. 153, 30 N. E. (2d) 204.

²⁵⁶ Dougherty v. Cross, (1944) 65 Cal. App. (2d) 687, 151 P. (2d) 654, rehearing denied 10/9/44; Johnson v. Spartanburg Co. Fair Ass'n, (1947) 210 S. C. 56, 41 S. E. (2d) 599.

²⁵⁷ Boericke v. Weise, (1945) 68 Cal. App. (2d) 407, 156 P. (2d) 781.

²⁵⁸ Friedberg v. Schultz, (1941) 312 Ill. App. 171, 38 N. E. (2d) 182, comment 41 *Mich. Law Review* 166 (Aug. 1942).

²⁵⁹ *Ibid.*; Brown v. McLanahan, (1945) 148 F. (2d) 703.

²⁶⁰ The depository may be a party to the agreement.

²⁶¹ As to the transferability of voting trust certificates, see *Union Trust Co. of*

certificates. Other provisions regulating the rights, duties, and liabilities of the various parties to the agreement are also found in the voting trust agreement.

When the duration of a voting trust is regulated by statute, a trust agreement for a longer period is usually invalid,²⁶² but the agreement may fix a time shorter than that allowed by statute.²⁶³ A state law limiting the duration applies to reorganizations under the Bankruptcy Act as well as to reorganizations under state law.²⁶⁴ The statement in a voting trust agreement that it is irrevocable does not prevent its revocation;²⁶⁵ nor does the power to amend include the power to extend the life of the voting trust agreement.²⁶⁶ If money is loaned on faith of the voting trust agreement, it cannot be terminated before its expiration date.^{266a}

Conducting the Vote

Methods of taking the vote—Ballot. A vote is merely a means of ascertaining the will of the body casting the vote. Where the statute requires a ballot,²⁶⁷ this should be provided.²⁶⁸ Otherwise the consensus of the meeting may be taken either by

Rochester Co. v. Oliver, (1915) 214 N. Y. 517, 108 N. E. 809. See also *In re Selway Steel Post & Fence Co.'s Receivership*, (1924) 198 Iowa 950, 200 N. W. 621; *Bostwick v. Chapman*, (1890) 60 Conn. 553, 24 A. 32; *Bryson v. Bryson*, (1923) 62 Cal. App. 170, 216 P. 391; *Garvan v. Certain Shares of International A. Corp.*, (1921) 276 F. 206. An unreasonable restriction on the transfer of a voting trust certificate is void. *Tracey v. Franklin*, (1948) (Del. Ch.) 61 A. (2d) 780.

²⁶² *Perry v. Missouri-Kansas Pipe Line Co.*, (1937) 22 Del. Ch. 33, 191 A. 823, discussed in 38 *Columbia Law Review* 508 (1938), and in 22 *Minnesota Law Review* 276 (1938). See also *Kittinger v. Churchill Evangelistic Ass'n*, (1934) 151 N. Y. Misc. 350, 271 N. Y. Supp. 510, in which a provision in a voting trust agreement authorizing the trustees to renew the agreement for a further term after expiration of the period allowed by statute was held invalid. This case is discussed in 33 *Michigan Law Review* 804. But a statute limiting the duration of voting trusts was held inapplicable to a trust created before its enactment. *Western Pac. R. Corporation v. Baldwin*, (1937) 89 F. (2d) 269.

²⁶³ *Friedberg v. Schultz*, (1941) 312 Ill. App. 171, 38 N. E. (2d) 182, comment 41 *Mich. Law Review* 166 (Aug. 1942).

²⁶⁴ *Bakers Share Corp. v. London Terrace, Inc.*, (1942) 130 F. (2d) 157.

²⁶⁵ *H. M. Byllesby & Co. v. Doriot*, (1940) 25 Del. Ch. 46, 12 A. (2d) 603.

²⁶⁶ *Olson v. Rossetter*, (1948) 399 Ill. 232, 77 N. E. (2d) 652.

^{266a} *Hearst v. American Newspapers, Inc.*, (1943) 51 F. Supp. 171.

²⁶⁷ As used in the statutes, a ballot is "a paper so prepared by printing or writing thereon as to show the voter's choice." *In re Mathiason Mfg. Co.*, (1907) 122 Mo. App. 437, 99 S. W. 502.

²⁶⁸ A ballot is specifically required by statute in some states for the election of directors. See statutes for the several states (collected in *Prentice-Hall Corporation Service*). The title of directors elected is determined according to the lawful ballots cast. *Hall v. Woods*, (1927) 325 Ill. 114, 156 N. E. 258. For right to correct ballot before election is finally announced, see page 49.

a showing of hands or by a viva voce vote. Where there is a dissent, neither a showing of hands nor a viva voce vote is satisfactory, for they indicate the per capita desires of the stockholders but not the per share determination of the question. The will of the shareholders may be taken by a reading of the roll, and a count of the per share vote may be made in that way. (See page 130 for form of demand that a vote be taken by ballot.)

Where a ballot is used, any form is satisfactory if it shows the number of shares voted, the persons for whom they are voted, and the name of the person casting the ballot. For forms of ballots, see page 130.

Where the written consent of stockholders to any action is required, a document setting forth the consent should be prepared and signed by the stockholders, with an indication of the shares held by each stockholder.

Per capita and stock vote. At common law, each member of a corporation was entitled to one vote. Today, however, the general rule is that each stockholder is entitled to one vote for each share of stock that he owns,²⁶⁹ unless the statute, charter, or by-laws provide otherwise. A by-law provision that no stockholder shall vote for more than one director is void, if the statute gives the stockholder the right to cast one vote for each of his shares for each director to be elected.²⁷⁰ The holder of a fractional share cannot vote it in the absence of specific statutory provision.²⁷¹ In some states, a corporation may be organized with shares that carry multiple voting rights.²⁷²

It has been held that failure to note the number of votes cast opposite the names of persons voted for as directors destroys the efficacy of a ballot. In *re Mathiason Mfg. Co.*, (1907) 122 Mo. App. 437, 99 S. W. 502. However, a ballot upon a question of sale of assets was not invalid because it failed to show the number of shares voted by the ballot, where the statute gave each stockholder of record, at the date fixed for determining the persons entitled to vote, one vote for each share standing in his name. *Wick v. Youngstown Sheet & Tube Co.*, (1932) 46 Ohio App. 253, 188 N. E. 514.

²⁶⁹ *Proctor Coal Co. v. Finley*, (1895) 98 Ky. 405, 33 S. W. 188; *State ex rel. Chapman v. Urschel*, (1922) 104 Ohio St. 172, 135 N. E. 630; *State ex rel. Fritz v. Gray*, (1925) 20 Ohio App. 26, 153 N. E. 187; *State ex rel. Cullitan v. Campbell*, (1939) 135 Ohio St. 238, 20 N. E. (2d) 366.

²⁷⁰ In *re Crown Heights Hospital, Inc.*, (1944) 183 N. Y. Misc. 563, 49 N. Y. Supp. (2d) 658.

²⁷¹ *Commonwealth ex rel. Cartwright v. Cartwright*, (1944) 350 Pa. 638, 40 A. (2d) 30; Op. Atty. Gen., (N. Y.) to Sec'y of State, 12/9/46; Op. Atty. Gen. (Pa.) to Sec'y of Banking, 11/30/46, 94 *Pittsburgh Legal Journal* 458.

²⁷² Op. Atty. Gen. (Minn.) to Sec'y of State, 3/30/44; Op. Atty. Gen. (N. C.) to Sec'y of State, 3/25/44.

See voting restrictions on stock, on page 407.

Cumulative voting. Since a stockholder is entitled to cast a number of votes equal to the number of shares he owns, it would be possible for a single stockholder owning a majority of stock to elect all the directors. To avoid such a situation, and to give the minority the opportunity to be represented on the board of directors, a system known as cumulative voting has been devised. Under this plan, each shareholder is entitled to as many votes as are equal to the number of shares he owns multiplied by the number of directors to be elected. He may cumulate the votes—that is, cast all the votes for one candidate—or he may distribute his votes among the candidates in any way he sees fit.

To illustrate, let us take as an example a corporation with 100 shares of which the majority controls 51 shares and the minority 49 shares. The faction strength is nearly equal. If 5 directors are to be elected, the majority is entitled to 255 votes (51×5) and the minority to 245 votes (49×5). If the majority contents itself with casting this cumulative vote for three out of five directors, it can secure their election by giving each director 85 votes. The minority may elect only two directors by giving one of the directors 122 votes and another 123 votes. In this case, if the majority frittered away its strength among the five directors, while the minority concentrated its strength upon four, the minority would gain control of the board.²⁷³

The corporation laws of some of the states prescribe that directors must be elected by cumulative voting. In other states, cumulative voting is permitted when the certificate of incorporation or the by-laws so provide.²⁷⁴ The right to cumulative voting cannot be claimed unless that method of voting is provided for by statute, or the statute permits the corporation's charter or by-laws to make such a provision.²⁷⁵ If the stock-

²⁷³ See *State ex rel. Price v. Du Brul*, (1919) 100 Ohio 272, 126 N. E. 87.

²⁷⁴ *Chappel et al. v. Standard Scale & Supply Corp.*, (1927) 15 Del. Ch. 333, 138 A. 74, holding that cumulative voting of shares of stock is permitted under the Delaware law only when the certificate of incorporation so provides. Where the right to cumulative voting is not mandatory by the statute, a different method of voting may be substituted by amendment of the charter. *Maddock v. Vorclone Corp.*, (1929) 17 Del. Ch. 39, 147 A. 255. Where the statute stated that the certificate of incorporation may provide for cumulative voting, but such voting was authorized only by the by-laws, adopted unanimously, and by written agreement among all the stockholders, cumulative voting was upheld. *In re American Fibre Chair Seat Corporation*, (1934) 241 N. Y. App. Div. 532, 272 N. Y. Supp. 206, aff'd, (1934) 265 N. Y. 416, 193 N. E. 253. See also *In re Brophy*, (1935) 13 N. J. Misc. 462, 179 A. 128.

²⁷⁵ All by-laws with regard to voting rights must be consistent with the statute

holder has the right of cumulative voting, he cannot be deprived of it by a by-law.²⁷⁶

The chairman should announce at the beginning of the meeting whether or not cumulative voting is permitted.²⁷⁷ It is not necessary for a stockholder, or a director, to inform the other stockholders that he intends to cumulate his vote.²⁷⁸

Method of determining shares needed to elect certain number. Often it becomes necessary to determine how many shares one should hold or control under the system of cumulative voting to insure the election of a certain number of directors. The following method may be used: (1) Multiply the total number of shares entitled to vote by the number of directors it is desired to elect; (2) divide this product by one more than the total number of directors to be elected; (3) add one to the quotient. The result will be the least number of shares of stock that must be held or controlled in order to elect the desired number of directors. Thus, if a company has outstanding 1,000 voting shares, 5 directors are to be elected, and it is desired to elect 2 out of the 5, the least number of shares that it will be necessary to hold or to control in order to accomplish this result will be found by multiplying 1,000 by 2, and dividing the product (2,000) by one more than the number of directors to be elected (5+1, or 6), giving a result of $333\frac{1}{3}$. To this is added 1, giving $334\frac{1}{3}$. The desired result, therefore, will be actually accomplished only if 335 shares are held or controlled. (Where there is a fraction, it is to be counted as an extra share.)²⁷⁹

Other methods of voting. Methods of voting other than

and with provisions in the articles of incorporation on the subject. In re American Fibre Chair Seat Corporation, (1934) 241 N. Y. App. Div. 532, 272 N. Y. Supp. 206, aff'd, (1934) 265 N. Y. 416, 193 N. E. 253; Brooks v. State ex rel. Richards, (1911) 3 Boyce 26 Del. 1, 79 A. 790. A by-law is ineffective to confer cumulative voting on the stockholders if the statute requires that the charter make provision therefor. In re Brophy, (1935) 13 N. J. Misc. 462, 179 A. 128.

²⁷⁶ Commonwealth ex rel. Brant v. Garrett Water Co., (1941) 41 Pa. D. & C. 357.

²⁷⁷ See Zachary v. Milin, (1940) 294 Mich. 622, 293 N. W. 770.

²⁷⁸ Commonwealth ex rel. Laughlin v. Green, (1945) 351 Pa. 170, 40 A. (2d) 492.

²⁷⁹ The result can be obtained by algebra if the following formula is used:

$$x = \frac{ac}{b+1} + 1$$

where x is the number of shares required, a the total voting shares, c the number of directors it is desired to elect, and b the number of directors to be elected. For a complete discussion of the strategy of cumulative voting, see Gerstenberg, "Mathematics of Cumulative Voting," *Journal of Accountancy*, January 1910.

those described above may be prescribed by the certificate of incorporation. For example, the holders of a certain class of stock may be given ten votes for the first ten shares and one vote for each ten shares thereafter, until a maximum of one hundred shares is reached, whereupon voting rights in respect to shares cease.

Sometimes the statutes make special provisions regarding the right to vote, as, for example, that stockholders who are in arrears or who are in debt to the company may not vote, or that stockholders whose stock has been attached may vote until title is divested.

Votes necessary for an election of directors. In the absence of special provision in the statute, charter, or by-laws, a majority of the votes cast, as distinguished from a majority of those present, will decide the result of an election.²⁸⁰ This rule applies even if those voting do not constitute a majority of all the stockholders, or do not represent a majority of the stock.²⁸¹ A charter provision that is intended to abrogate the general rule must be clear and explicit.²⁸² A majority of the votes actually cast will determine the election, even if stockholders present who had an opportunity to vote refrained from doing so.²⁸³ A statutory provision permitting cumulative voting takes precedence over a statutory provision requiring the vote of a majority of the number of shares for election of directors; the latter provision must be considered to apply only where the shares are voted without cumulating.²⁸⁴

Votes necessary to decide questions other than election. A majority of those present at a legal meeting may generally take action at the meeting, even though this majority may be less than a majority in number of stockholders and less than a

²⁸⁰ *State v. Chute*, (1885) 34 Minn. 135, 24 N. W. 353; *Sudbury v. Stearns*, (1838) 38 Mass. 148; *Col. Bottom Levee Co. v. Meier*, (1866) 39 Mo. 53; *Beardsley et al. v. Johnson*, (1890) 121 N. Y. 224, 241 N. E. 380; *Stratford v. Mallory*, (1904) 70 N. J. Law 294, 58 A. 347.

²⁸¹ *In re Rapid Transit Ferry Co.*, (1897) 15 N. Y. App. Div. 530, 44 N. Y. Supp. 539.

²⁸² A charter requirement that directors shall be elected by the "vote of a majority in number of shares issued and outstanding" is not clear enough to abrogate the general rule. *Standard Power & Light Corp. v. Inv. Associates, Inc.*, (1947) (Del.), 51 A. (2d) 572.

²⁸³ *State v. Chute*, *supra* (Note 280). See *contra*, *Commonwealth v. Wickersham*, (1870) 66 Pa. 134.

²⁸⁴ *Schwartz v. State*, (1900) 61 Ohio St. 497, 56 N. E. 201.

majority in amount of stock.²⁸⁵ This rule does not hold, of course, if the statute, charter, or by-laws require a specific number of votes to decide a question. In such cases, the express requirement must be met.²⁸⁶ Charter or by-law provisions calling for a greater vote than the statutes require have been upheld; but in New York a by-law requiring the *unanimous* vote of stockholders for certain corporate acts was invalidated because it was inconsistent with statutory provisions giving a prescribed percentage of stockholders the control of those matters.^{286a}

Where the consent of the stockholders is being obtained in accordance with a statutory requirement, care should be exercised to determine just what proportion of the corporate stock is necessary to carry the proposal. Ordinarily the statute specifically states what percentage of the outstanding stock is required. Sometimes the statute is ambiguous and does not state whether the proportion required is applicable to the individual stockholders or to the number of shares outstanding, irrespective of the number of holders thereof. A provision in the statute or by-laws requiring the approval of "a majority of the stockholders" upon a particular question has been held to mean a majority in interest of the stockholders, and not a majority in number only.²⁸⁷ But the more general view is that the term "a majority of the stockholders," as ordinarily used, means a per capita majority when the right to vote is per capita, and a stock majority when each share of stock is entitled to vote.²⁸⁸ Stock that is void because it has been illegally issued cannot be counted when determining whether a proposition has been carried by the required vote.²⁸⁹

In some cases, the statute is so worded that the percentage of consent required is a percentage of the total amount of stock outstanding, irrespective of the classes into which the stock is divided. In other cases, certain percentages of each of the several classes of stock are required. Sometimes the statutes

²⁸⁵ *Green v. Felton*, (1908) 42 Ind. App. 675, 84 N. E. 166; *Green River Mfg. Co. v. Bell*, (1927) 193 N. C. 367, 137 S. E. 132, and cases there cited.

²⁸⁶ *In re Boulevard Theatre & Realty Co.*, (1921) 195 N. Y. App. Div. 518, 186 N. Y. Supp. 430.

^{286a} *Benintendi v. Kenton Hotel, Inc.*, (1945) 294 N. Y. 112, 60 N. E. (2d) 829. The New York Stock Corporation Law (§9) was subsequently amended to overcome the Court's decision in this case.

²⁸⁷ *Bank of Los Banos v. Jordan*, 1914) 167 Cal. 327, 139 P. 691.

²⁸⁸ *Simon Borg & Co. v. New Orleans City R. Co.*, (1917) 244 F. 617, following *Mower v. Staples*, (1884) 32 Minn. 284, 20 N. W. 225.

²⁸⁹ *Bentley v. Zelma Oil Co.*, (1919) 76 Okla. 116, 184 P. 131.

require that the consent be obtained from stockholders having the right to vote. In other cases, the statutes provide that the consent be obtained from the stockholders, and the question as to whether stock which is ordinarily nonvoting has the right to participate in the action is left open. It would seem that nonvoting stock should have the right to vote in any matter specifically affecting the rights of the holders thereof, unless the statute is very clear in indicating that their consent is not required.

Tie votes. The following illustration explains the effect of a tie vote. Five directors, let us say, are to be elected by cumulative voting. Six candidates have been named. Four hundred votes have been cast. Suppose that candidates *A* and *B* each receive 80 votes, and candidates *C*, *D*, *E*, and *F* each receive 60 votes. What is the result of the election? The chairman of the meeting may not declare that no board has been elected and that the old directors shall continue in office.²⁹⁰ *A* and *B* will be considered elected,²⁹¹ and the chairman must permit the stockholders to vote again and again, if necessary, until it is demonstrated that further balloting is futile.

The same rules apply in the following situation: Suppose there are 100 shares of stock to be voted by straight voting, that is, one vote for each share. These shares are divided among four stockholders as follows: Jones, 2 shares; Smith, 25 shares; Brown, 40 shares; and Grey, 33 shares. The by-laws require that directors must be elected by a majority of the votes cast. Three directors are to be elected and there are six candidates. Each stockholder would have as many votes for each of three directors as he has shares. The votes cannot be split among the six candidates. The voting shows the following results: *A*, 100 votes; *B*, 100 votes; *C*, 2 votes; *D*, 25 votes; *E*, 40 votes; and *F*, 33 votes. *A* and *B* are considered elected and the balloting continues for the election of a third director.

Where the votes are divided between two factions, it is inadvisable for either faction to remain silent or to refuse to vote while the other faction votes, for by so doing the voting group is enabled to carry the election.²⁹²

If less than a majority of the board is elected, those elected cannot be inducted into office, and the old directors hold over

²⁹⁰ State ex rel. Price v. Du Brul, (1919) 100 Ohio 272, 126 N. E. 87.

²⁹¹ Ibid.

²⁹² Ibid.

until their successors are elected. But if a majority of the board has been elected, this number is sufficient to constitute a new board of directors, provided that the election is valid. The entire old board steps out, the elected majority assumes the duties of the board, and the places of directors not filled at the election are considered vacant.²⁹³ The manner of electing directors to fill such vacancies in the board is discussed on page 266.

Election of directors. The statutes vest in the stockholders the right to elect a board of directors annually.²⁹⁴ When the charter or a statute requires an annual election of directors by the stockholders, the election must in that case take place once a year.²⁹⁵ The right to elect directors cannot be taken away from the stockholders by any act of either the directors or the officers.²⁹⁶ Stockholders, however, may agree to vote for certain persons as directors.²⁹⁷

In some of the states, the statutes regulate the manner of electing directors. Where this is the case, the statutory direction cannot be modified by charter or by-law or by any other regulation. Thus, if the statute provides that directors shall be chosen at the time and place of meeting fixed by the by-laws, by a plurality of the votes at such meeting, the corporation cannot, by a charter provision or by-law, require that the vote of a majority of the total stock shall be necessary to elect directors; or that a majority of the stock shall vote at the election; or that

²⁹³ State v. Gray, (1925) 20 Ohio App. 26, 153 N. E. 187; State ex rel. Price v. Du Brul, supra (Note 290).

²⁹⁴ See Finkelstein, "The Conduct of Corporate Elections," 17 *St. John's Law Review* 75 (1943).

²⁹⁵ State of Nevada ex rel. Curtis v. McCullough, (1867) 3 Nev. 202. Where the by-laws set the election date, the directors empowered to change the by-laws may postpone the election. Barker v. Nat. Life Ins. Ass'n, (1918) 183 Iowa 966, 166 N. W. 597.

A corporation is not precluded from electing directors merely because it has ceased to do business or is insolvent. Beardsley v. Johnson et al., (1890) 121 N. Y. 224, 24 N. E. 380.

²⁹⁶ State v. Cronan, (1897) 23 Nev. 437, 49 P. 41. The refusal of the president to preside at the meeting or to permit the stockholders to use the office of the company for the meeting was illegal. The stockholders had the right to proceed with the business of the meeting without the president, and to adjourn the meeting to another room.

²⁹⁷ Davis v. Arguls Gas & Oil Sales Co., (1938) 167 N. Y. Misc. 377, 3 N. Y. Supp. (2d) 241; Williams v. Fredericks, (1937) 187 La. 987, 175 So. 642; Benintendi v. Kenton Hotel, (1945) 294 N. Y. 112, 60 N. E. (2d) 829.

directors can be elected only by unanimous vote of the stockholders.²⁹⁸ Neither may the corporation, under such a statute, by fixing the amount of stock necessary to constitute a quorum, enable stockholders to defeat an election by staying away from the meeting.²⁹⁹

It is not necessary to elect all of the required number of directors at one meeting.³⁰⁰ In electing directors nominations need not be seconded. A motion to close the nominations may be made and put to a vote at any time. No person has the right thereafter to make nominations,³⁰¹ but the closing of the nominations will not prevent the casting of ballots for other persons. Ordinarily a person can be elected to office through "write-ins" of his name on the ballot.³⁰² Where the election is unanimous, the secretary may cast a ballot for the slate. The ballot is deemed a vote from all voting stock represented at the meeting, and the election is recorded accordingly.

Effect of announcing the vote. The polls may be kept open for a prescribed period during which votes will be taken. After the polls are closed and the vote is announced, they cannot be reopened to receive additional votes.³⁰³ The election is not vitiated, however, if after the polls are closed additional votes are received, provided, of course, that the election results have not been announced.³⁰⁴ This means a formal announcement by the chairman or secretary.³⁰⁵ Thus, an announcement by another stockholder, or by the teller to a majority stockholder, does not prevent a stockholder from changing his vote or from voting additional proxies.³⁰⁶

²⁹⁸ *In re Boulevard Theatre & Realty Co.*, (1921) 195 N. Y. App. Div. 518, 186 N. Y. Supp. 430; *Benintendi v. Kenton Hotel*, *supra* (Note 297).

²⁹⁹ *Matter of P. F. Keogh, Inc.*, (1920) 192 N. Y. App. Div. 624, 183 N. Y. Supp. 408, citing *Matter of Rapid Transit Ferry Co.*, (1897) 15 App. Div. 530, 44 N. Y. Supp. 539.

³⁰⁰ *Great Falls, etc. Ry. Co. v. Ganong*, (1913) 48 Mont. 54, 136 P. 390; *State ex rel. Price v. Du Brul*, (1919) 100 Ohio 272, 126 N. E. 87; *In the Matter of the Excelsior Ins. Co.*, (1862) 38 Barb. (N. Y.) 297.

³⁰¹ This rule carries with it the corollary that no person can thereafter address the assemblage on the merits of any candidates. See *Moon v. Moon Motor Car Co.*, (1930) 17 Del. Ch. 176, 151 A. 298.

³⁰² *Commonwealth ex rel. Laughlin v. Green*, (1945) 351 Pa. 170, 40 A. (2d) 492.

³⁰³ *State ex rel. David v. Dailey*, (1945) 23 Wash. (2d) 25, 158 P. (2d) 330.

³⁰⁴ *Hardenburgh v. F. & M. Bank*, (1834) 3 N. J. Ch. 68; *State ex rel. David v. Dailey*, *supra* (Note 303).

³⁰⁵ *Zachary v. Milin*, (1940) 294 Mich. 622, 293 N. W. 770.

³⁰⁶ *State ex rel. David v. Dailey*, *supra* (Note 303); *Zachary v. Milin*, *supra*

The final results of an election may not be announced until the time has arrived for the closing of the polls, unless a majority of all voting stock has been voted in favor of a slate. Any stockholder may change his vote at any time before the results of the election are announced.³⁰⁷ If cumulative voting is permitted, a stockholder may change his vote to vote cumulatively.³⁰⁸ No election can be declared closed until the presiding officer so announces.³⁰⁹

Effect of failure to elect directors. The statutes generally provide that if no election is held on the day designated for the election of directors, the corporation is not thereby dissolved, but the directors continue to hold office and must discharge their duties until their successors have been elected. A hold-over director, in the absence of any resignation, is deemed a director to the same extent as during the year for which he was elected.³¹⁰ His term of office ends when his successor is elected.³¹¹ The statutes generally direct that another meeting for the election of directors be held as soon after the day fixed by the by-laws for election as may be convenient, or within a certain number of days thereafter.³¹²

Disputes as to result of election of directors. Disputes as to the result of the election of directors frequently involve disputes concerning the eligibility of voters. Where the power is not given to him by the charter or by-laws,³¹³ the president or chairman of the meeting has no right to determine who shall vote.

(Note 305). See also *Young v. Jebbett*, (1925) 213 N. Y. App. Div. 774, 211 N. Y. Supp. 61, in which it was held that proxies which had been overlooked through error, and had not therefore been voted, could be accepted after the polls were closed, but during the time the meeting was still in existence awaiting the report of the judges, there having been no indication that the proxies were irregular.

³⁰⁷ *State ex rel. Lawrence v. McGann*, (1895) 64 Mo. App. 225; *Young v. Jebbett*, (1925) 213 N. Y. App. Div. 774, 211 N. Y. Supp. 61; *Zachary v. Milin*, supra (Note 305).

³⁰⁸ *Zachary v. Milin*, (1940) supra (Note 305).

³⁰⁹ *Ibid.*

³¹⁰ *Turp v. Dickinson*, (1926) 100 N. J. Ch. 41, 134 A. 888.

³¹¹ *In re Warns*, (1941) *N. Y. Law Journal*, 11/10/41, p. 1448, col. 2.

³¹² This is also the rule by judicial opinion. See *Dowdle v. Central Brick Co.*, (1934) 206 Ind. 242, 189 N. E. 145; *Estel v. Midgard Inv. Co.*, (1932) (Mo.) 46 S. W. (2d) 193; *Russian Reinsurance Co. v. Stoddard*, (1925) 211 N. Y. App. Div. 132, 207 N. Y. Supp. 574; *Lee v. Nichol*, (1925) 98 W. Va. 434, 127 S. E. 193; *Voorheis v. Walker*, (1924) 227 Mich. 291, 198 N. W. 994; *Weil v. Defenbach*, (1922) 36 Idaho 37, 208 P. 1025; *Jenkins v. Baxter*, (1894) 160 Pa. St. 199, 28 A. 682.

³¹³ *State v. Cronan*, (1897) 23 Nev. 437, 49 P. 41; *In re Robert Clarke, Inc.*, (1919) 186 N. Y. App. Div. 216, 174 N. Y. Supp. 314.

Where no provision is made, the stockholders may determine the eligibility of voters by a vote. Their decision, of course, may be reviewed by the court.³¹⁴ (In regard to the right of inspectors of election to determine the eligibility of voters, see page 52.) An election or other action at a corporate meeting is not considered void unless the votes illegally cast change the result.³¹⁵

In settling disputes between stockholders claiming the right to vote, the meeting must be guided by the corporate records or the list of stockholders prepared for the meeting. The officers of the corporation need not look beyond the books to ascertain who are the real owners of the shares, although a court of equity will do so in a dispute in which it is seeking to settle rights between the claimants as such. If one of the stockholders claims that the record is not correct, he may apply to a court of equity for a writ compelling the acceptance of his vote. This writ must be obtained before the meeting and must be presented to the chairman; in the absence of such writ, the stockholders of record on the books of the corporation will be given the right to vote.

In some states, disputed elections are regulated by law. Where a dispute arises over the ownership of shares and hence over the right to vote, a court of equity will take jurisdiction to enjoin an election pending settlement of the dispute.³¹⁶ Where two elections are held by rival factions, the first faction that regularly organizes and carries its election will *prima facie* be recognized; the other faction is, of course, entitled to its day in court on the question of irregularities.³¹⁷ It has been held, however, that the courts may decide a dispute of this kind by considering the effect of the votes at the two meetings as though they were combined.³¹⁸ Moreover, in a proper case, an equity court will appoint a master to conduct the election.³¹⁹

³¹⁴ *State v. Cronan*, footnote 313; *State ex rel. Martin v. Chute*, (1885) 34 Minn. 135, 24 N. W. 353.

³¹⁵ *Beutelspacher v. Spokane Sav. Bank*, (1931) 164 Wash. 227, 2 P. (2d) 729; *Vanderlip v. Los Molinos Land Co.*, (1943) 56 Cal. App. (2d) 747, 133 P. (2d) 467. When votes cast under an invalid voting trust decided the result of an election, the election was void. *Appon v. Belle Isle Corp.*, (1946) (Del. Ch.), 46 A. (2d) 749.

³¹⁶ *Archer v. Am. Water Works Co.*, (1892) 50 N. J. Ch. 33, 24 A. 508; *Villamil v. Hirsch*, (1905) 138 F. 690, 143 F. 654.

³¹⁷ *Matter of Pioneer Paper Co.*, (1864) 36 How. Pr. (N. Y.) 105; *Com. v. Vandegrift*, (1911) 232 Pa. 53, 81 A. 153.

³¹⁸ *Re Cedar Grove Cem. Co.*, (1898) 61 N. J. Law 422, 39 A. 1024.

³¹⁹ *Tunis v. Hestonville, etc. R. R. Co.*, (1892) 149 Pa. 70, 24 A. 88; *Bartlett v.*

Inspectors of election. A common regulatory provision of the statutes concerning the election of directors is that the election shall be conducted by inspectors or judges of election appointed in the manner prescribed by the by-laws. If the inspectors are absent or refuse to act, it is lawful for the stockholders or the proxies present to appoint inspectors by a per capita vote.³²⁰ If the statute, charter, or by-laws make no provision regarding the manner of appointing inspectors, the stockholders present or represented at the meeting may do so.³²¹ Unless the statutes or by-laws otherwise provide, an inspector need not be a stockholder, nor in the absence of contrary statutory provision is an inspector disqualified either because he is a candidate for office³²² or because he holds office.³²³ An election is not void if the inspectors are not sworn, even if they are required by statute to be sworn.³²⁴

It would seem that, in the absence of a statutory requirement, inspectors are not essential. The by-laws may provide that inspectors shall conduct the vote not only for the election of directors, but for other questions that are put to vote. If the appointment of inspectors of election is not specifically required by the statute, charter, or by-laws, and a division of the vote is expected, the chairman generally appoints tellers to count the ballots. Since tellers are not required to report the results of election under oath, it is advisable for the chairman to permit anyone who disputes the count to examine the ballots in the company of the tellers. If any stockholder who is present at the meeting objects to the way in which the votes are being counted, he may always make a motion directing that inspectors administer the election; and then the will of the meeting as expressed in the result of the motion will be binding, provided that the transaction is not tainted with fraud.

Gates, (1902) 118 F. 66. See also *Wyatt v. Armstrong*, (1945) 186 N. Y. Misc. 216, 59 N. Y. Supp. (2d) 502.

³²⁰ *In re Wheeler*, (1866) 2 Abb. Pr. N. S. (N. Y.) 361; *In re Remington Typewriter Co.*, (1922) 234 N. Y. 296, 137 N. E. 335; *Gow v. Consolidated Copper-mines Corp.*, (1933) 19 Del. Ch. 172, 165 A. 136.

³²¹ *In re Remington Typewriter Co.*, *supra* (Note 320).

³²² *In re Wheeler*, (1866) 2 Abb. Pr. N. S. (N. Y.) 361.

³²³ *Re Chenango Co.*, (1839) 19 Wend. (N. Y.) 635.

³²⁴ *In re Mohawk & Hud. Riv. Co.*, (1838) 19 Wend. (N. Y.) 135; *In re Zenitherm Co.*, (1921) 95 N. J. Law 297, 113 A. 327. But if the right of the inspector to act is questioned at the time, he must be sworn, or all his actions are invalid. *Dickson v. McMurray*, (1881) 28 Grant Ch. 533; *State v. Merchant*, (1881) 37 Ohio 251.

Powers of inspectors of election. Where an election of directors is conducted by inspectors of election, the latter distribute the ballots, collect them, count the vote, and report the result of the election under oath. The inspectors are ministerial, not judicial, officers.³²⁵ Ordinarily they are bound by the corporate records and cannot question the right of a registered owner to vote stock standing in his name on the books of the corporation.³²⁶ Within the scope of their ministry, inspectors may exercise some discretion.³²⁷ For example, they may pass upon the eligibility of voters, but they may not determine the eligibility of candidates, and their decisions are subject to review by the courts.³²⁸ The inspectors may reject votes,³²⁹ and they may keep the polls open for a reasonable time after the hour fixed for closing them, if the extra time is needed to give all stockholders who are ready and who wish to vote an opportunity to do so.³³⁰

A vote can always be challenged.³³¹ If it is, the person presenting the ballot is entitled to defend his right to vote.³³² If the vote is not challenged, the inspectors' duty is to count it. After learning the result of the election, inspectors cannot decide that some of the ballots cast for the successful candidate were illegal, and thus cause the minority to win.³³³

Report of election of directors. In some states, the statutes require the filing, within a specified time, of a report showing,

³²⁵ *Young v. Jebbett*, (1925) 213 N. Y. App. Div. 774, 211 N. Y. Supp. 61; *Standard Power & Light Corp. v. Inv. Associates, Inc.*, (1947) (Del.), 51 A. (2d) 572.

³²⁶ *In re Giant Portland Cement Co.*, (1941) (Del. Ch.), 21 A. (2d) 697.

³²⁷ For a case in which the inspectors acted beyond their powers, see *Gow v. Consolidated Coppermines Corp.*, (1933) 19 Del. Ch. 172, 165 A. 136.

³²⁸ *Umatilla Water Users' Ass'n v. Irvin*, (1910) 56 Ore. 414, 108 P. 1016; *In re Election of Directors of St. Lawrence Steamboat Co.*, (1882) 44 N. J. Law 529; *Triesler v. Wilson*, (1899) 89 Md. 169, 42 A. 926.

If the inspectors make an error in addition, the courts will review the matter, although the error is not discovered until after the meeting. The courts will also review a charge of forgery in a proxy. *Standard Power & Light Corp. v. Inv. Associates, Inc.*, *supra* (Note 325).

³²⁹ *In re Mohawk & H. R. Co.*, (1838) 19 Wend. (N. Y.) 135.

³³⁰ *People v. Albany & Susquehanna R. R. Co.*, (1869) 55 Barb. (N. Y.) 344.

As to duties of inspectors, see also *In re Schirmer's Will*, (1931) 231 N. Y. App. Div. 625, 248 N. Y. Supp. 497; *Elevator Supplies Co. v. Wylde*, (1930) 106 N. J. Eq. 163, 150 A. 347; *In re Robert Clarke, Inc.*, (1919) 186 N. Y. App. Div. 216, 174 N. Y. Supp. 314; *In re Gulla*, (1921) 13 Del. Ch. 23, 115 A. 317; *Haslam v. Carlson*, (1924) 46 R. I. 53, 124 A. 734.

³³¹ *Petition of Serenbetz*, (1943) 46 N. Y. Supp. (2d) 475.

³³² *Kauffman v. Meyberg*, (1943) 59 Cal. App. (2d) 730, 140 P. (2d) 210, rehearing denied, 8/10/43.

³³³ *Ibid.*

among other things, those persons who were elected. Of course, the mandatory effect of such statutes will depend upon their wording. The courts seem disposed to construe such requirements very liberally in favor of the corporation.³³⁴

³³⁴ Where officers are ineligible for reëlection, if they "shall wilfully refuse to comply with the provisions" respecting the filing of a report, neglect will not be construed as wilful if there has been no demand or request on the directors to file. *In re Zenitherm Co.*, (1921) 95 N. J. Law 297, 113 A. 327.

CHAPTER 2

FORMS RELATING TO STOCKHOLDERS' MEETINGS

CALLS, NOTICES, AND WAIVERS OF NOTICE OF STOCKHOLDERS' MEETINGS

No. 1

Call of regular annual meeting of stockholders by president.

To,

Secretary of Corporation:

The regular annual meeting of stockholders of the Corporation is hereby called for (*Day of Week*), the .. day of, 19.., at o'clock in the noon, to be held at the principal office of the Corporation at (*Street*), (*City*), (*State*), for the following purposes:

(Here insert purposes; see form No. 26.)

You are hereby directed, as Secretary of the said Corporation, to give proper notice of said meeting to the stockholders of said Corporation, as prescribed by the By-laws thereof.

.....
President

Dated, 19..

Request by stockholders to secretary to give notice of special business to be transacted at annual stockholders' meeting.

To the Secretary of Corporation:

We, the undersigned, stockholders of Corporation, holding the number of shares hereinafter set opposite our respective names, do hereby request that you give notice to the stockholders of the Corporation that the following proposal will be presented for consideration and vote at the annual meeting of stockholders of the said Corporation, to be held at the office of the Corporation,

..... (Street), (City),
 (State), on the .. day of, 19.., at o'clock .. M.
 —to wit:

(Here insert special business proposed to be considered at the meeting.)

....., holding shares

....., holding shares

....., holding shares

No. 3

Call of special meeting of stockholders by president.

To,

Secretary of Corporation:

Pursuant to the provisions of the By-laws of the
 Corporation, I hereby call a special meeting of the stockholders of said
 Corporation, to be held at the principal office of the Corporation,
 (Street), (City), (State), on
 the .. day of, 19.., at o'clock in the noon,
 for the following purposes:

(Here insert purposes; see form No. 26.)

You are hereby authorized and directed, as Secretary of the said
 Corporation, to give notice to stockholders of said special meeting, as
 required by the By-laws of this Corporation.

.....
 President

No. 4

Call of special meeting of stockholders by the stockholders.

Dated, 19..

To,

Secretary of Corporation:

The undersigned, stockholders of the Corporation,
 owning at least (*insert fractional part*) of the outstanding
 capital stock of said Corporation, do hereby call a special meeting of
 the stockholders of the said Corporation, to be held at the prin-
 cipal office of the Corporation, (Street),
 (City), (State), on the .. day of, 19..,
 at o'clock .. M., for the following purposes:

(Here insert purposes; see form No. 26.)

FORMS—STOCKHOLDERS' MEETINGS

We hereby direct you, as Secretary, to give notice to the stockholders of the said Corporation of such meeting, as prescribed by the By-laws.

<i>Name of Stockholder</i>	<i>Number of Shares Owned</i>
.....
.....
.....

No. 5

Call of special meeting of stockholders by directors, addressed to president.

....., 19..

To the President of the Corporation:

We, the undersigned, directors of the Corporation, pursuant to the provisions of the By-laws of said Corporation, do hereby authorize and direct you to call a special meeting of the stockholders of the said Corporation, to be held on the .. day of .., 19.., at o'clock .. M., at the principal office of the Corporation, (Street), (City), (State), for the purpose of:

(Here insert purpose of meeting.)

.....

 (Signatures of directors)

No. 6

Call of special meeting of stockholders by the directors, addressed to the secretary.

To

Secretary of the Corporation:

We, the undersigned, directors of the Corporation, pursuant to the provisions of the By-laws of this Corporation, do hereby call a special meeting of stockholders of the said Corporation, to be held at the office of the Corporation, (Street), (City), (State), on the .. day of .., 19.., at o'clock in the noon, for the purpose of considering and voting upon the following proposal submitted to this Board—

..... (*insert subject matter of proposal*), and for the transaction of any further business that may be necessary and proper in connection therewith.

We direct you, as Secretary of the said Corporation, to give notice to the stockholders of the said special meeting, pursuant to the provisions of the By-laws of said Corporation.

Dated , 19..

.....
.....
.....
(Signatures of directors)

No. 7

Request by stockholder for special meeting of stockholders.

..... , 19..

To the President of the Corporation:

We, the undersigned, holding at least (*.....*) per cent of the capital stock of the Corporation entitled to vote, pursuant to the provisions of the laws of the State of and of the By-laws of this Corporation, do request you to call a special meeting of the stockholders of the said Corporation, to be held at the office of the Corporation, (*Street*), (*City*), (*State*), on the .. day of, 19.., at o'clock .. M., for the purpose of (*insert purpose*), and for the transaction of such other business as may be necessary and proper in connection therewith.

....., holding shares
....., holding shares
....., holding shares
....., holding shares

No. 8

President's instructions to secretary indorsed on stockholders' request to call special meeting.

..... , 19..

To the Secretary of Corporation:

You are hereby authorized and directed to serve notice of a special meeting of the stockholders of the Corporation, to be

held at the office of the Corporation, (Street),
 (City), (State), on the .. day of ..
 19.., at o'clock in the noon, called by me pursuant to
 the within request of stockholders for the purpose therein set forth.

.....
 President

No. 9

Call of special meeting of stockholders by one stockholder, upon failure to elect directors.

To the Stockholders of Corporation:

PLEASE TAKE NOTICE That the annual meeting of stockholders of
 Corporation for the election of directors, provided by
 the By-laws to be held on the first (Day of Week) in
, 19.., was not held, and that the directors have failed
 and omitted for a period of more than one month thereafter to call a
 meeting for such purpose. Therefore, the undersigned stockholder
 hereby calls a special meeting of the stockholders of
 Corporation, pursuant to the provisions of the laws of the State of
, to be held at the principal office of the Corporation,
 (Street), (City), (State),
 on the .. day of, 19.., at o'clock, .. M., for the
 purpose of electing directors and for the further purpose of transacting
 any and all business which may properly come before said meeting.

Dated at (City), (State),, 19..

.....
 A Stockholder of Corporation

No. 10

Notice of annual meeting of stockholders.

..... COMPANY

....., 19..

The Annual Meeting of the stockholders of the
 Company, for the election of directors and the transaction of such
 other business as may be brought before the meeting, will be held at its
 principal office, (Street), (City),
 (State), on (Day of Week),
 .., 19.., at o'clock .. M.

No stock can be voted at the election of directors which has been transferred within (....) days prior thereto.

.....
Secretary

If you are unable to be personally present at the meeting, please sign the attached [or enclosed] proxy and return it in the enclosed envelope.

[Note. For proxies, see forms Nos. 30 et seq.]

No. 11

Notice of annual meeting of stockholders that does not solicit proxies.

The Annual Meeting of the Shareholders of Corporation, will be held at the Hotel, (City), (State), on (Day of Week),, 19.., at o'clock in the noon, (Eastern Standard Time), for the election of directors and for the transaction of such other business as may properly come before the meeting or any adjournment thereof.

The stock transfer books of the Corporation will not be closed, but only shareholders of record, as of the close of business, 19.., will be entitled to vote at the meeting.

The above notice is given pursuant to the By-Laws of the Corporation. No solicitation is hereby made on behalf of any person for any proxy, consent or authorization, in respect of any securities of Corporation.

.....
Secretary

..... (City), (State)
....., 19..

No. 12

Notice of annual meeting of stockholders, including notice of special business to be transacted.

To the Stockholders of Company:

The annual meeting of the stockholders of the Company will be held in Room at the principal office of the said Company, at (Street), (City), (State), on (Day of Week),, 19.., at o'clock .. M., for the following purposes:

1. To elect (....) directors to hold office until the next

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annual meeting following their election and until their successors are elected.

2. To (include here any special purpose). See purpose clauses, form No. 26.

3. To transact any other business that may come before said meeting.

Polls will be open from o'clock in the noon to o'clock in the noon.

The books for the transfer of stock will not be closed, but only stockholders of record at the close of business on, 19.., will be entitled to vote at said meeting.

A proxy is enclosed. If you cannot be present at the meeting, will you kindly sign and return the proxy, properly witnessed, in the enclosed envelope. When signing as attorney, executor, administrator, or guardian, please give full title and file papers showing your authority. Proxies executed by a corporation should have the corporate seal affixed, duly attested.

By order of the Board of Directors.

Yours very truly,

.....
Secretary

No. 13

Notice of annual meeting of stockholders, with proxy statement complying with regulations under Securities Exchange Act of 1934.

..... Corporation

NOTICE OF ANNUAL MEETING OF STOCKHOLDERS

NOTICE IS HEREBY GIVEN that the annual meeting of stockholders of the (*insert name of company*) will be held at the principal office of the Corporation, at (*insert street address, city and state*), on the (*insert date of meeting*), at (*insert the time of day*), for the following purposes:

1. To elect two directors of the Corporation;
2. To consider and act upon the approval of A, J & Co., as auditors for the Corporation for the ensuing year; and
3. To transact such other business as may properly come before the meeting.

Only stockholders of record at the close of business on (*insert record date*) will be entitled to vote at the meeting.

If you do not expect to be present in person at the meeting, please sign, date and fill in the enclosed proxy and return it by mail.

.....
Secretary

(Here insert date of notice)

PROXY STATEMENT

[Note: Rule X-14A-3 requires that a written proxy statement be furnished each person whose proxy is solicited. The proxy statement must contain the information enumerated in Schedule 14A. The references throughout this suggested form are to the particular items of Schedule 14A which require the information given. Responses to items 1, 3, and 5 to 7, inclusive, of Schedule 14A must be included in every proxy statement.]

The enclosed proxy is solicited by the management of Corporation for use at the Annual Meeting of the Stockholders to be held on, 19...., at (Street Address), (City), (State) [Item 3 (a)]. Any stockholder giving a proxy has the power to revoke it at any time before it is voted [Item 1].

[Note: If the right to revoke a proxy is subject to conditions, state the conditions.]

The Annual Report for the twelve months ending, 19.... is enclosed herewith.

[Note: Although neither the X-14 rules nor Schedule 14A require inclusion of the foregoing statement, it is deemed good practice to include such a statement in the proxy material. In this connection, see Rule X-14A-3 (b).]

Costs and Method of Solicitation

The cost of soliciting proxies will be borne by the Corporation [Item 3(c)].

Arrangements may be made with brokerage houses, custodians, nominees and other fiduciaries to send proxy material to their principals, and the Corporation may reimburse them for their expenses, estimated not to exceed \$500. In addition to solicitation by mail, certain officers and employees of the Corporation, who will receive no compensation for their services other than their regular salaries, may solicit proxies by telephone, telegraph and personally. These persons may be reimbursed for their expenses, estimated not to exceed \$200 [Item 3(d)].

[Note: If solicitation of proxies will also be made by paid solicitors, include the additional information required by Item 3(d).]

Voting Rights

The outstanding voting securities of the Corporation (entitled to one vote per share irrespective of class) is shares, consisting of shares of Common Stock, and shares of Preferred Stock [Item 5(a)].

Only stockholders of record at the close of business, 19.... will be entitled to vote at the meeting [Item 5(b)].

[Note: If stockholders other than those of record on the record date are entitled to vote at the meeting, give the additional information required by Item 5(b). If, with respect to the election of directors, shareholders have cumulative voting rights, give the information required by Item 5(c). If any person owns of record or beneficially more than 10% of the outstanding voting securities, include the information required by Item 5(d).]

Election of Directors

Two directors are to be elected to serve for a term of two years and until the election and qualification of their successors. It is the intention of the persons named in the proxy to vote the proxies for the election as directors of N. Hiram-Shore and Jon Van Keck, who are at present directors of the Corporation [Item 6(a)]. In the event, however, either of the nominees refuses or is unable to serve as a director, the persons named as proxies reserve full discretion to vote for such other persons as may be nominated.

[Note: If the candidacy of any nominee for election as a director is the subject of an arrangement or understanding between the nominee and any other person, furnish the information required by Item 6(b).]

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Information Regarding Nominees

The following information is submitted concerning the present directors of the Corporation, who are nominees for reelection [Item 6(c)]:

Names of nominees and their principal occupation or employment	First year as director	Approximate number of shares of the Company beneficially owned as of....., 19.....	
		Common	Preferred
N. Hiram-Shore, President	1915	64,458	2,000
Jon Van Keck, Chairman of Executive Committee —Member of firm, B, C, P & G, attorneys.....	1935	1,500	23

[Note: Information regarding the business experience of a nominee for election as director must be furnished, unless such nominee meets the conditions specified in Item 6(d).]

Remuneration of Officers and Directors

The table below gives the remuneration directly or indirectly paid by the Corporation and its subsidiary, during the fiscal year ended (*insert date*), to each of the following persons whose aggregate remuneration (exclusive of pension, retirement and similar payments) was more than \$25,000, and who (1) was a director at any time during the year, or (2) was one of the three highest paid officers of the Corporation; and to all persons, as a group, who were directors or officers of the Corporation during the last fiscal year [Item 7(a)].

(1) Name of individual or identity of group	(2) Capacity in which remuneration was received	(3) Fees, salaries and commissions	(4) Bonuses and shares in profits	(5) Pension, retirement and similar payments	(6) Excess of amounts in columns (3) and (4) over preceding year
Allen A. Dale	Vice-President	\$ 38,000	\$ 3,785	\$ 4,540	\$ 8,000
N. Hiram-Shore	Director and President	82,000	6,850	9,180	10,800
Jon Van Keck	Director and Chairman of Executive Committee	59,500 (Note 1)	None	None	None
John L'Amery	Chairman of the Board	62,550	None	8,470	None
Martin Vance	Treasurer	27,500	2,750	3,875	2,800
Robert Pratt	Secretary and General Counsel	34,500	2,875	4,125	3,075
8 directors and 5 officers, as a group	As directors or officers	323,075	17,085	31,675	26,540

Note 1—Included in this amount is the sum of \$48,925 paid to the law firm of B, C, P & G, of which Mr. Van Keck is a member. This information is furnished in lieu of an allocation of Mr. Van Keck's share in the remuneration paid to this firm. [Instruction 2 to Item 7(a).]

Estimated Annual Benefits Payable Under Annuity Plan

Effective April 20, 1938, the Corporation adopted an Annuity Plan for salaried employees receiving \$250 or more per month. Each participant contributes 4% of his monthly base salary in excess of \$250 for a maximum period of 30 years and the Corporation contributes the balance of the funds necessary to provide future service benefits under the Plan.

It is not possible to determine which of the Corporation's officers or directors will eventually receive an annuity or, as to those who will receive them, what the amount of such annuity will be. No specific amount is paid or set aside by the Corporation for the account of any individual employee or officer prior to retire-

ment date. Retirement benefits have not at this date vested in any person who is mentioned in the preceding tabulation and who is a participant in the Plan.

Based on the assumption that the Annuity Plan will be continued in its present form, and based on certain assumptions as to an employee's (including participating officers and directors) earnings and years of credited service, there is shown in the table below, for purposes of illustration, the approximate annuity to which participating employees may become entitled upon retirement [Item 7(b)].

Average annual earnings while a contributor under the Plan	Total annuity payable at normal retirement date based on average annual earnings		
	20 years	25 years	30 years
\$ 6,000	\$ 1,200	\$ 1,500	\$ 1,800
12,000	2,400	3,000	3,600
24,000	4,800	6,000	7,200
40,000	8,000	10,000	12,000

[Note: Item 7(b) requires information regarding the estimated annual benefits payable to each person named in response to Item 7(a) pursuant to any pension or retirement plan. In lieu of this, however, it is permitted by the Instruction to Item 7(b) to substitute a table showing the annual benefits payable to persons in specified salary classifications. If such a table is used, make certain to give the name and amount of benefits for each person named in response to Item 7(a) whose retirement benefits have already vested.]

Transactions Between the Corporation and Directors and Officers

During the fiscal year, the Corporation paid \$12,000 as rent for a warehouse to the Z Corp. This company is wholly owned by Allen A. Dale, Vice-President of the Corporation, and members of his family [Item 7(e)].

Remuneration of Others Than Directors, Officers and Employees

The name of each person, other than an officer, director or employee, who, during the last fiscal year, received remuneration from the Corporation for services in excess of \$25,000, the amount of such remuneration and the capacity in which it was received is given below [Item 7(f)]:

Name	Capacity in Which Received	Aggregate Remuneration
B, C, P & G*	Attorneys	\$48,925

*Mr. Jon Van Keck, a nominee for reelection as a director, is a member of the firm of B, C, P & G.

Election of Auditors

Upon the approval of a majority of the stockholders, the Board of Directors proposes to adopt a resolution appointing A, J & Co. as auditors of the Corporation for the ensuing year. A, J & Co. have audited the Corporation's books for the past 10 years. The Corporation has been advised by A, J & Co. that neither that firm nor any of its associates had any material relationship with the Corporation or any affiliate of the Corporation [Item 8].

Other Matters

The management of the Corporation knows of no other matters which may come before the meeting. However, if any matters other than those referred to above should properly come before the meeting, it is the intention of the persons named in the enclosed proxy to vote such proxy in accordance with their best judgment.

By order of the Board of Directors,

Dated:, 19.....

Secretary.

No. 14

Notice of adjourned stockholders' annual meeting.

..... COMPANY

The annual meeting of the stockholders called for, 19.., was adjourned until, 19..

The adjourned meeting will reconvene at the office of the Company, (Street), (City), (State), (Day of Week),, 19.. at o'clock in the noon for the purposes set forth in the original notice of, 19..

The Annual Report of the Company is enclosed.

.....
Clerk

..... (City), (State)
..... .., 19..

No. 15

Notice of adjourned annual meeting of stockholders.

To Stockholders of Corporation:

NOTICE IS HEREBY GIVEN That, pursuant to the laws of the State of and to the By-laws of the Corporation, the adjourned annual meeting of the stockholders of the said Corporation will be held at its principal office, (Street), (City), (State), on the .. day of, 19.., at o'clock in the noon, for the purpose of:

(Here insert purposes set forth in notice of original meeting; see forms Nos. 12, 26.)

Dated, 19..

.....
Secretary

No. 16

Notice of annual meeting of stockholders for election of directors;
specified proportion of directors to be elected by various
classes of stock.

The annual meeting of the stockholders of Corporation for the purpose of electing directors, and for the transaction of such other business as may properly come before the meeting, is to be

held at the office of the Corporation in the City of, State of, on, 19.., at o'clock .. M.

Stockholders of record at the close of business twenty (20) days prior to the said .. day of, 19.., are entitled to vote for the election of directors at that meeting. Holders of Common Stock have the right to vote for and to elect one third of the directors of the Corporation, and the holders of Management Stock have the right to vote for and to elect two thirds of the directors of the Corporation. Nine directors are to be elected. The Certificate of Incorporation of the Corporation contains the following provisions:

At each annual meeting, the common stockholders and the holders of Management Stock shall separately nominate directors, and each holder of Common Stock shall be entitled to vote for a number of directors from those nominated by the common stockholders equal to one third of the total number of directors to be elected, and each holder of Management Stock shall be entitled to vote for a number of directors from those nominated by the holders of Management Stock equal to two thirds of the total number of directors to be elected. The nominees of the common stockholders (not exceeding one third of the total number of directors to be elected at any such meeting) receiving the largest number of votes of the holders of Common Stock shall be elected directors of the Corporation, and the nominees of the holders of Management Stock (not exceeding two thirds of the total number of directors to be elected at any such meeting) receiving the largest number of votes of the holders of Management Stock shall also be elected directors of the Corporation. All directors so chosen shall hold office until the next annual meeting of the stockholders of the Corporation and until their successors shall be duly elected.

If you are unable to be present at the meeting, please sign and return the enclosed proxy, authorizing Messrs.,,, and, or a majority of them that may be present at such meeting (or if only one be present and act, then that one), to nominate three (3) directors in behalf of the common stockholders, and to vote as your proxy the number of shares of Common Stock held by you for the election of such directors so nominated. We will affix the necessary stamps. The proxy should be signed and returned in the stamped envelope enclosed for that purpose to, Secretary of the Corporation, (Street), (City), (State).

Yours truly,

..... Corporation
By
Secretary

No. 17

**Combined notice of annual meeting, and of special meeting;
majority of directors to be elected by preferred stock.**

TAKE NOTICE that the Annual General Meeting of
Company will be held at the Head Office of the Company,
(*Street*), (*City*), (*State*), on
(*Day of Week*), the day of, 19.., at the hour
of o'clock in thenoon, Eastern Daylight Saving Time,
to receive the report of the Directors for the year ending
..., 19.., to appoint Auditors, and to transact such other business as
may properly come before the meeting;

AND FURTHER TAKE NOTICE that the said meeting is also called as
a Special General Meeting of the Shareholders for the purpose of
electing the Board of Directors of the Company, and that at such
meeting the holders of preference shares are entitled to elect a majority
of the members of the Board, and the holders of the common shares
are entitled to elect the remaining members of the Board.

DATED at (*City*), (*State*), this day
of, 19...

By Order of the Board.

.....,
Secretary

No. 18

**Published notice of record date for notice of annual meeting of
stockholders.**

RECORD DATE FOR NOTICE OF ANNUAL MEETING

The Board of Directors of Company, has, in
accordance with the By-laws of the Company, fixed
19.., as the day as of which stockholders entitled to notice of and to
vote at the annual meeting, to be held on 19..,
shall be determined, and only stockholders of record at the close of
business on 19.. will be entitled to notice of or to
vote at such annual meeting.

.....
Secretary

No. 19

Combined notice of annual meeting of common stockholders and special meeting of preferred stockholders, indicating purpose of meeting (authorization of debentures) and showing manner in which holder of proxy will vote.

NOTICE IS HEREBY GIVEN That the annual meeting of the stockholders of Company, Inc., a (*insert state*) corporation, will be held on the .. day of .., 19..., at o'clock in the noon, at the offices of the Company at (*Street*), (*City*), (*State*), for the following purposes:

1. To elect a Board of Directors for the ensuing year.
2. To approve the form of the enclosed annual report for the year 19...
3. To transact such other business as may properly come before the said meeting.

Pursuant to the Amended Certificate of Incorporation of the Company, as last amended, and the By-laws of the Company, only the holders of record of Common Stock of the Company at the close of business on .., 19.. shall be entitled to vote for the election of directors at said meeting.

NOTICE IS ALSO HEREBY GIVEN That a Special Meeting of the Preferred Stockholders of the Company will be held on the .. day of .., 19..., at o'clock in the noon, at the offices of the Company at (*Street*), (*City*), (*State*), for the following purposes:

1. To consider and take action, pursuant to the provisions of Subdivision of Article of the Amended Certificate of Incorporation of the Company, as last amended, upon a proposal to authorize the Board of Directors of the Company to create and issue Dollars (\$.....) principal amount of Ten-Year 5% Sinking Fund Debentures of the Company, with Common Stock Purchase Warrants attached, a description of certain provisions of the Indenture under which such Debentures and Warrants will be issued being printed on the reverse side of this notice. The net proceeds of these Debentures, if and when sold, will be used together with additional funds of the Company, to redeem and retire all of the Ten-Year 6% Sinking Fund Debentures of the Company now outstanding in the principal amount of Dollars (\$.....), which are due .., 19...

2. To transact such other business as may properly come before the said Special Meeting.

Pursuant to a resolution of the Board of Directors, only the holders of record of the Preferred Stock of the Company at the time of the meeting shall be entitled to vote at said special meeting.

By order of the Board of Directors.

Dated, 19..

.....
Secretary

Notice. If you cannot attend, please sign the attached form of proxy designating the officers named therein to act as your proxy at the Annual Meeting and/or Special Meeting, as the case may be, the proxy having been approved by the Board of Directors of the Company, and being forwarded in behalf of the management of the Company. In the exercise of the said proxy, it is intended that at the Annual Meeting, the holders of the proxy, in behalf of the Common Stockholders, will consider and vote upon the election of directors and the approval of the form of the Annual Report for the year 19.., and that at the Special Meeting, the holders of the proxy, in behalf of the Preferred Stockholders, will consider and vote in favor of a resolution authorizing the Company to create and issue the Debentures above referred to.

[reverse side of notice]

Outline of certain provisions of the proposed Indenture (hereinafter called the "Indenture"), to be dated on or about, 19.., between Company, Inc. (hereinafter called the "Corporation"), and Trust Company, Trustee:

(Here follows the outline referred to.)

No. 20

Notice of special business to be considered at annual meeting of stockholders.

Special Notice to Stockholders:

Pursuant to the requirements of the laws of the State of, and by order of the Board of Directors of the Corporation, notice is hereby given that, in addition to the usual business to be transacted at the annual meeting of the stockholders of the said Corporation, to be held on the .. day of, 19.., at o'clock in the noon, at the office of the Corporation, (Street), (City), (State), said meeting is specially called for the purpose of:

(Here insert special business to be considered.)

.....
Secretary

No. 21

Notice of special meeting of stockholders to act upon resolution of directors.

To the Stockholders of Corporation:

NOTICE IS HEREBY GIVEN That a special meeting of the stockholders of the Corporation will be held at its office at (Street), (City), (State), on the .. day of .., 19.., at o'clock .. M., pursuant to a resolution of the Board of Directors of said Corporation, adopted at a special meeting of the Board on the .. day of .., 19.., for the purpose of considering and voting upon the following resolution also adopted by the said Board at the said meeting:

(Here insert resolution of directors.)

The meeting of stockholders is also called for the purpose of transacting such other business as may properly come before the meeting or any adjournment thereof.

By order of the Board of Directors.

.....
Secretary

(Should you be unable to attend said meeting, please sign the enclosed proxy, have your signature witnessed, and return the same in the enclosed stamped envelope.)

No. 22

Notice of special meeting of stockholders, indicating purpose of the meeting (sale of assets, change of name, dissolution of company).

NOTICE IS HEREBY GIVEN That a special meeting of stockholders of Company will be held at (Street), (City), (State), on (Day of Week), .., 19.., at o'clock in the noon for the following purposes:

1. To consider and act upon the matter of authorizing the sale of all the property and assets, including the goodwill of this Company, to Corporation, a (insert state) Corporation, or its nominee, upon the terms of an offer from Corporation, dated .., 19.., which terms include the assumption by Corporation, or its nominee, of the liabilities of this Company and the delivery to the Company of common capital stock of Corporation, on the basis of

six (6) shares of the latter for each share of stock of this Company, or upon substantially the above terms.

2. To consider and act upon the matter of changing the name of this Company and the matter of voting to liquidate and wind up the affairs of this Company in such manner as may be determined at the meeting; and, particularly, but without limiting the generality of the foregoing, to authorize the distribution of the proceeds of any sale of this Company's property and assets authorized at the meeting of stockholders by the payment of a dividend in liquidation on such terms and in such manner as may be determined at the meeting; and to authorize a reduction of the capital stock accordingly.

3. To consider and act upon the matter of voting to dissolve this Company and all details in any way relating thereto, or in furtherance thereof.

4. To authorize, empower, and direct the Board of Directors and/or any officers of this Company to carry into effect and take such action as, in the opinion of the directors or of the officers acting, may become necessary or desirable to carry into effect all action taken at the meeting and all and every adjournment thereof.

5. To consider and act upon any other matters which may properly come before the meeting.

By order of the Board of Directors.

.....
Secretary

..... City, State
....., 19..

Notice. If you cannot be present at the meeting, YOU ARE RESPECTFULLY URGED TO SIGN AND RETURN THE ENCLOSED PROXY, which will be voted in favor of the proposal of Corporation. The directors desire as large a representation of stockholders at the meeting as possible, A VOTE OF EIGHTY-FIVE PER CENT OF THE STOCK IN FAVOR OF ACCEPTANCE BEING REQUIRED as a condition of the offer.

No. 23

Second notice of special meeting of stockholders.

....., 19..
To the Stockholders of Corporation (a
corporation):

Under date of , 19.., there was sent to you a notice of a Special Meeting of Stockholders of your Corporation to be held in the City of, State of, on, 19..,

for the purpose of voting upon the question of whether or not the Corporation should be dissolved. This notice was accompanied by a proxy, to be executed by you and returned in the event that you did not expect to be personally present at the meeting, and was enclosed with a letter explaining the circumstances leading up to the calling of the meeting. To date your proxy has not been received.

At the Special Meeting of the Stockholders held pursuant to said notice, in the City of, State of, on
 ..., 19..., (....) shares of the capital stock of the Corporation were represented at the meeting. There are outstanding (....) shares of the capital stock of the Corporation. Under the General Corporation Law of the State of, since two thirds of the number of shares of stock of the Corporation were not represented at the meeting, no action could be taken except to adjourn to a later date. The meeting was therefore adjourned to reconvene on
 ..., 19..., at the same hour and place.

A further adjournment of the meeting would involve considerable expense to the Corporation, in addition to the delay. As has been previously explained to you, the Board of Directors feels it desirable that the stockholders express their wishes on the proposed dissolution. This cannot be done unless the required number of shares are represented.

Accordingly, if you do not expect to attend the adjourned meeting, will you kindly execute the enclosed proxy and return it in the enclosed return envelope. A copy of the original notice of the Special Meeting of Stockholders is enclosed herewith.

Very truly yours,

.....
 Secretary

No. 24

Notice of adjourned special meeting of stockholders.

To the Stockholders of Corporation:, 19..

The special meeting of stockholders of the Corporation, which was called to be held at the office of the Corporation, (Street), (City), (State), on the .. day of, 19..., at o'clock in the noon, has been adjourned to the .. day of, 19..., to be held at the same hour and place.

We are enclosing a copy of the call of the meeting, indicating the purposes thereof, as well as another proxy covering representation of your stock at the meeting.

(Here insert, if desired, explanation of importance of action to be taken at meeting.)

If you are unable to be present at the adjourned meeting in person, will you please execute and return the enclosed proxy promptly in order to have your stock represented at the adjourned meeting.

..... Corporation
By
Secretary

No. 25

Miscellaneous items appearing in notices of stockholders' meetings.

[*Note.* Statements similar to those appearing below often appear in the form of proxy accompanying the notice of meeting; see forms Nos. 30 et seq.]

Right to vote vested in preferred stockholders because of default in dividend payments.

Because the accumulated and unpaid dividends on the Preferred Stock of the Corporation outstanding amount to per cent (....%) and more of the par value of such stock, the right to vote at said meeting is vested exclusively in the holders of said Preferred Stock, each such holder having one vote for each share of such stock held by him.

Note as to voting rights of different classes of stock.

At this meeting the \$7 Preferred Stock, the \$6 Preferred Stock, and the Common Stock will have the right to vote equally, share for share (and the \$4 Preferred Stock will have the right to cast 5 votes for each 8 shares, or $\frac{5}{8}$ of 1 vote for each share) upon the election of all directors, and upon any other matters which may properly come before the meeting.

Tickets of admission required to stockholders' meeting.

Tickets of admission, as prescribed by the By-laws, will be required for attendance at this meeting, and may be obtained by personal application to the undersigned, or by letter addressed to him at (Street), (City), (State).

Time for election specified.

The election of (....) directors to serve for the ensuing year will be held between the hours of o'clock, ..M. and o'clock, ..M.

Transfer books to be closed.

The transfer books for all classes of preferred and common stock

will be closed at o'clock ..M., on the .. day of, 19.., and will be reopened at o'clock ..M., on the .. day of, 19...

Transfer books not to be closed.

The board of directors has fixed, 19.., as the record date for the determination of the stockholders entitled to notice of, and to vote at, the special meeting, and all persons who are holders of record of common or preferred stock at the close of business on that date (but only such persons) will be entitled to vote at such meeting and any adjournment thereof. The stock transfer books will not be closed.

Copy of annual report being mailed.

A copy of the annual report will be mailed to each stockholder of record, under separate cover, and will be submitted at the meeting.

Copy of annual report to be mailed if requested.

The annual report for 19.., which will be ready for distribution on or about, 19.., will be sent only to those stockholders who request it. If you desire that the report be sent you, please indicate this fact on the accompanying proxy card. If no response is received, it will be assumed that the report is not desired.

Minutes of meetings open for inspection.

The minutes of the meetings of the Board of Directors and of the Finance Committee will be open to inspection by stockholders of record during business hours at the principal office of the Corporation, (Street), (City), (State), until after the close of the meeting.

Offer of trustees to issue proxy to stockholders of affiliated corporation whose shares are held under trust agreement.

Referring to the foregoing notice of the annual meeting of the stockholders of Company, the undersigned, as Trustees under the Trust Agreement dated, 19.., relating to stock of said Company, in accordance with the provisions of said Trust Agreement, will issue to any shareholder in the Corporation, upon timely and written request by such shareholder, addressed to the undersigned at the principal office of said Company stated in said notice, a proxy to enable such shareholder or his substitute to vote at said meeting upon the number of shares of stock of said Company corresponding to such shareholder's proportionate beneficial interest in the total number of shares of the stock of said Company held by the

undersigned; but no such proxy will be given in respect of any fraction of a share of stock of said Company.

.....

.....

.....

Trustees under said Trust Agreement

Note requesting stockholders to return proxy promptly, and showing who is soliciting proxy.

If you do not expect to be present at the meeting, please execute the attached proxy and return it promptly, as it is important that the presence of a quorum be secured. No postage is required to return the proxy. Said proxy is being solicited in behalf of the management of the Company. It is intended that the holders of the proxy will consider and vote upon the election of directors.

Note indicating how proxy will be used.

Unless instructions to the contrary are given, all proxies sent in will be voted in favor of the proposed amendment to the By-laws.

Note indicating that annual meeting is to be adjourned pending preparation of annual report.

Because of the fact that the auditors of your Company have been unable to complete their audit in time to have the annual report of your Company sent to you with this notice, it is contemplated that the meeting, when convened, will be adjourned to 19.., at o'clock noon, and at the same place, in order that you may receive the annual report in ample time before the meeting. Proxies will be enclosed with the annual report.

[Note. A notice such as the above may be included with the notice of annual meeting where the annual meeting must be called for a certain date to meet the by-law requirements but where, for some reason, an adjournment is desirable.]

No. 26

Special purpose clauses in notices of stockholders' meetings.

To authorize attendance by proxy at stockholders' meetings.

To authorize directors and officers of the Company to attend in person or by proxy any annual and/or special meetings of corporations in which Company is a stockholder, with authority to vote stock in said corporations standing in the name of Company or owned by it, and to provide for the execution of proxies.

To change date of annual meeting of stockholders.

To authorize the change of the date for the holding of the annual meeting of stockholders of the Corporation from the second (Day of Week) in of each year to the third (Day of Week) in of each year, and to that end to authorize the necessary amendment to Section of Article of the By-laws of the Corporation.

To consider annual report.

To consider, approve, and ratify any and all matters that may be referred to in the annual report to the stockholders.

To consider officers' reports.

To receive and act upon the reports of the officers of the corporation.

To elect directors for varying terms.

To elect thirty-six (36) directors of the Company, twelve (12) to be elected for three (3) years, twelve (12) to be elected for two (2) years, and twelve (12) to be elected for one (1) year, and/or until their respective successors shall have been elected and qualified.

To elect inspectors of election.

To elect Inspectors of Election to serve until the close of the next annual meeting of stockholders.

or

To elect two (2) Inspectors of Election to serve at the next annual meeting.

To hear report.

To hear the report of the (*insert title of officer or other person making report*) and act thereon.

To remove directors.

To consider and act upon the proposal to remove the present Board of Directors of this Corporation and to elect a new Board of Directors in case the present Board is removed.

To approve transactions of corporations and acts of directors, executive committee, and officers since last annual meeting.

To consider and vote upon the approval and ratification of all contracts and transactions of the Corporation and all acts and proceedings of the Board of Directors, the Executive Committee, and the officers since the last annual meeting of the Corporation, including contracts and transactions of this Corporation with individual directors and with partnerships in which a director of this Corporation is a member, and with corporations of which directors of this Corporation are directors. The said contracts, transactions, acts, and proceedings are set forth in

the minute book of the Corporation, which will be presented to the meeting and be open to the inspection of stockholders.

[*Note.* To meet the requirements of the Securities Exchange Act of 1934, the notice of meeting should contain a brief description of the various acts and proceedings to be approved or ratified at the meeting.]

To approve sale of treasury stock.

To consider and vote upon the ratification of the action of the Board of Directors in effecting the sale of (....) shares of treasury stock.

To vote upon the question of investment of corporate funds.

To vote upon the following question: "Shall the Corporation continue to invest substantial portions of the cash funds of the Corporation in stocks and/or bonds of corporations not allied with the industry?"

To approve contract in which directors are interested.

To approve the contract entered into on the .. day of, 19.., between this Corporation and the Company for the (*state subject matter of contract*), in which contract and, directors of this Corporation, have a personal interest, said directors being holders of stock in the said Company.

**To consider sale of an asset (stock in another corporation)
to a director.**

To consider the question of approving or disapproving the proposed sale to of (*City*), (*State*), a director of this Corporation, of the shares of Capital Stock of Company owned by this Corporation, upon the terms and conditions set forth in that certain contract dated, 19.. between this Corporation and said which, among other things, provides that the consideration to be paid by said is the sum of \$....., plus the sum of \$....., being an amount equal to the net current assets of said Company as of, 19.., plus an amount equal to the earnings of said Company from, 19.., to the date of the consummation of the sale and that such purchase price is based upon the acquisition by purchaser of shares, or all of the outstanding Capital Stock of Company, and is to be adjusted proportionately to the actual number of shares owned by this Corporation.

**To approve lease between a director as landlord, and the
company as tenant.**

To consider and vote upon the ratification of the action of the Board

of Directors in effecting a lease for further factory space between one of the directors, as landlord, and this company, as tenant.

To ratify specific contract.

To ratify, confirm, and approve the contract entered into on the .. day of, 19.., with the Company, by the officers of this Corporation in its name and in its behalf, to (*state subject matter of contract*).

To authorize directors and officers to carry out authorized changes.

To authorize and empower the Board of Directors and the officers of the Corporation to effectuate the foregoing proposal, if adopted by the stockholders, and to authorize and empower the Board of Directors and the officers to amend the Charter and the By-laws of the Corporation to conform therewith.

To ratify additional compensation of officers and employees.

To vote upon a proposal to ratify the action of the Board of Directors, taken at a meeting duly held on the .. day of, 19.., authorizing payment to the officers and employees of the Corporation of the sum of (\$.....) Dollars, as additional compensation for their services.

To elect auditors.

To elect independent auditors to audit the books and accounts of the Corporation at the close of the current fiscal year.

To select committee to employ auditor.

To select a committee of three (3) stockholders of the Corporation who are not directors to employ an auditor for the Corporation, *in accordance with the statutory requirements*.

To adjourn meeting.

To adjourn said meeting from time to time to a date or dates to be fixed at said meeting or any adjournment thereof, for the purpose of considering and acting upon any of the foregoing matters or any modifications thereof.

To approve acts of board of directors and executive committee.

To consider and vote upon the approval and ratification of all purchases, contracts, contributions, compensations, acts, proceedings, elections, and appointments by the Board of Directors, or by the Finance Committee since the Annual Meeting of the Stockholders of the Corporation on, 19.., and all matters referred to in the Annual Report to stockholders for the fiscal year ending, 19... The minutes of the Board of Directors and of the Finance Committee will be open to inspection by stockholders of record during business hours at the

(City) office of the Corporation, No., City of, State of until after the close of the meeting.

To consider stock employees' subscription plan.

To consider and vote upon the revised Employees' Stock Subscription Plan of the Corporation formulated and declared advisable by the Board of Directors pursuant to Chapter of the Laws of the State of, a copy of which revised Plan is inclosed herewith.

To issue stock to employees.

To vote upon the question of reserving for, and selling to, the employees of the Company and of its subsidiaries, through the agency of the Savings Fund Committee of the Company under the rules governing the Employees' Savings Fund, without first being offered for subscription to the Stockholders of the Company, shares of the Common Stock of the par value of Dollars (\$.....) each of this Company heretofore authorized but at present unissued, and of selling the shares so reserved by the Company at Dollars (\$.....) per share or at such higher price as may from time to time be determined by the Board of Directors.

To issue stock to employees engaged in important capacities.

The stockholders will consider and vote on a proposal to authorize the Board of Directors to issue, or set apart for issue, to persons now engaged or employed, or hereafter to be engaged or employed by the company in important capacities, not more than shares of the now authorized and unissued common stock; the Directors to be authorized to sell said shares or to grant non-assignable options of the same, in lots of not more than shares to any one person, either in connection with an employment contract of years or more or upon the basis of service in the employ of the company for a period exceeding years, upon such prices, terms and conditions as said Board of Directors shall in their discretion determine.

To consider employee insurance and pension benefit plans.

To consider and take action upon the proposed Corporation Plan for Employee Insurance Benefits and that part of the proposed Corporation Plan for Employee Pension Benefits relating to new non-contributory pension benefits for employees, the said plans being attached to and described in the proxy statement dated, 19..., copies of which plans and proxy statement are being mailed to all stockholders of Corporation with this notice.

To elect committee.

To elect a committee of three stockholders to administer the Corporation Profit Sharing Plan adopted at the Annual Meeting,, 19...

To fill vacancies.

To elect new directors to fill the vacancies which exist in the Board of Directors by reason of the resignation of Messrs. and

To ratify all contributions up to a limited amount.

To consider, and, if deemed advisable, to ratify, all contributions made by the officers of the Company to an amount not exceeding Dollars (\$.....).

To vote upon resolution passed by board of directors.

The following resolution, which was duly passed at the regular meeting of the Board of Directors on, 19..., will serve to explain the purpose of the special meeting and the matters which will be submitted to the stockholders for action thereon:

(Insert here the resolutions passed at the meeting of the Directors, to be approved by the stockholders.)

Authorizing board of directors and officers to do all necessary acts to carry out changes authorized by stockholders.

Authorizing and empowering the Board of Directors and officers of the Company to effectuate the foregoing propositions if adopted by the stockholders and authorizing and empowering the Board of Directors and officers to amend the Charter and the By-laws of the Company to conform thereto.

To ratify compensation.

To vote upon a proposition to ratify the action of the Board of Directors, taken at a meeting duly held on the day of, 19..., in authorizing and paying \$..... to the officers and employees as a part of their compensation.

To authorize sale of stock below par value.

To authorize the sale and issuance of stock below par value.

To approve the issuance of stock.

To approve the issuance of additional shares of the Common Stock of the Company.

To authorize sale of stock to stockholders, and approve underwriting agreement for shares not taken by stockholders.

1. Authorizing the sale of shares of the present authorized but unissued Common Stock pro rata to the stockholders at a price of \$..... per share.

2. Approving a certain underwriting agreement entered into between the Company and Messrs. & Company and & Company as bankers, whereby the bankers agree

to underwrite the sale of all or any part of said shares that is not subscribed for by the stockholders, at \$..... per share, upon the terms and conditions therein set forth.

To authorize issuance of convertible preferred stock.

To consider and act upon a proposition to authorize the issue of not exceeding five hundred thousand (500,000) shares of cumulative preferred stock of the par value of One Hundred Dollars (\$100) each, the holders of which shall be entitled to receive out of the annual net income of the Company dividends of not exceeding seven (7) per centum per annum, with the privilege of exchanging said preferred stock for common stock par for par; also to authorize the issue from time to time of common stock to be available for exchange for said preferred stock par for par; also to fix a price and time at which said preferred stock may be called and retired; also to determine any other rights and privileges which may pertain to said preferred stock when issued; and also to authorize an underwriting to purchase such of said preferred stock as shall not be taken by those entitled to subscribe for the same.

To vote upon options to officers to purchase stock.

To consider and vote upon the grant of options to certain other officers and employees of the Company and of its subsidiaries, for the purchase of stock of the Company.

To consider amendment of certificate of incorporation.

(First Form)

To consider and act upon a resolution or resolutions authorizing the amendment of the Certificate of Incorporation of said Corporation (as amended by Certificate of Amendment of its Certificate of Incorporation filed in the office of the Secretary of State of the State of on the day of, 19...):

First: By striking out the paragraph of Article, which now reads as follows:

(Insert the clause.)

and by inserting in lieu thereof the following:

(Insert the clause.)

To consider amendment of certificate of incorporation.

(Second Form)

To consider and vote upon an amendment to Article of the Certificate of Incorporation, which amendment has been declared advisable by resolution of the Board of Directors of the Company. The paragraph of Article of Certificate of Incorporation as per the proposed amendment shall read as follows:

(Insert clause.)

To change the name of a bank.

To vote upon a resolution to change the name of this Company to "....." and to authorize the President or a Vice President and the Secretary or an Assistant Secretary of the Company to execute the certificate required for such purpose pursuant to Section 60 of the General Corporation Law of the State of New York and to make and annex to such certificate the affidavit required by said section and to cause such certificate, with the approval of the Superintendent of Banks indorsed thereon, to be filed as required by said section on, 19.., or such later date as shall be determined by the Board of Directors of the Company.

To enlarge purposes.

To enlarge the objects for which said company was formed.

To extend corporate existence.

To consider and act upon a proposition to extend the term of the corporate existence of this corporation for years.

To change location.

To act upon a proposition to change the location of the office of the corporation.

To increase number of directors, and to elect additional directors.

To consider and act upon a proposition to increase the number of directors from to, and to elect such additional members to the Board as may be provided for at said meeting.

To increase capital stock without par value and to authorize issuance.

1. To consider and act upon a proposal to increase the authorized number of shares of the Corporation from 500,000 shares without par value to 1,500,000 shares without par value.

2. To authorize the issuance and/or sale of said additional shares of Common Stock for such consideration as from time to time may be fixed by the Board of Directors.

3. To authorize the execution and filing of such certificate or certificates as may be necessary or advisable to effect any of the changes herein referred to.

To authorize increase of stock having par value; approve an offer to stockholders; and to approve sale to trustees for benefit of employees.

1. To increase the authorized capital stock of the Company from \$1,000,000 divided into 10,000 shares of the par value of \$100 each to \$4,000,000 divided into 40,000 shares of the par value of \$100 each.

2. To approve of an offer of 27,000 shares of the par value of \$100 each, of such increase of stock, for subscription by stockholders at \$200 per share, each stockholder of record at the close of business on a date to be determined by the Board of Directors or Executive Committee (which date it is anticipated will be , 19..), to have the right to subscribe to two and seven-tenths ($2 \frac{7}{10}$) shares for each share then held by him, any shares so offered but not subscribed for within a time to be fixed by the Board of Directors or Executive Committee to be sold or disposed of as the Board of Directors or Executive Committee may determine, but at a price of not less than \$200 per share.

3. To approve of the issue and sale of 3,000 shares of the par value of \$100 each, of such increase of stock, at \$200 per share to trustees, to be selected by the Board of Directors, to be held for the benefit of officers and employees of the Company under such plan and/or agreement and subject to such terms and conditions as may be determined by the Board of Directors.

4. To authorize, ratify, and approve all acts and proceedings necessary or proper fully to perform and carry into effect any and all of the above matters.

In the event that the increase of stock and the offer of shares for subscription by stockholders above mentioned shall be approved by the stockholders at the said meeting and such consents as are necessary from public authorities obtained, warrants representing such subscription rights will be mailed to stockholders of record entitled thereto with an appropriate letter of instructions.

**To authorize increase of stock and amendment of certificate
of incorporation.**

1. To consider and act upon the proposition of increasing the capital stock of the Corporation from \$....., as at present authorized, to \$....., and of amending Article of the Certificate of Incorporation so as to provide that the capital stock shall be \$....., divided into shares of the par value of \$..... each.

2. To authorize (indicate officer or officers designated by statute) of the Corporation to file the required certificate of the foregoing increase in the office of the Secretary of State of the State of

3. To prescribe, authorize, or approve the terms and conditions upon which subscriptions for the increased stock shall be received and upon which such stock shall be issued.

To increase stock, provide for convertible notes, and ratify contract with banking syndicate.

1. Considering and voting upon an increase in the number of the authorized shares of the Cumulative 7% Preferred Stock of the Company by 250,000 shares and an increase in the number of authorized shares of Common Stock of the Company by 250,000 shares so that, including those previously authorized, the total authorized number of shares of the Company will be 2,250,000 shares divided as follows:

One million (1,000,000) shares of Cumulative 7% Preferred Stock of the par value of \$100 each.

Two hundred fifty thousand (250,000) shares of Cumulative 6% Preferred Stock of the par value of \$100 each.

One million (1,000,000) shares of Common Stock without par value.

2. Considering and voting upon a proposal authorizing the Board of Directors of the Company to issue \$25,000,000 principal amount of convertible notes or debentures of the Company, such notes or debentures to be dated October 1, 19.., to mature October 1, 19.., to bear interest at the rate of 6% per annum, and to have such other terms and provisions as the Board of Directors in their absolute discretion may determine; and to authorize the Board of Directors of the Company, under such regulations as they may adopt, to confer upon the holder of each of said notes or debentures the right to convert the principal thereof within such period and upon such terms and conditions as may be fixed by the resolution of the Board of Directors conferring the right of conversion, into Cumulative 7% Preferred Stock of the Company at the rate of \$100 principal amount of such notes or debentures for \$100 par value of such Stock. Such notes or debentures may further provide that the holder shall have the right, upon conversion of the same, to purchase within such period or periods and at such price or prices as the Board of Directors may determine (not less than \$50 a share) one share of Common Stock for each \$1,000 principal amount of such notes or debentures so converted.

3. Considering and voting upon such variations of and additions to the above as may be deemed advisable at said meeting, and the giving of full authority to the agents and officers of the Company to make, execute, and file such certificates and documents and to do such acts as may be necessary, convenient, or advisable to carry into effect such actions as may be adopted at said meeting.

4. Taking action upon the approval and ratification of a contract by the Company with a group or syndicate to purchase or effect the sale of the \$25,000,000 principal amount of convertible notes or debentures, if authorized at the meeting to be issued. The group or syn-

dicade will include banks and banking or security houses which have handled former issues of the Company and in which some directors of the Company are interested as directors or otherwise.

5. Taking action upon any other matter relative to the foregoing that properly may come before the meeting.

To increase stock and reclassify stock authorized but not issued.

1. To vote in favor of or against an amendment declared by vote of the Board of Directors of the Company by resolution to be advisable, to the Charter or Certificate of Incorporation of the Company (as heretofore amended), the purpose and effect of which amendment is:

a. To increase the total number of authorized shares of 7% series preferred stock of the Company from 20,000 to 60,000 shares.

b. To change the authorized 6% series preferred stock of the Company (none of which stock has been issued) to 6½% series preferred stock, and thereby to create a 6½% series preferred stock and set forth the designations, preferences, and voting powers or restrictions or qualifications thereof.

2. To approve the resolutions of the Board of Directors of the Company respecting such amendment to the Charter or Certificate of Incorporation of the Company, and to authorize the directors and officers of the Company to take all action necessary or proper to make such amendment (or any modification thereof) effective.

To increase capital stock and to acquire stock of another corporation in exchange for stock.

1. To authorize the increase of the number of shares of Common Stock, without par value, of this Company from 4,320,000 shares, the number heretofore authorized, to 12,000,000 shares, and the change of all the said previously authorized shares of Common Stock, now issued, into twice the number of shares of the same class, and to prescribe the terms upon which such change is to be made.

2. To authorize the acquisition by this Company, subject to authorization by the Public Service Commission, of all or any part (but not less than 70 per cent) of the outstanding capital stock of the Company, Inc., a New York corporation, by the issue, in exchange therefor, of one share of the \$5 Cumulative Preferred Stock and two shares of the Common Stock, as increased, of this Company, for each share of the capital stock of the said Company, Inc., so acquired.

To increase par value of stock, and reduce the number of shares.

To increase the par value of the shares of Com-

pany from Dollars (\$.....) each to Dollars (\$.....) each, and effect a corresponding reduction in the number of shares.

To increase number of shares, to reduce par value, and to exchange new for old.

To consider and act upon a proposition to increase the number of shares of capital stock of the Company from 40,000 shares to 200,000 shares and to amend the Charter of the Company accordingly, and to consider and act upon a proposition to reduce the par value of the shares of capital stock of the Company from \$25 each to \$5 each and to amend the Charter of the Company accordingly, so that hereafter all shares, including those now issued and those to be hereafter issued, shall have a par value of \$5 each; and that the holders of all outstanding shares having a par value of \$25 each shall receive five shares of stock having a par value of \$5 each in exchange for each share of stock held by them.

To authorize change from stock with par value to stock without par value and exchange of stock.

To consider and act upon a proposed amendment to the Certificate of Incorporation changing the authorized Common Stock of the Company from shares of the par value of \$..... each, to shares of Common Stock without par value; and to authorize the issue of (.....) shares of such stock without par value for each share of the existing Common Stock of the par value of \$..... outstanding.

To reduce capital stock by reducing par value, and to authorize distribution of surplus.

1. To consider and act upon a proposition to reduce this Company's capital stock from \$..... to \$....., such decrease to be effected by reducing the par value of each share from \$..... to \$.....

2. To consider and act upon a proposition to authorize the Board of Directors to distribute in whole or in part to the stockholders pro rata, at such times and in such manner as the Board shall determine, any surplus in excess of the amount to which the capital stock is reduced.

To reduce capital by retiring stock held in the sinking fund.

To consider and act upon a resolution which will be presented to said meeting reducing the capital of the Corporation by retiring shares of its preferred stock without nominal or par value, owned by the Corporation and now held in the sinking fund.

**To amend the certificate of incorporation to provide
for a recapitalization.**

1. Considering and voting upon proposed amendments to the Certificate of Incorporation of the Corporation to effect a recapitalization thereof, by decreasing its authorized capital stock by changing the number of shares from shares to shares, and reclassifying the authorized capital stock of the Company so that there shall be one class of stock, to wit, Common Stock, and so that the total number of shares that may be issued by the Company shall be shares, all of which are to be without nominal or par value and are to be Common Stock. This change will be effected by (1) the amendment of Article "Fourth" of the Certificate of Incorporation by striking out all of the said Article "Fourth" and inserting in lieu thereof the following:

(Insert new article.)

(2) The amendment of Article "Fifth" of the Certificate of Incorporation, by striking out all of the said Article "Fifth," which article now sets forth the distinguishing rights, privileges, restrictions, classifications, and voting powers of the Common Stock and the Management Stock of the Company.

2. Taking action upon a resolution, in the event of the adoption of the aforesaid proposed amendments, authorizing the exchange of all the present issued and outstanding shares of Management Stock of the Corporation, for shares of presently authorized and unissued Common Stock of the Corporation, in the ratio of shares of such Management Stock for each shares of such Common Stock, and the cancellation and retirement of such Management Stock upon such exchange.

To amend by-laws or adopt new by-laws.

To amend the By-laws of the Company or to adopt new By-laws.

To amend the by-laws to change annual meeting date.

To amend the By-laws of the Company so as to change the date of the annual meeting of stockholders from the first Tuesday in March in each year to the first Tuesday in April in each year.

**To amend the by-laws to fix date for determining stockholders
entitled to vote, or to receive dividends or rights.**

To amend the By-laws of the Company so as to fix, or authorize the Board of Directors to fix, a date, not exceeding twenty days preceding the date of any meeting of stockholders, any dividend payment date or any date for the allotment of rights, as a record date for the determination of the stockholders entitled to notice of and to vote at such meeting, or entitled to receive such dividends or rights, as the case may be.

To amend by-laws to permit facsimile signatures.

To consider and act upon a proposal to amend the By-laws so as to permit facsimile signatures of officers and facsimile corporate seal upon stock certificates.

To amend a certain section of the by-laws.

To take action upon the amendment of Section of Article of the By-laws of the Corporation, adopted by the Board of Directors at a Special Meeting thereof held on , 19.., by adding thereto a provision reading as follows:

(Insert new provision.)

To amend the by-laws to show increase in directors.

To amend Section of Article of the By-laws to show that the Board of Directors consists of (.....) persons.

To amend by-laws as to closing transfer books.

(First Form)

To consider and act upon a proposal to alter and amend Article, Section of the Company's By-laws by striking out in such section reference to the closing of the transfer books for purposes of stockholders' meetings and substituting therefor a date of record to be fixed by the Board of Directors for determination of stockholders entitled to notice of and to vote at any such meetings. A copy of the proposed amendment will be mailed at least days prior to the meetings in a postage prepaid envelope, addressed to each stockholder at his address as entered upon the books of the Company.

To amend by-laws as to closing transfer books.

(Second Form)

To permit the taking of a record date (not more than days prior to any meeting) for determining stockholders entitled to notice of and to vote at meetings to avoid the necessity of closing stock transfer books prior to meetings.

To adopt amended by-laws adopted by the board of directors.

Considering and voting upon the adoption of amended By-laws of the company heretofore adopted by the Directors of the Company on the day of, 19..; a printed copy of the amended By-laws, the adoption of which is proposed, is inclosed herewith.

To borrow money to finance building, and to authorize lease of land and building.

1. To borrow money for the purpose of financing in part the erection of the proposed clubhouse of the Corporation, and to that end to

authorize the execution and delivery of a bond of the Corporation in the principal amount of \$3,400,000, maturing fifteen years after its date and bearing interest at the rate of $5\frac{1}{2}\%$ per annum for five years and 5% per annum thereafter; and to secure the payment of the principal and interest of said bond by authorizing the execution, acknowledgment, and delivery of a first mortgage upon the land of the Corporation known as (insert description), and the building proposed to be erected thereon.

2. To borrow additional money for the purpose of financing in part the erection and equipment of the proposed clubhouse of the Corporation, and to that end to authorize the execution and issuance of coupon bonds of the Corporation in an aggregate principal amount not exceeding \$1,500,000, maturing twenty-five years after their date and bearing interest at the rate of $6\frac{1}{2}\%$ per annum; each of said bonds to have attached a warrant entitling the holder thereof to purchase shares of the fully paid and nonassessable common stock of the Corporation at any time within ten years on payment in New York funds of the purchase price to be therein stated, but not less than par, at the rate of ten shares for each \$1,000 bond, and to secure the payment of the principal and interest of said bonds by authorizing the execution, acknowledgment, and delivery to some Bank or Trust Company of the City of New York, N. Y., as trustee, of a second mortgage upon the land of the Corporation, above described, and the building proposed to be erected thereon, and also of a chattel mortgage upon the furnishings and equipment to be placed in said proposed building.

3. To authorize the execution, acknowledgment, and delivery of all other mortgages, building loan agreements, assignments, pledges, transfers, leases, conveyances, assurances, and instruments of whatever nature that may reasonably be required to carry out any of the purposes set forth above.

4. To lease the above described land of the Corporation, together with the clubhouse proposed to be erected thereon, and the furnishings and equipment to be placed therein, to Association, Inc., for a term of twenty-five (25) years, said term to commence when said proposed clubhouse shall have been erected, furnished, and equipped, and to authorize the execution, acknowledgment, and delivery of any and all leases, agreements, contracts, and assignments that may reasonably be necessary to carry out such a purpose.

To authorize execution of a mortgage.

a. The execution of a first mortgage in the sum of \$300,000 to Trust Company, of, as Mortgagee, upon the real property, together with the buildings and improvements thereon, owned by the Company and located at Nos.

..... Street, in the Ward of the City of, situated at the corner of and Streets; said mortgage to be payable at the expiration of five (5) years from the date thereof or at any semiannual date for the payment of interest prior thereto, on six (6) months' notice from the Company to the Mortgagee, with interest at the rate of 6 per cent (6%) per annum, payable semiannually, and to contain such other terms and conditions as the Board of Directors of the Company may deem advisable;

b. The execution of a first mortgage or deed of trust in the sum of \$560,000 to Trust Company of,, as Trustee, upon the real property, together with the buildings and improvements thereon, and the machinery, fixtures, and other permanent property now or hereafter owned by the Company on the premises located at the corner of Street and Avenue in the Ward of the City of, County of, State of; said mortgage to be payable at the expiration of ten (10) years from the date thereof; and the issue and sale, on such terms and conditions as the Board of Directors of the Company may determine, of bonds to be secured by said mortgage or deed of trust to an amount not exceeding in the aggregate \$560,000; said bonds to become due and payable at the expiration of ten (10) years from the date of issuance, or, at the option of the Company, one (1) per cent of the principal amount thereof to become due and payable on any semiannual date for the payment of interest thereon, with interest at a rate not in excess of 6 per cent (6%) per annum; and said mortgage or deed of trust and said bonds to contain such terms and conditions as the Board of Directors of the Company may deem advisable.

To authorize creation and issue of mortgage bonds.

1. To consent to, direct, approve, sanction and authorize the creation and issue of Refunding and Improvement Mortgage Bonds of the Company limited to an aggregate principal amount equal to three times the par value of the capital stock of the Company; such bonds to mature at such date or dates, not later than April 1,, to bear interest from such date or dates, not earlier than April 1, 19..., and at such rate or rates as the Board of Directors or the Executive Committee of the Company may determine; to be issuable from time to time in such series, for such purposes, upon and subject to such terms and conditions and in such denominations, to be payable, both principal and interest, at such place or places, in such currency or currencies and at such rate or rates of exchange, and to be in such form and to contain such additional terms and provisions, as said Board or said Committee may determine.

2. To consent to, direct, approve, sanction, and authorize the execution and delivery to secure such bonds of a mortgage and deed of trust (or other proper instrument) on and of all or any part of the railroads, equipment, franchises, and property, including corporate stocks and obligations, owned by the Company at the date of the execution and delivery of such mortgage and deed of trust or at any time thereafter acquired by it, as in such mortgage and deed of trust shall be provided.

3. To make and approve any changes or alterations in the foregoing that may be brought before the meeting.

4. To determine and approve in the foregoing as set out in (1) and (2) and in all other particulars the form and terms of such mortgage and deed of trust (or other proper instrument), or to authorize the Board of Directors in its discretion to determine the same.

5. To approve, ratify, and confirm and to authorize and consent to any action theretofore taken or authorized by the Board of Directors or by the Executive Committee of the Company, whether for the purposes of or in connection with or in contemplation of any of the matters aforesaid or otherwise which may be submitted to the meeting.

To vote upon creation of indebtedness.

To consider and vote upon the proposition to create an original bonded indebtedness of and by the Corporation, in the principal sum of Dollars (\$.....), and to take such other and further action and proceedings as properly and usually pertain thereto.

To authorize corporate mortgage and refunding of bonds.

To consider and act upon a proposal to authorize a mortgage of all or part of the Corporation's properties and franchises to secure an issue of bonds, in the aggregate amount of Dollars (\$.....), and to authorize the issuance of such bonds in order to retire existing bonds which will mature on the day of, 19...

To consent to mortgage and issuance of convertible bonds.

To vote on a proposition to mortgage the franchises and property of said Corporation and to consent to said mortgage and to the conversion of bonds that may be issued thereunder into stock of such corporation.

To execute and deliver bonds, and to sell same.

To authorize the directors and officers of the Company to execute and deliver an issue of Dollars (\$.....) par value of (insert description) bonds of the Company and a Debenture Bond Agreement securing the same, and to dispose of said bonds or any part thereof at such prices and on such terms as the Board of Directors may deter-

mine; also for the purpose of authorizing the directors and officers of the Company to pay off and retire the unpaid bonds of the present (insert description) bonds amounting to Dollars (\$.....).

To authorize pledge of stock.

To authorize the deposit and pledge by Corporation of the whole or any part of its holdings of the capital stock of subsidiary companies as security for a guaranty by Corporation of the payment of the principal and interest of a proposed issue of \$....., face value, of Five Per Cent Fifteen Year Sinking Fund Bonds of Company.

To consider proposition that trustee deliver securities when trust indenture terms are satisfied.

To consider and vote upon the proposition that the Company of New York, Trustee under the Indenture, dated, 19.., securing the Fifty-Year Five Per Cent Bonds of the..... Corporation, and under the Indenture, dated, 19.., securing the Ten-Sixty-Year Five Per Cent Sinking Fund Bonds of said Corporation, be authorized, in case both of said Indentures are satisfied in accordance with their terms, to deliver to said Corporation any or all shares of stock, bonds, and other securities held thereunder by said Trustee (except stocks, bonds, and other securities held in the Sinking Fund, which shall be delivered to said Corporation in accordance with the provisions of said Indentures), in accordance with the request of said Corporation approved by two thirds of the members of its Board of Directors.

To act upon sale of part of the corporate business.

Voting and taking action upon and consenting to the sale and conveyance of the shipbuilding business of the Corporation, or any interest therein or any part thereof, together with the properties of the Corporation, real, personal, or mixed, in any way used, acquired, or held by the Corporation in connection with said business, or any interest therein or any part thereof, upon such terms and conditions as may be consented to by vote of the stockholders at such meeting or any adjournments thereof, or upon such terms and conditions as such meeting may authorize the Board of Directors to settle and determine, or taking such action upon the foregoing proposition or any modification thereof, as may be submitted to such meeting (or any adjournment thereof).

To sell stock holdings of the corporation.

Taking such action as may be advisable to consummate the sale of the stock holdings of the Corporation in the Company, or any interest therein or any part thereof.

To authorize sale of property.

To authorize the Board of Directors to sell the property of the Corporation known as Street, City of, State of

Sale of entire property.

To consider and act upon a proposed agreement for the sale of the entire property and assets of the said Company.

To lease property from a corporation.

A proposition will be presented for the approval of the stockholders to lease from the Company, for the use and operation by this Company, the portion of the railroad of the Company on Avenue between the town line separating the former Town of, and the former Town of and Avenue, in the Borough of, City of, and State of, for a term of (.....) years.

To lease property jointly with another from a corporation.

One of the purposes of said meeting will be the approval of and consent to a lease for a term of 999 years proposed to be made by Railroad Company, as lessor, to this company and the Company jointly and severally as lessees, of the line of railroad proposed to be constructed by the lessor in the State of, together with appurtenant properties and franchises and all extensions and branches that may be constructed, acquired, or leased by the lessor with the approval of the lessees.

..... Railroad Company has been organized in the interest of the proposed lessees, each of which will own one half of its capital stock, to construct a line of railroad extending from to, in the counties of and, in the State of The Board of Directors has authorized the proposed lease subject to the approval of the stockholders.

To lease entire assets of a corporation.

To authorize, approve, and consent to a lease proposed to be taken by the Company of the lines of railroad, rights, interests, powers, privileges, immunities, and appurtenant franchises and other properties of the Company, such lease to be for a term of (.....) years.

To lease property to a corporation.

A proposition will be presented for the approval of the stockholders to lease that portion of the railroad of the Company on Avenue from, at, or near Street, to

Street, to the Company for a term of (.....) years.

To approve of merger agreement.

To consider and act upon approving the agreement made and entered into between the Company and the Corporation for the merger of the Company into the Corporation, and to take any and all other proceedings necessary or advisable in connection with such merger.

To act upon reorganization of the corporation.

To consider and pass upon the recommendation of the Board of Directors that this Company be reorganized, either by consolidation or by transfer to another corporation of all the assets of the Company, to the end that the business of this Company and its Subsidiaries shall be conducted as one enterprise and be owned and operated by one corporation. Appended hereto is a letter addressed to the stockholders by the President of the Company containing information with reference to such proposal.

To act upon consolidation agreement.

To take action upon the proposal to consolidate said Company and Corporation into a corporation to be known as, Inc., in accordance with and upon the terms and conditions set forth in a certain Agreement between said Company and Corporation, dated, 19.., or upon such other terms as may be approved by the stockholders at said meeting or any adjournment thereof.

To approve of agreement of consolidation.

Taking into consideration and acting upon an Agreement of Consolidation, dated, 19.., between the said Corporation and the Corporation, a (*state*) corporation, which has been entered into and signed by the Directors or a majority of them, of the said corporations, and of transacting such other business in connection with the foregoing as may come before the said meeting.

The said Agreement of Consolidation is on file and may be inspected at any time during business hours at the office of the Corporation, No., (*City*), (*State*); and a copy thereof will be furnished to any stockholder upon application to the Secretary.

To act upon a merger or consolidation.

To consider and act upon a proposition to merge or to consolidate

this Company with the A Company by this Company transferring substantially all its assets to: (1) a new company which shall also acquire all the assets of the A Company, the consideration to be paid to each constituent company for its assets so transferred to be a number of shares of the capital stock of the new company equal to the number of outstanding shares of such constituent company, or (2) the A Company, in exchange for a number of shares of the capital stock of the company last mentioned equal to the number of outstanding shares of this Company.

To acquire stock of another corporation.

To consider and act upon the acquisition of shares of the capital stock of the Corporation.

To acquire entire assets and capital stock of a corporation.

To approve or disapprove a written agreement for the sale of the Corporation, as vendor, to this corporation as vendee, of all the outstanding and issued capital stock, and of all the franchises, corporate property, rights, and credits of the said Corporation, subject to all the debts, liabilities, duties, and obligations of the said Corporation, the purchasing corporation to pay to the said Corporation the sum of Dollars (\$.....).

To acquire capital stock of another corporation.

To authorize the directors and officers of the Company to acquire by purchase the entire capital stock of, a corporation organized and existing under the laws of the state of, and engaged in the business of

To acquire property.

To vote upon a proposal to acquire the railroad, property, and franchise of the Railroad Company upon such terms as the Board of Directors shall determine and to approve and ratify any such acquisition.

To approve purchase of property of another corporation.

To approve the purchase of the plant and property of the Corporation at (City), State of

To consider dissolution.

(First Form)

To consider and act upon a proposition to dissolve this corporation and to distribute its assets according to law.

To consider dissolution.

(Second Form)

To consider and act upon the proposed dissolution of the

..... Corporation and the surrender and abandonment of its corporate authority and franchises and to transact any and all business necessary or incident thereto.

To consider dissolution.

(Third Form)

The proposition of dissolving the Company will be considered and voted upon. The proposed resolution, which will be introduced at this annual meeting, will direct that, in the event said dissolution is authorized by the stockholders, a proportionate distribution of substantially all the cash on hand of the corporation be presently made to the stockholders of said corporation by way of liquidating dividend; and that the remainder of the assets of said corporation, which will consist of a small cash balance, second mortgages, and other securities, be transferred to a Trustee or Trustees in liquidation for the purpose of thereafter liquidating said assets of the corporation. The plan of dissolution so to be voted upon will involve a surrender by the stockholders of their stock upon the distribution to them of the cash above mentioned, together with certificates of beneficial interest in said trust, which certificates of beneficial interest will ultimately be surrendered upon the distribution of proceeds realized from the liquidation of the assets of the corporation so turned over to the Trustees.

To dissolve a trust, and organize a corporation to take over the property and assets of the trust.

1. To pass a resolution or resolutions authorizing,, and, or one or more of them, as agent of the certificate holders voting therefor, to convey all such certificate holders' right, title, and interest in and to the property and assets of Trust as beneficial and equitable part owners thereof and their certificate or certificates of beneficial interest representing said ownership and the legal ownership and title in and to such property and assets held by the Trustees corresponding to their right, title, and interest therein, to Corporation, a corporation of Delaware (such conveyance to be made in connection and contemporaneously with a general conveyance by the Trustees of said Trust of all the property, property interests, securities, and moneys constituting the entire trust fund and assets of the said Trust to said corporation), in exchange for the delivery to said four persons as individuals, or any one or more of them, acting as agents of such certificate holders, such certificate holders' due proportion of the entire authorized Special Stock of said Corporation, which entire authorized Special Stock consists of 208,433 shares without nominal or par value;

2. To pass a resolution or resolutions authorizing,
, and, or one or more
 of them, to receive from said corporation as the agent of certificate
 holders voting in favor thereof, for such certificate holders' use and
 benefit and in their name and behalf, their due proportion of the
 said 208,433 shares of Special Stock of said corporation issued in ex-
 change for said certificates (and assets), consisting of one share of
 said Special Stock for each share of beneficial interest represented by
 certificate or certificates of beneficial interest in said Trust so held
 and conveyed, such receipt of shares of said corporation to be in con-
 nection and contemporaneously with the receipt by said persons as
 individuals and/or as Trustees of the entire authorized Special Stock
 of said corporation on the acquisition by it of the entire property,
 estate and assets of said Trust;

3. To pass a resolution or resolutions authorizing,
, and, or one or more
 of them, to distribute among the Trust beneficiaries and certificate
 holders, upon the surrender by them, respectively, of their certificates
 of beneficial interest, the certificates of stock of said corporation so
 received by said persons as individuals or as Trustees representing all
 the shares of the Special Stock thereof in accordance with the re-
 spective interests of the said beneficiaries therein and in the ratio of one
 share of said Special Stock for each one share of beneficial interest;

4. To authorize the Trustees of Trust, after
 such distribution has been completed and the Trust estate fully dis-
 posed of, to terminate and dissolve the Trust as provided in the trust
 deed by which it was created; and

5. To authorize the Trustees of Trust, acting
 as Trustees and/or as individuals, to enter into such contracts, execute
 such conveyances and transfers and perform such other acts and
 deeds as may be necessary or appropriate to carry out the plan of
 replacing the Trust by a corporation, and of terminating and dis-
 solving the Trust, recommended by the Trustees in their statement to
 certificate holders, dated, 19..., according to the
 intent thereof.

No. 27

Waiver of notice of meeting of stockholders.

We, the undersigned, being all the stockholders of
 Corporation, a corporation organized under the laws of the State of
, do hereby waive any and all notice as provided by the
 laws of the State of, or by the Articles of Incorporation or

By-laws of said Corporation, and do hereby consent to the holding of a (*insert annual or special*) meeting of stockholders of said Corporation, on the .. day of, 19..., at o'clock .. M., or any adjournment or adjournments thereof, at the principal office of the Corporation, (*Street*), (*City*), (*State*), for the purpose of (*insert purposes; see form No. 26*), and we do hereby consent to the transaction of any business, in addition to the business herein noticed to be transacted, that may come before the said meeting.

Dated at the City of, State of, this .. day of, 19...

....., holding shares
 holding shares
 holding shares
 (Signatures of all stockholders)

No. 28

Waiver of notice and of publication of notice of stockholders' meeting.

The undersigned, being all the stockholders of Corporation, a corporation organized under the laws of the State of, hereby assent and agree that a meeting of the stockholders of said Corporation be held at the office of the Corporation, (*Street*), (*City*), (*State*), on the .. day of, 19..., at o'clock in the noon, for the purpose of (*insert purposes; see form No. 26*), and for the transaction of such other business as may come before the meeting.

We do hereby waive any and all notice of the said meeting and publication of the said notice which may be required by the statutes of the State of, or by the Articles of Incorporation or By-laws of the said Corporation, and agree that any business transacted at such meeting shall be as valid and effective as though held after notice duly given and published.

Dated at the City of, State of, this .. day of, 19...

....., holding shares
 holding shares
 holding shares

No. 29

Waiver of notice of special meeting signed by individual stockholder.

I, the undersigned, being a stockholder of the Corporation, a corporation organized under the laws of the State of, holding (....) shares of the stock of the said Corporation, do hereby waive any and all notice required by the laws of the State of, or by the Articles of Incorporation or By-laws of said Corporation, and do hereby consent to the holding of a special meeting of stockholders of said Corporation, on the .. day of, 19.., at o'clock .. M., or any adjournment or adjournments thereof, at the office of the Corporation, (Street), (City), (State), for the following purposes:

(Here insert purposes; see form No. 26.)

I do further consent to the transaction of any business, in addition to the business noticed to be transacted, that may come before the meeting.

Dated at the City of, State of, this .. day of, 19...

.....
(Signature of stockholder)

PROXIES FOR STOCKHOLDERS' MEETINGS

No. 30

Proxy appointing individual proxy for annual meeting.

KNOW ALL MEN BY THESE PRESENTS, That, the undersigned, being the owner(s) of (.....) shares of the capital stock of the Corporation do .. hereby constitute and appoint of (City), (State), true and lawful attorney, for and in name, place, and stead, to vote upon the stock owned by or standing in name, as proxy, at the annual meeting of the stockholders of the said company, to be held at the company's office, No. ..,, City of, State of on the day of, 19.., or on such other day as the meeting may be thereafter held by adjournment or otherwise, according to the number of votes now or may then be entitled to cast, hereby granting the said attorney full power and authority to act for and in name at the said meeting or meetings, in voting for directors of the said company or otherwise, and in the transaction of such other business as may come before the meeting,

as fully as could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that said attorney or substitute may do in place, name, and stead.

IN WITNESS WHEREOF, have hereunto set hand and seal this day of, 19...

..... (L. S.)

..... (L. S.)

No. 31

Proxy for first annual meeting of stockholders.

KNOW ALL MEN BY THESE PRESENTS, That the undersigned stockholder of Corporation, a corporation of the State of, does hereby constitute and appoint Messrs.,,, and the attorneys and proxies, and each of them attorney and proxy, irrevocable, of the undersigned, with full power of substitution, for and in the name, place, and stead of the undersigned, to vote upon all the stock held by the undersigned in Corporation, according to the number of votes and shares of stock which the undersigned would be entitled to vote if personally present at the first annual meeting of the stockholders of Corporation, to be held at the principal office of the Corporation, (Street), (City), (State), on (Day of Week),, 19.., at o'clock in the noon, and at any adjournment or adjournments thereof, for the following purposes:

(Here insert purpose clauses.)

as fully and with the same effect as the undersigned might or could do if personally present at said meeting; hereby ratifying and confirming all that said attorneys and proxies, and each of them, or their or his substitutes or substitute, may lawfully do or cause to be done by virtue hereof; hereby revoking any proxies or proxy to vote said shares heretofore given by the undersigned to any person or persons whomsoever.

IN WITNESS WHEREOF, the undersigned stockholder has executed this proxy, this .. day of, 19...

..... (L. S.)

Notice. A proxy to be executed by a corporation should be signed in its name by its President or one of its Vice-presidents, and its corporate seal should be affixed and attested by its Secretary or one of its Assistant Secretaries or other proper officer.

No. 32

Proxy for annual meeting of stockholders; purposes of meeting indicated by reference to notice.

..... CORPORATION
 STREET
 CITY, STATE

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, do hereby constitute and appoint and with power to be exercised by them or either of them, for me and in my name, place, and stead, to vote as my proxy at the annual meeting of the stockholders of Corporation, to be held on, 19.., at o'clock in the noon, at the office of said Corporation, (Street), (City), (State), and at any and all adjournments of said meeting, upon any and all the matters referred to in the notice of the said meeting dated, 19.., to which notice this proxy was attached at the time of the receipt thereof by me, according to the number of votes I should be entitled to vote if then personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said proxies, or either of them, or their substitutes, may do by virtue hereof, and I do hereby revoke any and all proxies heretofore given by me for use at said meeting or at any adjournment thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this .. day of .., 19...

..... (L.S.)
 Please sign, detach, and return in the enclosed envelope.

No. 33

Proxy for annual meeting of stockholders of corporation affected by Securities Exchange Act of 1934.

[NOTE: Stockholders who do not expect to attend the meeting are requested to sign and return this Proxy in the enclosed stamped envelope, addressed to Secretary, Company, No. ... Avenue, (City),.....]

..... COMPANY
 PROXY

KNOW ALL MEN BY THESE PRESENTS, That the undersigned hereby constitutes and appoints,, and, or any of them, with power of substitution, attorneys and proxies to appear and vote all of the shares of

stock standing in the name of the undersigned, at the annual meeting of stockholders of the Corporation, to be held at No. (Street), (City), (State), on, 19.., at o'clock in the noon, and at any and all adjournments thereof; and the undersigned hereby instructs said attorneys to vote:

1. To elect two Directors for the ensuing year.

2. To authorize the Board of Directors to select the firm of , as auditors of the Corporation for the ensuing year Yes No
☐ ☐

3. Upon any other business which may properly come before the meeting or any adjournment thereof.

IF NO INSTRUCTIONS ARE GIVEN ABOVE, THE UNDERSIGNED HEREBY AUTHORIZES THE PROXIES NAMED HEREIN TO VOTE IN FAVOR OF THE MATTER SET FORTH IN PARAGRAPH 2.

The undersigned hereby acknowledges receipt of the Proxy Statement dated, 19...

Dated this day of , 19..

..... (L.S.)
 (Stockholder should sign here.)

No. 34

Proxy for annual meeting, giving discretion to proxies as to how to vote.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned hereby constitutes and appoints,, and, and each of them, attorneys and agents, with power of substitution in each of them for and in behalf of the undersigned, to vote as proxy at the annual meeting of the stockholders of Company, to be held at the main office of the Company, (Street), (City), (State), on the day of, 19.., at o'clock noon, and at any adjournment or adjournments thereof, according to the number of shares that the undersigned would be entitled to vote if then personally present, upon the matters and proposals set forth in the Notice of said meeting, dated, 19.. and the Proxy Statement, dated, 19.., furnished therewith, copies of which have been received by the undersigned.

The undersigned agrees that said proxies and each of them may vote in favor of the directors named in said Proxy Statement, or, in their discretion, in favor of the election as directors of any other

persons, and may vote in accordance with their discretion on all matters, not known or determined at the time of the solicitation of this proxy, which may legally come before the meeting.

Dated....., 19...

.....
When signing as attorney, executor, administrator, trustee or guardian,
please give your full title as such.

No. 35

Proxy for annual meeting of stockholders, indicating vote in favor of one of the special purposes of the meeting.

KNOW ALL MEN BY THESE PRESENTS, That the undersigned, a stockholder of Company, does hereby constitute and appoint,, and, or a majority of them, true and lawful attorneys, agents, and proxies, with full power of substitution, for and in his name, place, and stead, to vote upon all of the shares of stock standing in his name at the annual meeting of stockholders of Company, to be held at (Street), (City), (State), on (Day of Week), 19.., at o'clock in the noon, and at any or all adjournments thereof, with all the powers the undersigned would possess if then personally present, and especially (but without limiting the general authorization of power hereby given) to vote in favor of amending the charter of the Corporation by increasing the common capital stock from Dollars (\$.....) to Dollars (\$.....).

WITNESS my hand and seal, this .. day of, 19...

..... (L.S.)

No. 36

Proxy for annual meeting, indicating persons for whom proxies are to vote.

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned, do hereby constitute and appoint,, and, or any one or more of them, with power of substitution, my true and lawful attorney, or attorneys, for me and in my name and stead, to vote as proxy or proxies upon all shares of stock of Company, entitled to vote, owned by me or standing in my name on

the books of the Company, at the close of business on ,
 19.., at the annual meeting of the stockholders of
 Company to be held at the office of the Company,
 (Street), (City), (State), on the .. day of
 , 19.., at o'clock in the noon of that day,
 or at any adjournment thereof, for the following purposes:

(Here insert purposes.)

WITNESS my hand and seal, this .. day of , 19..
 (L.S.)

(In order for this proxy to be
 effective, your name must be
 signed on this line, exactly as
 stenciled below.)

I hereby request my attorney, or attorneys, above named,
 in casting any vote as my proxy, to vote for the following
 persons as directors of Company:

- | | |
|------------|-------------|
| 1. | 7. |
| 2. | 8. |
| 3. | 9. |
| 4. | 10. |
| 5. | 11. |
| 6. | |

. (L. S.)

(If you fill in names in the
 above spaces, also sign
 here, exactly the same as
 above.)

Many stockholders knowing the personnel of the Company will desire to have
 their votes cast for particular persons. They may fill in any number of names on
 the lines above up to 11. Where names are not filled in, the proxies above
 named will select the directors for whom they, or any one or more of them, will
 vote.

Notice. In preparing proxy for return, be sure to fill in date, and mail promptly
 in enclosed envelope.

No. 37

Proxy for annual meeting and any meetings held during the year
 for election or removal of directors; majority present
 at meeting to act.

KNOW ALL MEN BY THESE PRESENTS, That the undersigned stock-
 holder of , a Corporation organized under the
 laws of the State of , does hereby constitute and appoint

.....,, and,
and each or any of them, the true and lawful attorney or attorneys,
agent or agents, and proxy or proxies of the undersigned, with power
of substitution, for and in the name, place, and stead of the under-
signed, to attend the annual meeting of stockholders of the
.....Corporation, to be held at the principal office of the Corpo-
ration, (Street), (City),
(State), on the .. day of, 19.., and any and all ad-
journments thereof, and to attend any and all other meetings of the
stockholders of the Corporation held during the calendar year ending
..... .., 19.., for the election or removal of directors of the
..... Corporation, and any and all adjournments
thereof, and then and there to vote all stock held or owned by the
undersigned or standing in his name, for the transaction of any and
all business that may come before such meeting or meetings, and any
and all adjournments thereof, including the election or removal of
directors; and upon all matters and in all things that may come before
such meeting or meetings and any and all adjournments thereof, to
represent and to vote all shares of stock of the undersigned, according
to the number of votes which the undersigned would be entitled to cast
if personally present, hereby revoking any proxy or proxies heretofore
given to vote such stock, and ratifying and confirming all that said
attorneys, agents, and proxies may do by virtue hereof.

The said proxies are hereby authorized and empowered to act in the
following manner:

If all three proxies be present at such meeting or meetings or any ad-
journments thereof, according to the determination of a majority; if
only two of the three proxies be present, according to the determination
of such two; and if only one proxy be present, according to the deter-
mination of such one; and thus to exercise all the powers of all of said
attorneys, agents, and proxies hereunder.

WITNESS my hand, this .. day of, 19..
.....
(Signature of stockholder)

No. 38

**Proxy for annual meeting of common stockholders and special
meeting of preferred stockholders; purposes specified
in notice repeated in proxy.**

Annual Meeting,, 19.. Shares of Common Stock
(Common Stockholders)
Special Meeting,, 19.. Shares of Preferred Stock
(Preferred Stockholders)

KNOW ALL MEN BY THESE PRESENTS, That the undersigned, the holder of Common Stock and/or Preferred Stock in Company, Inc., a corporation of the State of, hereby irrevocably constitutes and appoints,, and the attorneys and proxies, and each of them, with full power to act without the others, the attorney and proxy of the undersigned, for and in the name, place, and stead of the undersigned: (1) to vote upon all shares of Common Stock held by the undersigned in said Company at the annual meeting of stockholders of the said Company, to be held at the office of the Company, (Street), (City), (State), on, 19.., at o'clock in the noon, for the election of directors, for the approval of the form of the annual report of the Company for the year 19.., and for or against the adoption of resolutions and all acts and proposals that may properly come before the said meeting, or any adjournment or adjournments thereof; and (2) to vote upon all shares of Preferred Stock held by the undersigned in the said Company at the special meeting of Preferred Stockholders of the said Company, to be held at the office of the Company, (Street), (City), (State), on, 19.., at o'clock in the noon, or at any adjournment or adjournments thereof, in favor of a proposal to authorize the Board of Directors of the Company to create and issue Dollars (\$.....) principal amount of Ten-Year 5% Sinking Fund Debentures of the Company, a description of certain provisions of the Indenture under which the Debentures will be issued being printed on the reverse side of the Notice of Meeting to which this proxy was attached, the receipt of which Notice of Meeting is hereby acknowledged; according to the number of votes present at the said annual meeting and the said special meeting, or any adjournment or adjournments of either or both of the said meetings, and the undersigned does hereby ratify and confirm all that said attorneys and proxies, or any of them, or their or his substitutes or substitute, may do in the premises.

WITNESS the hand and seal of the undersigned, this .. day of, 19...

..... (L.S.)

No. 39

Proxy for special meeting of stockholders; purposes of meeting not indicated.

KNOW ALL MEN BY THESE PRESENTS, That, the undersigned, stockholder in the Company,

does hereby appoint and,
 or either of them, true and lawful attorneys, with power of substitution
 for and in name to vote, as proxy, at the
 Special Meeting of the Stockholders in said Company, to be held at
 the City of, State of, on the .. day of
, 19.., or at any adjournment thereof, with all the powers
 which should possess if personally present.

Dated this .. day of, 19...

..... (L. S.)

No. 40

**Proxy for special meeting of stockholders; purposes indicated by
 reference to notice of meeting.**

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned stockholder of Company
 hereby appoints and constitutes,
, and, and each of them, the
 true and lawful attorneys and proxies of the undersigned, with several
 power of substitution, for and in the name of the undersigned, to vote
 at the special meeting of the stockholders of said Company, to be held
 at (Street), (City),
 (State), on (Day of Week),, 19.., at
 o'clock ..M., Eastern Standard Time, or at any adjournment
 thereof, with all the powers which the undersigned would possess if
 personally present, including the power of voting in favor of the
 propositions referred to in the notice of the meeting, hereby revoking
 any proxy or proxies heretofore given to vote upon such stock, and
 ratifying and confirming all that said attorneys or proxies may do by
 virtue hereof. A majority of such of my attorneys or proxies as shall
 be present and shall act at the meeting (or if only one be present and
 act, then that one) shall have and may exercise all of the powers of all
 of said attorneys or proxies hereunder.

WITNESS my hand and seal, this .. day of, 19...

.....

No. 41

**Proxy for special meeting of stockholders; purposes specified in
 notice repeated in proxy.**

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned,
 being the owner of (.....) shares of the Preferred Stock and

..... (.....) shares of the Common Stock of the Corporation, do hereby constitute and appoint,, and, or one or more of them, my true and lawful attorney or attorneys, in my name, place, and stead to vote all the stock owned by me or standing in my name as my proxy at a special meeting of the stockholders of said Corporation, to be held at (Street), (City), (State), at o'clock .. M.,, 19..., or on such other day as the meeting may be thereafter held by adjournment or otherwise, according to the number of votes I am now or may then be entitled to cast, hereby granting said attorney or attorneys full power and authority to act for me and in my name at the said meeting or meetings, for the purpose of considering and acting upon the following propositions recommended by the Board of Directors of the Corporation:

(Here list purposes of meeting.)

and for the transaction of such other business as may lawfully come before the meeting, as fully as I could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or attorneys may do in my name, place, and stead.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this .. day of, 19...

..... (Seal)

No. 42

Proxy for special meeting of stockholders, waiving notice of meeting and giving authority to sign consent to proposed action.

KNOW ALL MEN BY THESE PRESENTS, That the undersigned stockholder of Corporation does hereby constitute and appoint and, attorneys, agents, and proxies, and each of them attorney, agent, and proxy, with power of substitution, to vote as proxy for and in behalf of the undersigned, at a special meeting of stockholders of said Corporation, to be held at the principal office of the Corporation, at (Street), (City), (State), on the .. day of, 19..., hereby waiving all requirements of the State of and of the Articles of Incorporation and By-laws of said Corporation as to service of notice of said meeting and publication thereof, and on such other day or days as the said meeting may thereafter be held by adjournment or otherwise, according to the number of votes which the undersigned may now or may then be entitled to cast; and the undersigned hereby grants to said attorneys,

agents, or proxies, and each of them, full power and authority to act for the undersigned at said meeting or meetings; and as fully as the undersigned could do if personally present, to vote upon any and all matters which may come before said meeting, including all matters mentioned in the call for said meeting dated the .. day of, 19.., a copy of which has been received by the undersigned, and especially to vote in favor of the proposal to (*insert subject matter of proposal*), mentioned in said notice, and in the name and in behalf of the undersigned to consent to such proposed and to sign the name of the undersigned to such consent; hereby ratifying and confirming all that said attorneys, agents or proxies, and each of them, may do in the name, place, and stead of the undersigned.

IN WITNESS WHEREOF, the undersigned stockholder has hereunto set his hand and seal, this .. day of, 19...

..... (L. S.)

No. 43

Proxy for special meeting of stockholders; authority to sign confirmation of record of meeting.

KNOW ALL MEN BY THESE PRESENTS:

That I,, the holder of shares of Common Stock in the Company, do hereby appoint, and, or any of them, my true and lawful attorney, with power of substitution, for me and in my name, to vote as my proxy at the meeting of the stockholders of said Company to be held at the office of the Company, (Street), (City), (State), on the .. day of, 19.., at .. o'clock in the noon, or at any adjournment thereof, with all the powers which I would possess if personally present, and particularly to vote as my proxy in favor of any and all of the propositions referred to in the notice of said meeting and/or in the President's letter accompanying said notice, and also, if necessary, to sign my name to any confirmation of the record of said meeting.

WITNESS my hand and seal, this .. day of, 19...

..... (L. S.)

No. 44

Proxy for special meeting of stockholders, giving instructions to vote in favor of proposed resolutions; proxy to an individual.

KNOW ALL MEN BY THESE PRESENTS, That the undersigned, being the owner of (....) shares of the capital stock of the

..... Corporation, do hereby constitute and appoint, of (Street), (City), (State), true and lawful attorney, in name, place, and stead, to vote upon the stock owned by or standing in name, as proxy, at the special meeting of the stockholders of the said Corporation to be held at the Corporation's office, on the .. day of, 19.., or on such other day as the meeting may be thereafter held by adjournment or otherwise, according to the number of votes may now or may then be entitled to cast, hereby granting the said attorney full power and authority to vote in favor of the four resolutions described in the notice of meeting as follows:

(Here indicate resolutions by title or number as they appear in the notice.) and to vote to consent to the proposition described in paragraph .. of the said notice of meeting, with full power of substitution and revocation.

IN WITNESS WHEREOF, have hereunto set hand and seal, this .. day of, 19...

[Note. See also form No. 36.]

No. 45

Proxy for special meeting, on which stockholder indicates how to vote on the special purpose of the meeting.


KNOW ALL MEN BY THESE PRESENTS, that the undersigned stockholder in Company hereby constitutes and appoints,, and, attorneys, with power of substitution to each, for and on behalf of the undersigned, and with the powers the undersigned would possess if personally present, to vote all stock of the undersigned in Company at the special meeting of stockholders of said Company to be held on (Day of Week), the ... day of 19.., and at any adjournments of said meeting, upon the matter set forth in the notice of said meeting and proxy statement, dated, 19.., and upon such other matters as may properly come before the meeting. Copies of such notice of meeting and proxy statement have been received by the undersigned. A majority of such of said attorneys as shall be present and shall act at said meeting shall have and may exercise all the powers of all said attorneys hereunder.

Without limiting the general authorization and power hereby given, said attorneys are specifically directed to vote as indicated below on the resolution to be submitted to the meeting:

- ☐ *FOR (The management recommends a vote FOR).*
- ☐ *AGAINST*

SAID ATTORNEYS ARE AUTHORIZED TO VOTE THIS PROXY FOR SUCH RESOLUTION UNLESS A CONTRARY DIRECTION IS INDICATED.

Dated....., 19...

Please sign here 

.....
Please sign as name appears on stock certificate (as indicated above). When signing as attorney, executor, administrator, trustee, guardian, etc., give full title as such. For joint accounts, each joint owner should sign.

No. 46

Proxy appointing two persons to act as alternates; proxy given without solicitation.

I hereby nominate and appoint, if present, and if said is not present, then, as my attorney, or proxy, in the order herein named, to represent me and cast my vote by proxy at the annual meeting of the stockholders of Corporation, to be held at the principal office of the Corporation, on the .. day of, 19.., or at any adjournment thereof, as fully and with the same effect as I might or could do if personally present at such meeting, hereby ratifying and confirming all that my said attorney may legally do by virtue hereof.

This proxy is given voluntarily and without any solicitation by an agent of the Corporation. Any proxy heretofore given by me for said meeting is hereby revoked.

Dated, 19..

.....

No. 47

Proxy for a specified period.

KNOW ALL MEN BY THESE PRESENTS, That I, the undersigned,
of (Street), (City),
(State), do hereby irrevocably constitute and appoint
..... of (Street), (City),
(State), my true and lawful attorney, in my name, place, and stead,
for a period of, beginning the .. day of,
19.., to vote upon the stock owned by me or standing in my name, as
my proxy, at any and all meetings of the stockholders of
..... Corporation held within the said period, upon any and all
matters which may be presented, considered, and voted upon at any

annual or special meeting of stockholders of the said Corporation, including the election of directors, as fully and with like effect as I might or could have done if personally present, hereby ratifying and confirming all that my said attorney may do in my name, place, and stead.

WITNESS my hand and seal, this .. day of, 19...
 (L. S.)

No. 48

Proxy for specified period unless sooner revoked; authority to sign consent certificate.

KNOW ALL MEN BY THESE PRESENTS:

That I/we,, do hereby constitute and appoint, and
, jointly and severally, my/our true and lawful attorneys for me/us and in my/our name and stead, to attend all meetings whatsoever of the stockholders of the Company, and to vote any and all shares of the capital stock of the Company, at the time standing in my/our name on the books of said Company, at any meeting of the said stockholders, and also to sign my/our name as such stockholder to any consent certificate or other document relating to said Company which the laws of the State of may require or permit.

This proxy is to continue in force for the period of (....) years from the date hereof, BUT MAY BE REVOKED AT ANY TIME BY NOTICE THEREOF IN WRITING, FILED WITH THE SECRETARY.

Dated at } (L. S.)
, 19.. } Address

No. 49

Proxy coupled with an interest.

KNOW ALL MEN BY THESE PRESENTS, That I, a stockholder of the Corporation, holding (....) shares of stock of the said Corporation, do hereby make, constitute, and appoint, and/or, and/or or any of them, with full power of substitution, and during and for the period of (*insert months or years*) from the date hereof, the true and lawful attorneys and proxies of the undersigned for and in my name, place, and stead in respect to such stock or any other stock received by the said attorney or attor-

neys, or his or their substitute or substitutes, in said Corporation, or any other corporation or corporations in respect thereof, for the following purposes: to represent and vote for the undersigned at all meetings, regular or special, of said Corporation, or said other corporation or corporations; to consent to and waive notice of all special or regular meetings; to consent to and enter into any transactions, contracts, reorganizations, recapitalizations, dissolutions, changes of name, or other acts of whatsoever kind or nature requiring the consent of stockholders or for which the consent of stockholders is requested by the Corporation, or any other corporation or corporations whose stock is received in respect of the stock of said Corporation, or by the directors or officers thereof; to receive dividends; to accept in lieu of the stock of the Corporation cash, and/or new stock, and/or other securities in the same Corporation, or any other corporation or corporations, and/or other consideration, whether in a single or in several transactions; to transfer, indorse, or otherwise deal with the said stock, and/or cash, and/or other securities, and/or other consideration, and to execute a deed, bill of sale, receipt, discharge, release, or other agreement or other instrument in respect of the interest of the undersigned in such stock, cash, securities, and/or other consideration; and generally and without limitation because of the above specific enumeration of authority hereby conferred, to do any and all acts and things which the undersigned might or could do in respect to such stock, cash, securities, and/or other consideration. And the undersigned hereby agrees that, in consideration of the acceptance of the authority hereby conferred and of the undertaking of the said attorney or attorneys, or his or their substitute or substitutes, to act uniformly in behalf of all the stockholders, subject to their instructions designating persons to receive new stock, cash, securities, and/or other consideration, this power of attorney and proxy is coupled with an interest and is irrevocable, and the undersigned hereby ratifies and confirms all that said attorney or attorneys and proxy or proxies, or their substitute or substitutes, may lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this
 .. day of, 19...

..... (L. S.)

No. 50

Proxy from administrator or individual executor.

KNOW ALL MEN BY THESE PRESENTS, That, as
 (*insert administrator or executor*) of the Estate
 of, deceased, hereby constitutes and appoints
 his true and lawful attorney, for him and in his
 name, place, and stead to attend the special meeting of stockholders

of Corporation, to be held at the principal office of the Corporation, (Street), (City), (State), on the .. day of, 19.., at o'clock .. M., and any and all adjournments thereof, and then and there to vote all of the stock of the said Corporation now standing in the name of the said, as (*insert administrator or executor*) of the Estate of deceased, in favor of a proposed (*insert subject matter on which vote is to be taken*).
Dated this .. day of, 19..

.....
As
(*administrator or executor*) of the Estate of,
Deceased

No. 51

Proxy from guardian of an incompetent.

KNOW ALL MEN BY THESE PRESENTS, That, as Guardian of the Estate of, an incompetent person, hereby constitutes and appoints his true and lawful attorney, for him and in his name, place, and stead to attend the annual meeting of the stockholders of Corporation, at the office of the Corporation, (Street), (City), (State), on the .. day of, 19.., at o'clock in the noon, and at any and all adjournments thereof, and then and there to vote all stock of the said Corporation now standing in the name of the said as Guardian of the Estate of, an incompetent person.

Dated this .. day of, 19..

.....
As Guardian of the Estate of, an
Incompetent Person

No. 52

Proxy from corporate executor.

KNOW ALL MEN BY THESE PRESENTS, That Trust Company, as Executor of the Last Will and Testament of, deceased, hereby constitutes and appoints its true

and lawful attorney, for it and in its name, place, and stead to attend the annual meeting of stockholders of the Corporation, to be held at the principal office of the Corporation, (Street), (City), (State), on the .. day of, 19.., at o'clock .. M., and any and all adjournments thereof, and then and there to vote all the stock of the said Corporation standing in the name of the said Trust Company, as Executor of the Last Will and Testament of, deceased.

IN WITNESS WHEREOF, the said Trust Company, as Executor of the Last Will and Testament of, deceased, has hereunto caused its corporate name and seal to be affixed by its officers thereunto duly authorized this .. day of, 19... (Corporate Seal)

Attest:
.....
Secretary

..... Trust Company
As Executor of the Last Will and
Testament of
Deceased
By
President

No. 53

Proxy from a trustee.

KNOW ALL MEN BY THESE PRESENTS, That Trust Company, as trustee for under a certain Trust Agreement dated the .. day of, 19.., between it and, hereby constitutes and appoints its true and lawful attorney, for it and in its name, place, and stead to attend the meeting of the stockholders of the Corporation, to be held at the principal office of the Corporation, at (Street), (City), (State), on the .. day of, 19.., at o'clock in the noon, and any and all adjournments thereof, and then and there to vote all stock of the said Corporation now or hereafter standing in the name of the Trust Company, as trustee under the said Trust Agreement, provided, however, that this proxy shall not be used for the purpose of voting said stock in any way not consistent with the provisions of said Trust Agreement.

IN WITNESS WHEREOF, the said Trust Company, as trustee under the said Trust Agreement, has caused these presents

to be signed by its President and Secretary, and its corporate seal to be hereto affixed this .. day of, 19...

..... Trust Company
As Trustee under Trust Agreement
with, dated
....., 19..

By
President

By
Secretary

(Corporate Seal)

No. 54

Proxy from a corporation.

KNOW ALL MEN BY THESE PRESENTS, That Corpo-
ration, a corporation organized and existing under and by virtue of
the laws of the State of, owning and holding
(....) shares of the capital stock of the Com-
pany, does hereby appoint and constitute of
..... (City), (State), its true and lawful at-
torney, to attend the annual meeting of the stockholders of the
..... Company, to be held at the principal office of the
Company, (Street), (City),
(State), on the .. day of, 19.., at o'clock in
the noon, and any and all adjournments thereof, and then
and there to vote in behalf of this Company, and in its name, place,
and stead, as its proxy and representative, the number of votes which
this Corporation would be entitled to cast if actually present; and
full power and authority are hereby conferred upon said attorney, in
the name of this Corporation and in its behalf, and as its corporate
act and deed, to consent in writing, and upon the records of the said
meeting, to any and all votes and proceedings thereof, and to do all
such other things within the power of a stockholder of said
..... Company as may, in his judgment, be necessary or ad-
vantageous for the interests of this Corporation.

IN WITNESS WHEREOF, this Corporation has hereunto caused its
corporate name and seal to be affixed by its President and its Secre-
tary, thereunto duly authorized by a resolution of its Board of
Directors, duly passed and adopted on the .. day of,
19...

..... Corporation
By
President

By
Secretary

(Corporate Seal)

No. 55

Substitution of proxy.

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned attorney and proxy for the stockholders of Corporation, under certain proxies and powers of attorney given to and, with power of substitution to each attorney and substitute, which proxies and powers of attorney are filed with the Assistant Secretary of said Corporation, hereby by virtue and in exercise of the powers therein contained and every other power, substitute, constitute, and appoint and as attorneys and proxies for the said stockholders, with all the powers of the undersigned, for and in the name of said stockholders, to call and waive notice of and to vote and act at any meeting of the stockholders of said Corporation, and at any and all adjournments thereof, with all the powers which the said stockholders or the undersigned would have if personally present.

The undersigned hereby ratifies and confirms all that shall be done in accordance with the foregoing.

Dated, 19.. (L.S.)

No. 56

Appointment of associate proxy as substituted proxy.

WHEREAS,,, and, or a majority of them, are duly appointed as proxies of certain stockholders of Corporation, with full power of substitution in the premises (including appointment of one of said associate proxies as substituted proxy), to vote and act in behalf of said stockholders at the annual meeting of stockholders of said Corporation, to be held at (Street), (City), (State), on (Day of Week),, 19.., at o'clock ..M., or at any adjournment or adjournments thereof:

NOW, THEREFORE, we, the undersigned, do hereby severally constitute and appoint our associate proxy,, as our substituted proxy to vote and act in our place and stead at said meeting, or any adjournment or adjournments thereof. We do severally give to our said substituted proxy all the rights and powers which we, and each of us, as original proxies, would have had if present, under each and every original proxy running to the above-named proxies, or a majority of them, in respect of such meeting, or any adjournment or adjourn-

ments thereof. We hereby ratify and confirm the acts of our said substituted proxy hereunder.

IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals, this .. day of, 19...

..... (L.S.)
..... (L.S.)
..... (L.S.)

No. 57

Revocation of proxy.

KNOW ALL MEN BY THESE PRESENTS, That the undersigned,, being the owner of (....) shares of stock of the Corporation, a corporation organized and existing under and by virtue of the laws of the State of, does hereby revoke, countermand, and declare null and void the proxy and power of attorney heretofore executed by him on the .. day of, 19.., whereby the undersigned did constitute and appoint, of (City), (State), his true and lawful attorney for him and in his name, place, and stead, to vote upon the stock owned by him or standing in his name, as his proxy, at the meeting of the stockholders of the said Corporation, to be held at the office of the said Corporation, (Street), (City), (State), on the .. day of, 19.., at o'clock in the noon.

IN WITNESS WHEREOF, the undersigned has hereunto set his hand and seal, this .. day of, 19...

..... (Seal)

No. 58

Revocation of proxy and consent.

The undersigned hereby revokes and cancels Proxy and Consent given to,, and, to vote his stock at the special meeting of the stockholders of the Company, to be held on, 19.., and at adjournments thereof, and at any other meeting of the shareholders called for the purpose of authorizing a new first mortgage on the property of the Company.
The undersigned also hereby revokes his consent to the execution of such mortgage.

WITNESS the hand and seal of the undersigned, this .. day of, 19...

..... (L.S.)
Stockholder

No. 59

Letter to stockholders requesting execution of proxy.

Messrs. and
..... Street
..... (City) (State)

Dear Sirs:

In the event that you do not expect to be present in person or otherwise represented at the annual meeting of stockholders of Company in the City of on, 19.. (a notice of which was mailed to you some days ago), will you please sign and return to us the enclosed proxy, to the end that there may be a full representation of the stock at the meeting.

Very truly yours,

.....
Secretary

No. 60

Notice to stockholders of importance of executing proxy.

IMPORTANT

It is important, in order to secure a quorum, that all stockholders, however small their holdings, should execute proxies unless they expect to attend the meeting.

..... Company

No. 61

Notice urging execution of proxy.

..... .., 19..

Dear Sir:

On, 19.., we mailed you notice of the Annual and Special Meetings of the stockholders of this Company, to be held, 19.., and, 19.., respectively, and enclosed a form of proxy for execution by you as a stockholder.

In going over the stockholders' list, we find that your proxy has not been received.

By referring to the notice of these meetings, you will see that a number of important matters are to be presented for the consideration of the stockholders. Four of them involve amendments to the Articles of Consolidation, and one relates to the proposed issue of Convertible Bonds, in connection with which Subscription Warrants representing valuable rights to subscribe to the bonds have been mailed to you.

All of the foregoing matters require the affirmative vote of the holders of two thirds of the total outstanding preferred and common stock. It is important, therefore, if you are unable to attend the meeting, that you sign and return the enclosed proxy at your earliest convenience, using the enclosed stamped and addressed envelope.

Yours truly,

.....
Assistant Secretary

No. 62

Acknowledgment and thanks by management for proxy for annual meeting of stockholders.

....., 19..

Dear Sir:

We acknowledge and thank you for your proxy to be voted at the Annual Meeting of Stockholders of the Company to be held on , 19.., which evidence of confidence is not only appreciated by the management but serves as a constant encouragement to it for the exercise of the utmost diligence in the promotion of the Company's interests.

Very truly yours,

.....
Secretary

No. 63

Resolution extending duration of voting trust agreement.

RESOLVED, That the duration of the Voting Trust Agreement relating to all of the common capital stock without nominal or par value of Company, dated , 19.., be and the same is hereby extended from twelve o'clock noon on , 19.. to twelve o'clock noon on , 19.., subject to the written consent of the registered holders of voting trust certificates representing not less than sixty per centum of the common stock deposited under said Voting Trust Agreement.

AFFIDAVITS, CERTIFICATES, OATHS, BALLOTS, ETC. RELATING TO STOCKHOLDERS' MEETINGS

No. 64

**Affidavit of secretary that notice of annual meeting of stockholders
was mailed.**

State of }
County of } ss:

....., being duly sworn, on oath deposes and says that he is the Secretary of the Corporation, a corporation organized and existing under the laws of the State of, having its principal office in the State of; and that on the .. day of, 19.., he caused notice of the annual meeting of the stockholders of the said Corporation, a copy of which is hereto attached and is hereby made a part of this affidavit, to be deposited in the United States Post Office at the City of, in a sealed envelope, postage prepaid, duly addressed to each stockholder of record of the said Corporation at his last-known post-office address as the same appeared on the books of the Corporation.

Subscribed and sworn to before me
this .. day of, 19..

.....
Secretary

.....
Notary Public

No. 65

**Proof of service of notice of stockholders' meeting personally on
individual stockholder.**

State of }
County of } ss:

....., being duly sworn, deposes and says that he is the Secretary of Corporation; and that on the .. day of, 19.., at (Street), (City), (State), he served notice of the meeting of stockholders, a copy of which is annexed hereto and made a part of this affidavit as if herein fully set forth, on, a stockholder holding (....) shares of stock of the said Corporation, by delivering to and leaving personally with the said a true copy thereof.

Sworn to before me this
.. day of, 19..

.....
Secretary

.....
Notary Public

No. 66

Certificate of secretary that all stockholders have waived notice of meeting.

I,, Secretary of the Corpo-
ration, do hereby certify that (*insert number*) waivers of notice
of the special meeting of stockholders, to be held on the .. day of
....., 19.., at o'clock in the noon, at the office
of the Corporation, (*Street*), (*City*),
..... (*State*), attached hereto, have been signed in the aggregate
by all the stockholders of the Corporation.

WITNESS my hand and seal, this .. day of, 19...

.....
Secretary

(Corporate Seal)

No. 67

**Proof of service of notice of special meeting of stockholders by
mail; names and addresses of stockholders listed.**

State of }
County of } ss:

....., being first duly sworn, on oath deposes and says:
That he is the duly elected, qualified, and acting Secretary of
..... Corporation.

That, pursuant to an order of the Board of Directors passed at a
meeting of said Board at the office of said Corporation, on
..., 19.., ordering and directing that the Secretary cause notice of
the special meeting of stockholders of this Corporation on
..., 19.., to be given to the stockholders of this Corporation in the
manner prescribed by the By-laws, he personally served the notice, a
copy of which is hereto attached, upon each of the stockholders of
said Corporation in the manner required by the By-laws for giving
notice of special meetings of stockholders—to wit: by sending a copy
of the notice through the mail, by depositing a full, true, and correct
copy thereof in the post office of the United States Mail, City of
....., State of, postage prepaid, to each of the
stockholders of this Corporation at his last-known place of residence,
being the address left by him with the Secretary of the Corporation.

The following is a list of stockholders to whom notice was sent as
aforesaid, being a list of all of the stockholders of this Corporation as

shown by the books of this Corporation, and to whom such notices were respectively addressed:

<i>Name</i>	<i>Address</i>
.....
.....
.....
.....
.....
.....

Subscribed and sworn to before me
this .. day of .., 19..
.....

Notary Public in and for the State of
....., Residing at

No. 68

Proof of service of notice of stockholders' meeting, personally and
by mail on stockholders indicated by name.

State of }
County of } ss:

....., being duly sworn, deposes and says that he
is Secretary of the Corporation, a corporation or-
ganized under the laws of the State of; that pursuant to
the call of the President, he served written notice of a special meeting
of stockholders, a copy of which is annexed hereto and made a part
of this affidavit, upon, and
(*insert names of all stockholders served personally*), by delivering to
and leaving a true copy of said notice personally with each of them;

That on the .. day of .., 19.., he served written notice
of the said meeting upon,
and (*insert names of all stockholders served by
mail*), by mailing to each of them a true copy thereof, enclosed in a
sealed and post-paid wrapper, directed to each of the said stockholders
at his last-known post-office address, and deposited in a post-office box
in the City of

Sworn to before me this
..day of .., 19..

.....
Notary Public

.....
Secretary

No. 69

Affidavit of secretary of publication of notice of stockholders' meeting.

State of }
County of } ss:

....., being duly sworn, on his oath says that he is the Secretary of Corporation, a corporation organized and existing under the laws of the State of; that pursuant to the order of the Board of Directors of said Corporation, he caused the notice of the (*insert annual or special*) meeting of stockholders, a copy of which is hereto annexed and made a part of this affidavit, to be published in the, a newspaper published in the City of, and circulating in the County of, being the county in which said Corporation is located, for a period of, beginning the .. day of, 19.., as required by (*insert words "the laws of the State of,," or, "the By-laws of the Corporation"*).

Sworn to before me this
.. day of, 19..

.....
Secretary

.....
Notary Public

No. 70

Affidavit of publisher of publication of notice of stockholders' meeting.

State of }
County of } ss:

....., being duly sworn, deposes and says that he is of lawful age; that he is the chief clerk of the printer and publisher of, a newspaper of general circulation, printed and published (*daily or weekly*) in the County of; and that the notice of meeting of the stockholders of Corporation, of which the annexed slip is a printed and true copy, was duly published (....) (*insert number of times*) in the above-named newspaper—to wit: on the (*insert dates of publication of notice*).

Sworn to before me this
..day of, 19..

.....

.....
Notary Public

No. 71

Affidavit of no change of stockholders' addresses.

State of }
 County of } ss:

....., being duly sworn, deposes and says that he is the Secretary of Corporation; and that no stockholder of said Corporation has filed with the Secretary thereof a written request (other than such written request or requests as may have heretofore expired or been withdrawn) that notices intended for him shall be mailed to some address other than his address as it appears on the stock book of the said Corporation.

Sworn to before me this

..day of, 19..

.....
 Notary Public

.....
 Secretary

No. 72

Certification of minutes of stockholders' meeting.

I,, Secretary of Corporation, a corporation organized under the laws of the State of, hereby certify that the foregoing is a full, true, and complete copy of the minutes of the (*insert annual or special*) meeting of the stockholders of the said Corporation, held at the office of said Corporation at (*Street*), (*City*), (*State*), on the .. day of, 19.., at o'clock ..M.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the said Corporation to be affixed hereto, this .. day of, 19...

(Corporate Seal)

.....
 Secretary

No. 73

Secretary's certificate of list of holders of stock.

I,, Secretary of the Corporation, a corporation organized and existing under the laws of the State of, do hereby certify that the attached list of holders of the Common Stock of this Corporation, with the number of shares owned by each, represents the total issued and outstanding Common

Stock of the Corporation as shown by the books of the Corporation on the .. day of, 19.., and on the .. day of, 19...

I further certify that with the exception of shares of Treasury Common Stock owned by the Corporation, said holders of the Common Stock are entitled to vote at the special meeting of this Corporation on the .. day of, 19.., and to cast the number of votes indicated respectively by the number of shares on said statement.

WITNESS my hand and the seal of said Corporation this .. day of, 19...

(Corporate Seal)

.....
Secretary

No. 74

List of stockholders.

The following is a list of stockholders of the Corporation at the closing of books on the .. day of, 19..:

<i>Name of Stockholder</i>	<i>Address</i>	SHARES HELD	
		<i>Common</i>	<i>Preferred</i>
.....
.....
.....

No. 75

Oath of inspectors of election.

State of }
County of } ss:

We, and, the undersigned, duly appointed Inspectors of Election of Corporation, being severally and duly sworn, do solemnly swear that we will fairly and impartially perform our duties as Inspectors of Election at the election to be held this .. day of, 19.., for directors of the said Corporation, and will faithfully and diligently canvass the votes cast at such election and honestly and truthfully report the result of said election.

Sworn to before me
this .. day of, 19..

.....
Notary Public

No. 76

Judges' oath.

State of }
County of } ss:

We,, and
....., the undersigned, duly appointed Judges for the purpose
of conducting the vote at the special meeting of holders of the Common
Stock of Corporation, a corporation organized
and existing under the laws of the State of, being severally
duly sworn, do solemnly swear that we will fairly and impartially
perform our duties as such Judges at the meeting to be held this .. day
of, 19.., and will faithfully and diligently canvass the
votes cast at such election and honestly and truthfully report the
result of said election.

.....
.....
.....

Subscribed and sworn to before
me this .. day of,
19...

.....
Notary Public

No. 77

Certificate and report of inspectors of election.

We, the undersigned, duly appointed Inspectors of Election of the
..... Corporation, a stock corporation of the State of
....., do hereby certify as follows:

That a meeting of the stockholders of the said Corporation was held
at the office of the said Corporation, (Street),
..... (City), (State), on the .. day of,
19.., at o'clock .. M., pursuant to due notice.

That before entering upon the discharge of our duties, we were
severally sworn, and the oath so taken by us is hereto annexed.

That we inspected the signed proxies used at the meeting and found
the same to be in proper form.

That we did receive the votes of the stockholders by ballot for the
election of (....) directors of the Corporation, to serve for
..... (....) years, did canvass the votes cast, and that the result of
the vote taken at such meeting was as follows:

<i>Directors</i>	<i>Votes</i>	CONSISTING OF	
		<i>Preferred</i>	<i>Common</i>
"A"	280,370	9,500	270,870
"B"	280,370	9,500	270,870
"C"	280,370	9,500	270,870
"D"	280,370	9,500	270,870
"E"	280,370	9,500	270,870
"F"	280,370	9,500	270,870

That the said "A," "B," "C," "D," "E," and "F," having received the number of votes above set opposite their respective names, being a majority of the votes cast, were declared by us duly elected directors of the said Corporation, as successors to the class of directors whose terms expire with this annual election, to hold office for the term of (.....) years.

IN WITNESS WHEREOF, we have made this certificate and have hereunto set our hands, this .. day of, 19...

.....
.....

No. 78

Certificate and report of inspectors of election (short form).

We, the undersigned, Inspectors of Election, duly appointed by the stockholders of the Corporation, at the meeting held this .. day of, 19.., do report that, having taken the oath to conduct the election of directors impartially, we did receive the votes of the stockholders by ballot.

We report that (.....) votes were cast, and that the following persons received the number of votes set opposite their respective names:

<i>Directors</i>	<i>Number of Votes</i>
.....
.....

No. 79

Inspectors' report of stock represented at meeting.

We, the undersigned, duly appointed and qualified Inspectors at the annual meeting of the stockholders of Company, held in the City of, State of, on (Day of Week),, 19.., do hereby certify that we have examined the list of stockholders of that Company, dated, 19.., properly certified; that we have received and taken in charge the proxies presented at said meeting; and have taken a poll

of the stockholders present in person; and we do further certify that there are represented at said meeting, by proxy, stockholders of said Company shown by said list to be the holders of (....) shares of Common Stock and (....) shares of Preferred Stock, a total of (....) shares of stock of both classes, of which (....) shares are represented by proxies other than the official Proxy Committee, and the remainder are represented by the Proxy Committee, or a member thereof. There are present in person stockholders holding together (....) shares of Common Stock and (....) shares of Preferred Stock, making the total number of shares represented:

Commonshares
Preferredshares
<hr/>	
Both Classesshares
or (....%) per cent of the total stock outstanding.	

	Inspectors

No. 80

Certificate of judges on specific question considered at meeting.

We, the undersigned, duly appointed Judges for the purpose of conducting the vote at the special meeting of the holders of Common Stock of Corporation, do hereby certify as follows:

That a special meeting of the holders of the Common Stock of said Corporation was held at Room, No. Street, City,, on, 19.., at P.M., by adjournment from, 19.., pursuant to the call of the President as authorized by the Board of Directors of the Corporation and written notice thereof given by the Secretary:

That before entering upon the discharge of our duties, we were severally duly sworn and the oath so taken by us is hereto annexed.

That we inspected the signed proxies and the credentials presented to the meeting and we found the same to be in proper form; that at said meeting we did receive the votes by ballot of the holders of the Common Stock upon the following resolutions:

(Here insert resolutions in full.)

That we did canvass the votes so cast and that the result of such voting was as follows:

That the number of shares of stock issued and outstanding and

entitled to vote on said resolutions were shares of the Common Stock (exclusive of shares of Treasury Common Stock owned by the Corporation); that shares of Common Stock voted in favor of said resolutions; and that no shares of Common Stock were voted against them.

IN WITNESS WHEREOF, we have made this certificate and have hereunto set our hands this .. day of, 19...

.....

No. 81

Inspectors' certificate of votes on a resolution ratifying the acts of the directors, committees, and officers.

We, the undersigned, duly appointed Inspectors of stockholders' votes and elections of Company, to act at a meeting of stockholders held on the .. day of, 19..., having taken an oath faithfully, honestly, and impartially to perform the duties of said Inspectors, do hereby certify that we did receive the votes of the stockholders of said Company by ballot in person and by proxy for and against the following resolution:

RESOLVED, That all contracts, acts, proceedings, elections, and appointments by the Board of Directors, Executive Committee, and officers of this Company from, 19..., as shown by the minutes of meeting of said Board of Directors and Executive Committee since that date, be and they hereby are approved, ratified, and confirmed.

and that the holders of (....) shares of the capital stock of said Company voted in person and by proxy in favor of said resolution, and that no holders of shares of the capital stock of said Company voted in person or by proxy against said resolution.

No. 82

Protest of stockholders against a meeting to elect directors and officers.

We, the undersigned, stockholders of the Company, protest against this meeting and object to its validity as a meeting to elect directors or other officers of the Company, on the following grounds:

1. This meeting was not called by any member of the Company.
2. The meeting was not advertised as required by the laws of the State of

3. Notice of the meeting has not been served personally or by mail upon each member of the Company.

4. This meeting is called to be held at a place other than the office of the Company.

5. Directors and other officers of the Company were duly elected at a stockholders' meeting held at the offices of the Company on, 19.., and the directors and officers so elected have qualified and are discharging the duties of their offices, and their term of office has not expired.

Filed, 19..

.....
Clerk

No. 83

Demand for a vote by ballot.

To the Secretary of the Corporation:

We, the undersigned, being holders of the shares of stock of the Corporation hereinbelow set opposite our respective names, do hereby demand that a vote by ballot be taken on the following resolution, which you declared to have been duly carried by a show of hands:

(Here set forth resolution.)

....., holding shares
....., holding shares
....., holding shares

No. 84

Ballot upon election of directors; straight voting; stockholders entitled to one vote for each share.

..... CORPORATION

Annual meeting of Stockholders,, 19..

I, the undersigned, hereby vote (.....) shares of stock for the following-named persons to serve as directors for the ensuing year:

.....
.....
.....

.....
By
Proxy

[Note. If a stockholder votes personally, his signature must be placed on the first line. If the ballot is cast by proxy, the proxy must sign the name of the

stockholder on the first line, and his own name on the second line. If several stockholders are represented by one proxy, the proxy may sign on the second line and write on the first line the words "Proxies filed."]

No. 85

Ballot upon election of directors where cumulative voting is used.

ELECTION OF DIRECTORS OF CORPORATION

at

Annual Meeting of Stockholders, , 19..
Name of stockholder
Name of proxy
Number of shares
Directors to be elected
Number of votes to which entitled (multiply number of directors
to be elected by number of shares)

BALLOT FOR DIRECTORS

<i>Names</i>	<i>Votes</i>
.....
.....
.....
..... (Stockholder signs here)	
By	Proxy

No. 86

Ballot for vote on resolution.

..... CORPORATION

SPECIAL MEETING OF STOCKHOLDERS, HELD , 19..

The undersigned votes { for
 against } the following resolution:

(Here follows resolution in full.)

Vote in person shares
Vote by proxy shares
.....
(Stockholder or proxy
signs here)

FORMS—STOCKHOLDERS' MEETINGS

No. 87

Ballot for vote on resolution (another form).

SPECIAL MEETING OF PREFERRED STOCKHOLDERS

OF

..... COMPANY

Held , 19..

In favor of:

Against:

the resolution with respect to the creation and issuance by the Company of its Ten-Year 5% Sinking Fund Debentures in the principal amount of (\$.....) Dollars with Common Stock Purchase Warrants attached.

Holding shares of Preferred Stock .

Representing by proxy shares of Preferred Stock

Dated at (City), (State), ,
19...

.....
(Stockholder or proxy
signs here)

CHAPTER 3

DIRECTORS' AND COMMITTEE MEETINGS

Necessity for holding directors' meetings. The board of directors, acting as a body, has sole authority to manage the corporation in those matters which are not reserved for action by stockholders. The stockholders cannot take this authority from the board and give it to an individual.¹

Generally directors can bind the corporation by their acts only when they are duly assembled at a meeting.² A casual and informal meeting of all the directors, without a record of the meeting, is not a legal meeting.³ (But see exceptions below.) The consent of the directors obtained separately is not equivalent to action by the board.^{3a} A majority of the board, as individuals, cannot act for the board itself,⁴ especially when the action is kept secret from the minority.⁵ Even if the majority of directors own a majority of the stock, they are not authorized to bind the corporation in an informal manner.⁶

Exceptions to rule that directors must act in meeting. The rule that directors can bind the corporation only when they are duly assembled in meeting has two exceptions. These are: (1) where by usage or custom the directors have managed the affairs of the corporation without formal meetings, and the corporation

¹ Kaplan v. Block, (1944) 183 Va. 327, 31 S. E. (2d) 893.

² United States v. Interstate R. Co., (1926) 14 F. (2d) 328; Branch v. Augusta Glass Wks., (1895) 95 Ga. 573, 23 S. E. 128; Starring v. Kemp, (1936) 167 Va. 429, 188 S. E. 174; City of Floydada v. Gilliam, (1937) (Tex. Civ. App.) 111 S. W. (2d) 761; Kelly v. Galloway, (1937) 156 Ore. 301, 68 P. (2d) 474; Zachary v. Milin, (1940) 294 Mich. 622, 293 N. W. 770; In re Joseph Feld & Co., (1941) 38 F. Supp. 506; Trethewey v. Green River Gorge, (1943) 17 Wash. (2d) 697, 136 P. (2d) 999; Farmers & Merchants Bank of Eureka v. Boland, (1943) (Mo. App.), 175 S. W. (2d) 939; Bayer v. Beran, (1944) 49 N. Y. Supp. (2d) 2.

³ Lycette v. Green River Gorge, (1944) 21 Wash. (2d) 859, 153 P. (2d) 873.

^{3a} Coleman v. Northwestern Mut. Life Ins. Co., (1917) 273 Mo. 620, 201 S. W. 544, (rehearing denied March 1918).

⁴ Mosell Realty Corp. v. Schofield, (1945) 183 Va. 782, 33 S. E. (2d) 774.

⁵ Gerard v. Empire Square Realty Co., (1921) 195 N. Y. App. Div. 244, 187 N. Y. Supp. 306; Flick v. Jordan, (1920) 74 Ind. App. 314, 129 N. E. 42.

⁶ Mosell Realty Corp. v. Schofield, *supra* (Note 4).

and its stockholders have by long practice acquiesced in an informal manner of doing business, the acts of the directors, if they are within the scope of their powers, are valid,⁷ for otherwise great injury might be done to third persons relying on this course of conduct; and (2) where stockholders or directors, with knowledge of the facts, acquiesce in informal action taken by the directors, they are bound by that action.⁸

If the directors are themselves the only stockholders, action taken by all of them, informally, and without a meeting, is corporate action.⁹ Also, if all of the directors are present when the terms of a contract with another party are agreed to, the corporation cannot deny the contract on the ground that it was not made at a legal meeting.¹⁰

Examples of acts held valid without formal meeting. The following illustrate acts that have been held not to require formal action by the board:

1. Making ordinary contracts: (a) by correspondence; (b) by agent; (c) by manager;¹¹ and (d) by corresponding secretary.¹²
2. Entering into general contracts of employment.¹³
3. Borrowing money by the corporation.¹⁴
4. Expenditures for radio advertising.¹⁵
5. Instituting proceedings to enforce a lien against a stockholder for past-due indebtedness to the corporation.¹⁶

⁷ *Kozy Theater Co. v. Love*, (1921) 191 Ky. 595, 231 S. W. 249; *Baker v. Smith*, (1918) 41 R. I. 17, 102 A. 721; *Holy Cross Gold Min. & Mill. Co. v. Goodwin*, (1924) 74 Colo. 532, 223 P. 58; *Byron v. Byron, Heffernan & Co.*, (1922) 98 N. J. Law 127, 119 A. 12; *Bayer v. Beran*, (1944) 49 N. Y. Supp. (2d) 2.

⁸ *Forrest City Box Co. v. Barney*, (1926) 14 F. (2d) 590; *Clark Realty Co. v. Douglas*, (1923) 46 Nev. 378, 212 P. 466; *Western Battery & Supply Co. v. Hazelett Storage Battery Co.*, (1932) 61 F. (2d) 220, rev'g 52 F. (2d) 659; *Webb v. Duvall*, (1940) 177 Md. 592, 11 A. (2d) 446; *Hurley v. Ornstein*, (1942) 311 Mass. 477, 42 N. E. (2d) 273. Directors are obligated to repudiate unauthorized transactions of a single director in behalf of the corporation. Failure to do so implies ratification. *Friend Lumber Co. v. Armstrong Building Finish Co.*, (1931) 276 Mass. 361, 177 N. E. 794.

⁹ *Temple Enterprises, Inc. v. Combs* (1940) 164 Ore. 133, 100 P. (2d) 613.

¹⁰ *Thompson v. M. K. & T. Oil Co.*, (1935) 5 Cal. App. 117, 42 P. (2d) 374.

¹¹ *Schofield v. Parlin, etc. Co.*, (1894) 61 F. 804.

¹² *Hall v. Herter Bros.*, (1895) 90 Hun. (N. Y.) 280, 35 N. Y. Supp. 769, 70 N. Y. 273.

¹³ *Scott v. Superior Sunset Oil Co.*, (1904) 144 Cal. 140, 77 P. 817; *Crowley v. Genesee Min. Co.*, (1880) 55 Cal. 273.

¹⁴ *Yolo Bank v. Weaver*, (1892) 3 Cal. unrep. 569, 31 P. 160.

¹⁵ *Bayer v. Beran*, (1944) 49 N. Y. Supp. (2d) 2.

¹⁶ *Elliot v. Sibley*, (1893) 101 Ala. 344, 13 So. 500.

6. Chartering vessels to carry on the regular business of a corporation engaged in transporting passengers or freight.¹⁷

7. Instituting proceedings by a water company to condemn land.¹⁸

Examples of acts held invalid without formal meeting. The following are examples of acts that have been held to require the vote of the board of directors:

1. Giving a mortgage of corporate property as security for a loan.¹⁹

2. Selling principal assets of the corporation.²⁰

3. Assigning corporation property for the benefit of creditors.²¹

4. Giving notice of the termination of a contract entered into by the corporation.²²

5. Authorizing bankruptcy proceedings.²³

6. Instituting legal action in corporation's name.²⁴

Waiver by stockholders of necessity for holding board meeting. Stockholders may waive the necessity for directors' meetings; ²⁵ transactions consummated without any meeting can then be attacked only by the state. This right of waiver is based on the fact that the directors derive all their powers from the stockholders.

Kinds of directors' meetings. Meetings of directors may be either regular or special. The only difference between regular and special meetings is in the matter of notice (see page 139). If there is no evidence that the meeting was regular, it will be presumed to have been special.²⁶ Regular meetings are called at the time and place and in the manner provided for in the by-laws

¹⁷ *Prentice v. U. S., etc. S. S. Co.*, (1893) 58 F. 702.

¹⁸ *Kountz v. Morris*, (1895) 58 N. J. Law 303, 33 A. 252, aff'd 58 N. J. Law 695, 34 A. 1099.

¹⁹ *St. Joseph State National Bank v. Union National Bank*, (1897) 168 Ill. 519, 48 N. E. 82; *Currie v. Bowman*, (1894) 25 Ore. 364, 35 P. 848; *Lycette v. Green River Gorge*, (1944) 21 Wash. (2d) 859, 153 P. (2d) 873.

²⁰ *Mosell Realty Corp. v. Schofield*, (1945) 183 Va. 782, 33 S. E. (2d) 774.

²¹ *Webb v. Midway Lumber Co.*, (1897) 68 Mo. App. 546; *Norton v. Alabama National Bank*, (1894) 102 Ala. 420, 14 So. 872.

²² *Skinner v. Walter A. Wood Mowing, etc. Mach. Co.*, (1892) 47 N. Y. 506, 20 N. Y. Supp. 251.

²³ *In re Joseph Feld & Co.*, (1941) 38 F. Supp. 506.

²⁴ *Douglas Development Corp. v. Carillo*, (1946) 64 N. Y. Supp. (2d) 747.

²⁵ *Morisette v. Howard*, (1901) 62 Kan. 463, 63 P. 756. In the absence of creditors, the consent of all the directors and all the stockholders to the president's sale of corporate property, obtained separately, is sufficient. *Aransas Pass Harbor Co. v. Manning*, (1901) 94 Tex. 558, 63 S. W. 627.

²⁶ *Barrell v. Lake View Land Co.*, (1898) 122 Cal. 129, 54 P. 594.

or in the statutes. Special meetings may be called at any time as provided in the by-laws. The manner of calling special meetings may be fixed by the by-laws or by statute.

Meetings held on Sundays or holidays. Since the date set for regular meetings may occasionally fall on a Sunday or holiday, provision should be made in the by-laws or by resolution for such a contingency. (See page 267 for form of provision.) In the absence of statute or by-law prohibiting a meeting on a holiday, the meeting cannot be held without notice on any day other than that appointed in the by-laws.²⁷ Thus, an action at a meeting held without notice the day after the regular date, which was a holiday, was void.²⁸ A meeting of directors on Sunday is valid if affirmed at a weekday meeting.²⁹ When agreements and contracts entered into on Sunday are void under the statute, a board of directors cannot amend or rescind a legal contract at a Sunday meeting.³⁰

Calling directors' meetings. The by-laws of the corporation generally indicate who has authority to call meetings of the board of directors, although sometimes this subject is covered by statute. The meeting must be called by the person authorized,³¹ but if the designated officer refuses to send the notices, another officer may do so.³² The duty of calling a meeting is frequently delegated to the chairman of the board, or, in his absence, to the president. Provision is also generally made that meetings may be called upon written direction of a certain number of the directors. If the provisions of the charter or by-laws are mandatory, they must be followed carefully to insure a valid meeting,³³ but defects in the call of the meeting do not necessarily make actions taken at the meeting illegal.³⁴

Where the by-laws provide that special meetings of directors

²⁷ *Cheney v. Canfield*, (1910) 158 Cal. 342, 111 P. 92. This decision was made in the face of a statute providing that if an act of a secular nature, appointed by law or contract to be performed on a particular day, fell on a holiday, it might be performed on the next business day. The court said that a by-law is not a contract within the meaning of this statute.

²⁸ *Cheney v. Canfield*, *supra* (Note 27).

²⁹ *Flynn v. Columbus Club*, (1900) 21 R. I. 534, 45 A. 551.

³⁰ *Smith v. Mills*, (1946) 199 Miss. 367, 24 So. (2d) 864. See also *Chapin v. Cullis*, (1941) 299 Mich. 101, 299 N. W. 824. In this case the evidence was insufficient to show that the contract had been amended at a Sunday meeting; the added proviso was therefore not invalid.

³¹ *Jackson v. Dillehay*, (1946) 209 Ark. 707, 192 S. W. (2d) 354.

³² *Whipple v. Christie*, (1913) 122 Minn. 73, 141 N. W. 1107.

³³ *Bruch v. National Guarantee Credit Corp.*, (1922) 13 Del. Ch. 180, 116 A. 738.

³⁴ *Morris v. Y. & B. Corp.*, (1930) 198 N. C. 705, 153 S. E. 327.

shall be called by the president, or, at his request, by the secretary, the secretary and a third member of the board, though constituting the majority of the board, have no authority to call a special meeting.³⁵ If the by-laws authorize the president or the secretary to call special meetings, the secretary can call the meeting without a request from the president.³⁶

If the by-laws give the president the power to call special meetings of the directors, and provide that, in his absence, the vice president shall take his place and perform his duties, the vice president may call any special meeting which the president could have called if he had been present.³⁷

The manner of calling directors' meetings is controlled by the charter and by-laws, not by an agreement among the stockholders.³⁸ In the absence of other provisions in the statute or by-laws of the company, the meeting need not be called in any particular manner; if all the directors receive proper notice, the meeting will be valid.³⁹

Necessity for giving notice of directors' meetings. The general rule of law is that no power or function intrusted to a body consisting of a number of persons can be legally exercised unless notice of the meeting at which such power or function is to be exercised is given to all the members of that body.⁴⁰ A lawful meeting requires due notice to all of the directors, unless there is a waiver of notice.⁴¹ Presence at a meeting waives notice.⁴² The validity of a meeting is not impaired, however, by failure to give notice, even if the by-laws or charter requires such notice, when all the directors attend the meeting and do not object.⁴³

Unless expressly required by statute, no notice of regular meetings need be given where the by-laws, charter, or resolution of the board of directors specifies the time of the regular meet-

³⁵ *Aetna Casualty and Surety Co. v. Am. Brewing Co.*, (1922) 63 Mont. 474, 208 P. 921.

³⁶ *Jackson v. Dillehay*, *supra* (Note 31).

³⁷ *Union Gold Min. Co. v. Rocky Mountain National Bank*, (1872) 1 Colo. 531.

³⁸ *In re Allied Fruit & Export Co., Inc.*, (1934) 243 N. Y. App. Div. 52, 276 N. Y. Supp. 153.

³⁹ *Bell v. Standard Quicksilver Co.*, (1905) 146 Cal. 699, 81 P. 17.

⁴⁰ *People v. Batchelor*, (1860) 22 N. Y. 128; *Lycette v. Green River Gorge*, (1944) 21 Wash. (2d) 859, 153 P. (2d) 873.

⁴¹ *In re Joseph Feld & Co.*, (1941) 38 F. Supp. 506.

⁴² *Lippman v. Kehoe Stenograph Co.*, (1915) 11 Del. Ch. 80, 95 A. 895.

⁴³ *Ney v. Eastern Iowa Tel. Co.*, (1919) 185 Iowa 610, 171 N. W. 26; *Minneapolis Times Co. v. Nimocks*, (1893) 53 Minn. 381, 55 N. W. 546; *Zachary v. Milin*, (1940) 294 Mich. 622, 293 N. W. 770.

ing.⁴⁴ If the directors establish the custom of meeting at regular times of the day, as at luncheon, to discuss the business of the corporation, all the directors being present, notice of such regular meetings is likewise unnecessary. If notice is required, it must be sent to each director.⁴⁵ A director who has resigned need not be given notice.⁴⁶ In the absence of proof to the contrary, notice will be presumed to have been given.⁴⁷ One who attacks the validity of a directors' meeting on the ground that there was no notice has the burden of proving failure to give notice.

Necessity for giving notice of directors' special meeting. Notice of a special meeting must be given to every director, unless there is some express provision in the charter or by-laws or established usage to the contrary, or unless it is impractical or impossible to do so.⁴⁸ Otherwise, the meeting is illegal, and all actions taken are invalid unless later ratified.⁴⁹ Thus, an assessment levied at a special meeting held without notice was void.⁵⁰ The fact that a director might object to the proposed action is no excuse for not sending him a notice of the meeting.⁵¹

Failure to give notice is excused when emergency demands immediate action, and the directors who were not given notice could not have been notified in time to attend the meeting.⁵²

⁴⁴ *Seal of Gold Min. Co. v. Slater*, (1911) 161 Cal. 621, 120 P. 15; *Gumaer v. Cripple Creek Tunnel Transportation & Min. Co.*, (1907) 40 Colo. 1, 90 P. 81; *Whitehead v. Hamilton Rubber Co.*, (1893) 52 N. J. Ch. 78, 27 A. 897; *Atlantic Mut. Fire Ins. Co. v. Sanders*, (1858) 36 N. H. 252, 269. See also *Holcombe v. Trenton White City Co.*, (1912) 80 N. J. Ch. 122, 82 A. 618; *White v. Penelas Min. Co.*, (1939) 105 F. (2d) 726.

⁴⁵ *Doernbecher v. Columbia City Lumber Co.*, (1892) 21 Ore. 573, 28 P. 899.

⁴⁶ *Meyer v. Ft. Hill Engraving Co.*, (1924) 249 Mass. 302, 143 N. E. 915.

⁴⁷ *Ashley Wire Co. v. Illinois Steel Co.*, (1896) 164 Ill. 149, 45 N. E. 410; *Stockton Combined Harv. & Agricultural Works v. Houser*, (1895) 109 Cal. 1, 41 P. 809.

⁴⁸ *American Exchange National Bank of N. Y. v. First Nat. Bank of Spokane*, (1897) 82 F. 961 (Wash.); *McCay v. Luzerne & Carbon County Motor Transit Co.*, (1937) 125 Pa. Super. Ct. 217, 189 A. 772.

⁴⁹ *Defanti v. Allen Clark Co.*, (1921) 45 Nev. 120, 198 P. 549 (rehearing denied, Aug. 1921).

⁵⁰ *Richman v. Bank of Perris*, (1929) 102 Cal. App. 367, 141 P. 399, and *Thompson v. Williams*, (1888) 76 Cal. 153, 18 P. 153.

⁵¹ *Lycette v. Green River Gorge*, (1944) 21 Wash. (2d) 859, 153 P. (2d) 873. If notice has not been given to a director who would be ineligible to vote, or if it is self-evident that he would vote against any action as being injurious to himself (see *Ney v. Eastern Iowa Telephone Co.*, (1919) 185 Iowa 610, 171 N. W. 26), the meeting is not illegal nor are the acts thereof invalid. *Troy Min. Co. v. White*, (1898) 10 S. D. 475, 74 N. W. 236. But see the *Doernbecher* case above (Note 45), where the director's interest was held to be no excuse for failure to notify.

⁵² *Bank of Little Rock v. McCarthy*, (1892) 55 Ark. 473, 18 S. W. 759; *Stafford Springs St. R. Co. v. Middle River Mfg. Co.*, (1907) 80 Conn. 37, 66 A. 775; *Nat.*

An example of such an emergency is when all the property of a corporation is about to be sold at public auction for a fraction of its value, and the corporation wishes to postpone the sale.⁵³ Where the exceptions are not present, a special meeting held in the absence of some of the directors and without any notice to them is illegal, and the action of such a meeting, although affirmed by a majority of the directors, is invalid.⁵⁴

Rights of creditors are not affected by failure to give directors notice of a special meeting, because they are justified in assuming that the meeting is a regular one.⁵⁵

Necessity for giving notice of adjourned meetings of directors. If notice of the original meeting was given, notice of an adjourned meeting need not be given either to directors who were present at the original meeting or to those who were absent, unless otherwise required by the by-laws.⁵⁶ Directors who receive notice of a special meeting are bound to know that the meeting may be adjourned and that business which could have been transacted at the original meeting may be transacted at the adjourned meeting.⁵⁷ An adjournment of a regular meeting at which some directors are absent, without a statement of the hour at which the adjourned meeting will be held, requires that notice be given to the absentees.⁵⁸

Contents of notice of directors' meeting. Unless a statute, the charter, or a by-law prescribes a particular form of notice of directors' meeting, any form will be satisfactory. If written notice is prescribed, oral notice is not sufficient unless all the directors attend the meeting. However, if the custom is to hold meetings without written notice, oral notice is sufficient, despite a statute requiring written notice.⁵⁹

The requirement that the notice be written does not mean that it must be signed.⁶⁰ The notice should contain the exact time

Bank of Commerce v. Shumway, (1892) 49 Kan. 224, 30 P. 411; Porter v. Robinson, (1883) 30 Hun. (N. Y.) 209.

⁵³ Paducah & Illinois Ferry Co. v. Robertson, (1914) 161 Ky. 485, 171 S. W. 171.

⁵⁴ Farwell v. Houghton Copper Works, (1881) 8 F. 66.

⁵⁵ Colcord v. Granzow, (1929) 137 Okla. 194, 278 P. 654.

⁵⁶ Seal of Gold Min. Co. v. Slater, (1911) 161 Cal. 621, 120 P. 15; Whitcomb v. Giannini, (1919) 43 Cal. App. 229, 184 P. 887; Clark v. Oceano Beach Resort Co., (1930) 106 Cal. App. 574, 289 P. 946.

⁵⁷ Ibid.

⁵⁸ Thompson v. Williams, (1888) 76 Cal. 153, 18 P. 153.

⁵⁹ O'Rourke v. Grand Opera House Co., (1913) 47 Mont. 459, 133 P. 965.

⁶⁰ Bell v. Standard Quicksilver Co., (1905) 146 Cal. 699, 81 P. 17.

and place of the meeting,⁶¹ but the purpose of the meeting need not be stated unless it is expressly required by statute, charter, or by-law.⁶² The general rule is that at a special meeting called by a general notice, any business whatever may be transacted.⁶³ In other words, when a notice does not state a specific purpose, it is presumed and understood that the meeting is called to consider and act upon any general business matters that may come before it.⁶⁴ However, if the purpose is extraordinary, it is best to state it. If the notice of a special meeting states a purpose, the courts are likely to hold that any extraordinary business outside of that stated in the notice cannot be transacted⁶⁵ unless all the directors are present.

Delivery of notice of directors' meetings. If the notice is received by the director, or if he attends the meeting, it is immaterial by what means notice was conveyed to him. The manner of serving notice becomes important when the director is absent from the meeting and the question arises whether notice was properly served upon him. If the by-laws are silent as to the manner in which written notice shall be served, it is best to mail the notice to the director.⁶⁶ There are some cases, however, which hold that, when no mode of giving notice of directors' meetings is provided in the by-laws or regulations of a corporation, personal notice must be given to each director.⁶⁷

Waiver of notice of directors' meeting. The directors may

⁶¹ *Hackler v. International Traveler's Ass'n*, (1914) (Tex. Civ. App.), 165 S. W. 44.

⁶² *Homan v. Fir Products Co.*, (1923) 123 Wash. 260, 212 P. 240. But see *Wall v. Utah Copper Co.*, (1905) 70 N. J. Ch. 17, 62 A. 533, and *Trendley v. Illinois Traction Co.*, (1912) 241 Mo. 73, 145 S. W. 1. See also *Gold Min. Co. v. Slater*, (1911) 161 Cal. 621, 120 P. 15; *Bank of National City v. Johnston*, (1900) (Cal.) 60 P. 776.

⁶³ *In re Lone Star Shipbuilding Co.*, (1925) 6 F. (2d) 192 (N. Y.); *Granger v. Original Empire Mill & Min. Co.*, (1881) 59 Cal. 678; *Ashley Wire Co. v. Illinois Steel Co.*, (1896) 164 Ill. 149, 45 N. E. 410; *In re Argus Co.*, (1893) 138 N. Y. 557, 34 N. E. 388.

⁶⁴ *Ibid.*

⁶⁵ *Mercantile Library Hall Co. v. Pittsburgh Library Ass'n*, (1896) 173 Pa. 30, 33 A. 744; *Federal Mining & Engineering Co. v. Pollak*, (1939) 59 Nev. 145, 85 P. (2d) 1008.

⁶⁶ *Ashley Wire Co. v. Illinois Steel Co.*, (1896) 164 Ill. 149, 45 N. E. 410, aff'g 60 Ill. App. 179. Receipt of the notice will be presumed in the absence of proof to the contrary.

⁶⁷ *Bank of Little Rock v. McCarthy*, (1892) 55 Ark. 473, 18 S. W. 759, in which it was held that it was not sufficient to leave a written notice of a meeting at the usual place of residence of a director, while he and his family were temporarily absent.

waive notice of a meeting before it is held; but directors who are absent from a meeting, the time and place of which were not fixed, cannot waive the required notice after it has been held.⁶⁸ The principles underlying the decisions regarding notice of directors' meetings are explained as follows:

Each member of a corporate body has the right to consultation with the other, and has the right to be heard upon all questions considered, and it is presumed that if the absent members had been present, they might have dissented, and their arguments might have convinced the majority of the wisdom of their proposed action, and thus have produced a different result. If, however, they had notice and failed to attend, they waived their rights; likewise, if they signed a waiver of notice prior to the meeting; but consent given subsequent to the meeting, looking to the ratification of what was done, is without force to validate the action taken.⁶⁹

Ratification of action taken at improperly called meetings. The object of giving notice to directors is that they may have an opportunity to be present at the meeting and take part in its proceedings. Therefore, if all the directors attend and participate in the meeting it is immaterial that notice has not been given as provided in the by-laws.⁷⁰ Directors cannot participate in a meeting and then, when an action is voted over their objections, claim that the meeting is illegal.⁷¹ Action taken by the directors at a meeting for which proper notice has not been given may be ratified, of course, at a subsequent meeting at which all the directors are present.⁷² If the subsequent meeting is called upon proper notice, the business transacted at the improperly called previous meeting may be ratified, although all the members of the board do not attend the subsequent meet-

⁶⁸ *United States v. Interstate R. Co.*, (1926) 14 F. (2d) 328; *Lippman v. Kehoe Stenograph Co.*, (1915) 11 Del. Ch. 80, 95 A. 895; *Holcombe v. Trenton*, (1912) 80 N. J. Eq. 122, 82 A. 618, aff'd 82 N. J. Eq. 364, 91 A. 1069. But see *Stafford Springs St. R. Co. v. Middle River Mfg. Co.*, (1907) 80 Conn. 37, 66 A. 775, in which waiver of notice subsequent to a meeting was considered sufficient, the corporation having acquiesced in what was done at the meeting; *Clark Realty Co. v. Douglas*, (1923) 46 Nev. 378, 212 P. 466.

⁶⁹ *Holcombe v. Trenton*, (1912) 80 N. J. Eq. 122, 82 A. 618, aff'd 82 N. J. Eq. 364, 91 A. 1069.

⁷⁰ *Minneapolis Times Co. v. Nimocks*, (1893) 53 Minn. 381, 55 N. W. 546; *Homan v. Fir Products Co.*, (1923) 123 Wash. 260, 212 P. 240; *Clark v. Mutual Loan & Investment Co.*, (1937) 88 F. (2d) 202.

⁷¹ *Zachary v. Milin*, (1940) 294 Mich. 622, 293 N. W. 770.

⁷² See *McCay v. Luzerne & Carbon County Motor Transit Co.*, (1937) 125 Pa. Super. Ct. 217, 189 A. 772.

ing.⁷³ Approval of the minutes of the prior illegal meeting is not ratification of action taken at that meeting.⁷⁴

Place of directors' meetings. The directors' meetings should be held at the place and time designated in the notice of the meeting,⁷⁵ and the place and time there noted should not conflict with the requirements of the statute, charter, or by-laws.⁷⁶ When the statute says meetings shall be held at the office *or* principal place of business, the certificate of incorporation calls for meetings at the principal place of business, and the by-laws call for meetings at the office of the company, the statute governs, and a meeting held at the office of the company is legal.⁷⁷ The statutes of many of the states authorize the holding of directors' meetings, as provided in the by-laws, either within or without the state. In the absence of an express provision naming a particular place, the directors may designate any reasonably convenient place within the state.⁷⁸ The directors are not bound to meet at the principal place of business of the corporation.⁷⁹

Legality of meetings held outside the state. The courts generally agree that the directors may meet outside the state, in the absence of a provision restricting the place of meeting to the state of incorporation, to transact any business in which they act as mere agents of the company or superintendents of the business.⁸⁰ A difference of opinion exists concerning the power of the directors to meet outside the state to act upon such matters as electing officers and levying assessments; in other words, to

⁷³ *County Court of Taylor County et al. v. Baltimore & Ohio R. Co.*, (1888) 35 F. 161.

⁷⁴ *Belle Isle Corp. v. MacBean*, (1946) (Del. Ch.) 49 A. (2d) 5.

⁷⁵ A meeting held in the hall outside the office because the directors found the office locked was valid, though the statute required the meeting to be held at the principal office. *Seal of Gold Min. Co. v. Slater*, (1911) 161 Cal. 621, 120 P. 15. The court said in this case: "It cannot be, under any reasonable construction of the statute, that any person who happens to be in possession of the office of the corporation has the power of excluding the directors and members [in order] to absolutely prevent the holding of meetings." To the same effect, see *Clark v. Oceano Beach Resort Co.*, (1930) 106 Cal. App. 574, 289 P. 946.

⁷⁶ *Moreno Mut. Irr. Co. v. Jordan*, (1925) 197 Cal. 69, 239 P. 716.

⁷⁷ *Ibid.*

⁷⁸ *Russian Reinsurance Co. v. Stoddard*, (1925) 211 N. Y. App. Div. 132, 207 N. Y. Supp. 574; *Corbett v. Woodward*, (1879) 5 Sawy. (U. S.) 403, Fed. Cas. No. 3223.

⁷⁹ *Hackler v. International Traveler's Ass'n*, (1914) (Tex. Civ. App.), 165 S. W. 44.

⁸⁰ *Saltmarsh v. Spaulding*, (1888) 147 Mass. 224, 17 N. E. 316. See also *Lippman v. Kehoe Stenograph Co.*, (1916) 11 Del. 190, 98 A. 943.

act in a purely corporate capacity. Thus, in one case, it was held that the directors may not meet outside the state to make calls upon stock,⁸¹ whereas in another it was held that a meeting for this purpose may be held outside the state of incorporation.⁸²

If the statute specifies that meetings of directors shall be held within the state, a meeting outside the state will not be legal; the action of the directors taken at such a meeting will not be binding.⁸³ Where the statute requires the written consent of all the directors if meetings are to be held outside the state, a valid meeting cannot be held outside the state without such written consent.⁸⁴ Thus, notes authorized at a directors' meeting outside the state, without the unanimous consent of the directors to hold the meeting elsewhere than at the office of the corporation, were held invalid.⁸⁵ Those who attend the meeting and participate in the action cannot object to the validity of the meeting on the ground that it was improperly held outside the state.⁸⁶

Quorum at directors' meetings. The presence of a quorum at a meeting is necessary to enable the directors to transact business.⁸⁷ A quorum is presumed to be present unless it is questioned or unless the record shows that one is not present.⁸⁸ Corporations can fix their own quorum requirements, as long as they do not conflict with statutory requirements.⁸⁹ The presence and vote at a meeting of directors owning a majority of the stock is not a substitute for quorum requirements.⁹⁰

A director cannot be tricked into attendance at a meeting against his will in order to obtain a quorum.⁹¹ For example, if the directors come together accidentally, some of them cannot

⁸¹ *Ormsby v. Vermont Copper Mining Co.*, (1874) 56 N. Y. 623.

⁸² *Ohio & M. R. Co. v. McPherson*, (1864) 35 Mo. 13.

⁸³ *State National Bank v. Union Bank*, (1897) 168 Ill. 519, 48 N. E. 82.

⁸⁴ *A. Lorenze Co. v. Penn-Louisiana Oil & Gas Co.*, (1924) 155 La. 749, 99 So. 586. See *Illig v. Chartiers Ry. Co.*, (1920) 268 Pa. 467, 112 A. 116, in which it was held that the board had authority to carry out a resolution to change the route of the road, passed at a meeting of the board held outside the state of domicile.

⁸⁵ *A. Lorenze Co. v. Penn-Louisiana Oil & Gas Co.*, *supra* (Note. 84).

⁸⁶ *Wood v. Boney*, (1891) (N. J. Eq.) 21 A. 574.

⁸⁷ *Parucki v. Polish Nat. Catholic Church*, (1920) 114 N. Y. Misc. 6, 186 N. Y. Supp. 702; *Engles v. Shaffer*, (1920) 143 Ark. 31, 219 S. W. 343; *Cleburne County Bank v. Butter Gin Co.*, (1931) 184 Ark. 503, 42 S. W. (2d) 769; *Federal Mining & Engineering Co. v. Pollak*, (1939) 59 Nev. 145, 85 P. (2d) 1008.

⁸⁸ *Coombs v. Harford*, (1904) 99 Me. 426, 59 A. 529.

⁸⁹ *Benintendi v. Kenton Hotel*, (1945) 294 N. Y. 112, 60 N. E. (2d) 829.

⁹⁰ *Belle Isle Corp. v. MacBean*, (1946) (Del. Ch.) 49 A. (2d) 5; comment, 45 *Mich. Law Rev.* 630, March, 1947.

⁹¹ *Trendley v. Illinois Traction Co.*, (1912) 241 Mo. 73, 145 S. W. 1; *Zachary v. Milin*, (1940) 294 Mich. 622, 293 N. W. 770.

declare, over the protests of others, that the persons gathered together are in a "meeting."⁹² But if all members of the board are present and are willing to transact corporate business, then the gathering is a legal matter.⁹³

Quorum requirements for ratification are the same as those for original authorization.⁹⁴ In regard to the necessity for a continuance of a quorum during a meeting, see page 14.

Quorum when board has vacancies. Where there is no provision in the statutes, charter, or by-laws, a majority of the required number of directors is the minimum requirement for a quorum,⁹⁵ even where there are vacancies on the board.⁹⁶ But where the stockholders had passed a resolution increasing the number of directors, and no actual change in the number had been made, a quorum of the old board was sufficient.⁹⁷ Unfilled directorships have been distinguished from vacant directorships for quorum purposes.^{97a} Although the charter provides that the corporation shall be managed by a certain number of directors, the by-laws can provide that a majority of the directors (for the time being in office) shall constitute a quorum.⁹⁸ Under such a by-law, if a corporation is required by its charter to have a board of seven directors, and there are two vacancies on the board, three directors constitute a quorum and can hold a legal meeting.

The fact that there are vacancies on the board does not prevent the remaining directors from holding meetings and transacting business, when they constitute a majority of the entire board as it would be constituted if all the vacancies were filled.⁹⁹

If the number of members of the board is less than the quorum requirements, the board cannot transact any business other than

⁹² Zachary v. Milin, *supra* (Note 91).

⁹³ *Ibid.*

⁹⁴ Belle Isle Corp. v. MacBean, *supra* (Note 90).

⁹⁵ Wells v. Rahway White Rubber Co., (1869) 19 N. J. Ch. 402; Story v. Furman, (1862) 25 N. Y. 214; Gay v. Young Men's Consolidated Co-op. Mercantile Inst., (1910) 37 Utah 280, 107 P. 237.

⁹⁶ Hotaling v. Hotaling, (1924) 193 Cal. 368, 224 P. 455 (rehearing denied, April 1924); Bruch v. National Guarantee Credit Corp., (1922) 13 Del. Ch. 180, 116 A. 738; Mecleary v. John S. Mecleary, Inc., (1923) 13 Del. Ch. 329, 119 A. 557; Belle Isle Corp. v. MacBean, (1946) (Del. Ch.) 49 A. (2d) 5.

⁹⁷ Robertson v. Hartman, (1936) 6 Cal. (2d) 408, 57 P. (2d) 1310.

^{97a} Belle Isle Corp. v. MacBean, (1948) (Del. Ch.) 61 Del. 699.

⁹⁸ Twisp Mining & Smelting Co. v. Chelan Mining Co., (1943) 16 Wash. (2d) 264, 133 P. (2d) 300.

⁹⁹ See power to fill vacancies, on page 264.

the filling of vacancies,¹⁰⁰ until the vacancies are filled.¹⁰¹ If the number is reduced below the minimum required by law, the board may transact business if a quorum still exists and is present.¹⁰²

Interested directors, for quorum purposes. Frequently a quorum is present, but one of the directors necessary to make a quorum is personally interested in the business before the meeting. The general rule is that a director who is disqualified from voting because he is *personally interested* in the matter under consideration *cannot be included* in determining whether a quorum is present.¹⁰³ However, unless prohibited by statute, a corporation's charter can provide that an interested director may be counted for quorum purposes.¹⁰⁴ There is some authority for including such a director even in the absence of express charter provision,¹⁰⁵ but it represents a minority view and not the "better opinion."¹⁰⁶

The widespread practice of having corporate attorneys and employees on boards of directors indicates a fairly universal acceptance of the proposition that such relationships do not disqualify a director from being counted in determining the existence of a quorum.¹⁰⁷ Thus, a director who was an attorney and expected compensation for negotiating a contract has been counted for quorum purposes; also, a director who was an employee and participant in a bonus plan.¹⁰⁸

¹⁰⁰ Currie v. Matson, (1940) 33 F. Supp. 454.

¹⁰¹ See footnotes 87 and 96.

¹⁰² Pennington v. George W. Pennington Sons, (1915) 27 Cal. App. 57, 148 P. 947; Porter v. Lassen County Land & Cattle Co., (1899) 127 Cal. 261, 59 P. 563; Castle v. Lewis, (1879) 78 N. Y. 131. That the number of directors was less than that required by statute cannot be urged collaterally by a creditor of the corporation. Wallace & Sons v. Walsh, (1890) 125 N. Y. 26, 25 N. E. 1076.

¹⁰³ Marcuse v. Broad-Grace Arcade Corporation, (1935) 164 Va. 553, 180 S. E. 327; Hein v. Gravelle Farmers Elevator Co., (1931) 164 Wash. 309, 2 P. (2d) 741; Holcomb v. Forsyth, (1927) 216 Ala. 484, 113 So. 516; Nicholson v. Kingery, (1927) 37 Wyo. 299, 261 P. 122; Cardin Bldg. Co. v. Smith, (1927) 125 Okla. 300, 258 P. 910; In re Lone Star Shipbuilding Co., (1925) 6 F. (2d) 192; McLean v. Bradley, (1922) 282 F. 1011; North Confidence Min. & Devel. Co. v. Fitch, (1922) 58 Cal. App. 329, 208 P. 328; In re Fergus Falls Woolen Mills Co., (1941) 41 F. Supp. 355; Goldie v. Cox, (1942) 130 F. (2d) 695. See also Hotaling v. Hotaling, supra (Note 96); Bassett v. Fairchild, (1901) 132 Cal. 637, 64 P. 1082; Whecher v. Delaware Mines Corp., (1932) 52 Idaho 304, 15 P. (2d) 610; Crump v. Bronson, (1937) 168 Va. 527, 191 S. E. 663.

¹⁰⁴ Piccard v. Sperry Corp., (1943) 48 F. Supp. 465, aff'd, (1946) 152 F. (2d) 462, cert. denied, 5/13/46, 66 S. Ct. 1024.

¹⁰⁵ Buell v. Buckingham, (1864) 16 Iowa 284, 85 Am. Dec. 516; Gumaer v. Cripple Creek Tunnel T. & M. Co., (1907) 40 Colo. 1, 90 P. 81, 13 Ann. Cas. 781, 122 Am. St. Rep. 1024.

¹⁰⁶ Piccard v. Sperry Corp., supra (Note 104).

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

Conduct of directors' meetings. In the case of small corporations, meetings of the board of directors are usually conducted in an informal manner. Larger corporations, however, generally conduct their directors' meetings with considerable formality. The chairman of the board sits at the head of the directors' table. The president sits at the right of the chairman, or if the office of chairman of the board does not exist, the president sits at the head of the table. Usually the secretary sits next to the chairman, often at his left, so that he can be consulted conveniently on any matter in the order of business and hand documents and records to him with a minimum of disturbance. The president generally presides at meetings of the directors, unless some other provision is made by the by-laws.¹⁰⁹

Votes are usually taken in an informal manner, generally by a call for "yes" and "no" answers.¹¹⁰ The usual order of business is as follows:

1. Call to order.
2. Announcement of a quorum present.
3. Reading and approval of the minutes of the previous meeting.
4. Reports of officers and committees.
5. Unfinished business.
6. Election of officers, if there is to be an election.
7. Declaration of dividend, if there is to be a dividend declared.
8. Other new business.
9. Adjournment.

Voting at directors' meetings. Unless expressly provided otherwise in the statutes, charter, or by-laws, a majority vote of the directors present at a meeting, as distinguished from a majority of the full board, is sufficient to authorize action.¹¹¹ Usually the board acts by a majority of a quorum present and *voting*, irrespective of the number of other directors who may be present at the meeting.¹¹² A director has no additional authority

¹⁰⁹ See *Benson v. Keller*, (1900) 37 Ore. 120, 132, 60 P. 918.

¹¹⁰ A chairman was justified in declaring a resolution unanimously adopted, where one of the directors who did not answer "no" denied that he voted in the affirmative, and did not dispute the declaration of unanimous adoption. *Herring-Curtiss Co. v. Curtiss*, (1923) 120 N. Y. Misc. 733, 200 N. Y. Supp. 7.

¹¹¹ *Sargent & Co. v. Heggen*, (1922) 195 Iowa 361, 190 N. W. 506; *Edison v. Edison United Phonograph Co.*, (1894) 52 N. J. Ch. 620, 29 A. 195; *Western Cottage Piano & Organ Co. v. Burrows*, (1908) 144 Ill. App. 350; *Stott v. Stott Realty Co.*, (1929) 246 Mich. 267, 224 N. W. 623; *Kaplan v. Block*, (1944) 183 Va. 327, 31 S. E. (2d) 893.

¹¹² See *Crowley v. Commodity Exchange, Inc.*, (1944) 141 F. (2d) 182.

because he is the representative of the majority stockholder,¹¹³ for voting is not on the basis of stock ownership. A director cannot vote by proxy.¹¹⁴

Voting by interested directors. Any director who is present at a meeting may vote on any subject in which he is not pecuniarily interested.¹¹⁵ The vote of an interested director cannot be counted if necessary to carry the vote,¹¹⁶ but his vote does not invalidate a resolution passed by a majority of disinterested directors.¹¹⁷ A director who is attorney for a person having a claim against the corporation is not qualified to vote on the settlement of the claim,¹¹⁸ nor may directors against whom the corporation is bringing suit vote on that question.¹¹⁹ A wife is not disqualified at a directors' meeting in fixing the sum due her husband under a contract with the corporation.¹²⁰ (See "Interested directors for quorum purposes," page 145; also, "Voting on contracts by interested directors," page 236.)

¹¹³ Trethewey v. Green River Gorge, (1943) 17 Wash. (2d) 697, 136 P. (2d) 999.

¹¹⁴ Stevens v. Acadia Dairies, Inc., (1927) 15 Del. Ch. 248, 135 A. 846; Perry v. Tuscaloosa Cotton-Seed Oil-Mill Co., (1891) 93 Ala. 364, 9 So. 217; State v. Perkins, (1901) 90 Mo. App. 603; Craig Medicine Co. v. Merchants' Bank, (1891) 59 Hun., (N. Y.) 561, 14 N. Y. Supp. 16. In Lippman v. Kehoe Stenograph Co., (1915) 11 Del. Ch. 80, 95 A. 895, the court said: "His [the director's] judgment is necessary, and he cannot delegate his duties, or assign his powers." See also First Nat. Bank of Omaha v. East Omaha Box Co., (1902) 2 Neb. Unof. 820, 90 N. W. 223.

¹¹⁵ Hames v. Spokane-Benton County Natural Gas Co., (1922) 118 Wash. 156, 203 P. 18; Sacajawea Lumber & Shingle Co. v. Skookum Lumber Co., (1921) 116 Wash. 75, 198 P. 1112, 116 Wash. 699, 198 P. 1114; Fields v. Victor Building & Loan Co., (1918) (Okla.) 175 P. 529; Alward v. Broadway Gold Mining Co., (1933) 94 Mont. 45, 20 P. (2d) 647. In Bowman v. Gum, Inc., (1937) 327 Pa. 403, 193 A. 271, it was held that a director is not *per se* disqualified from voting upon matters in which he has a financial interest, but his participation will be closely scrutinized.

¹¹⁶ Goldie v. Cox, (1942) 130 F. (2d) 695; Bovay v. Byllesby & Co., (1944) (Del.) 38 A. (2d) 808.

¹¹⁷ In re Franklin Brewing Co., (1920) 263 F. 512 (N. Y.). In Washington the Supreme Court has held that a resolution of trustees (directors) voting a salary as a general manager to one of their members who voted in favor of it, is merely voidable and not void. Standard Furniture Co. v. Hotel Butler Co., (1931) 161 Wash. 109, 296 P. 153. The same rule prevails in Maine, where the voidable act of the directors may be ratified by the formal act of acquiescence of the corporation. Bates Street Shirt Co. v. Waite, (1931) 130 Me. 352, 156 A. 293. See also Metropolitan Casualty Ins. Co. v. Bank, (1932) (Tex. Civ. App.) 54 S. W. (2d) 358. See also Caminetti v. Prudence Mut. Life Ins. Ass'n, (1943) (Cal. App.) 142 P. (2d) 41, aff'd on rehearing, (1944) 62 Cal. App. (2d) 945, 146 P. (2d) 15.

¹¹⁸ North Confidence Min. & Devel. Co. v. Fitch, (1922) 58 Cal. App. 329, 208 P. 328; see also Stevenson v. Sickelsteel Lumber Co., (1922) 219 Mich. 18, 188 N. W. 449.

¹¹⁹ Anderson v. Gailey, (1929) 33 F. (2d) 589 (Ga.).

¹²⁰ Cuneo v. Giannini, (1919) 40 Cal. App. 348, 189 P. 633.

Irregularity of directors' meetings. The principles expressed under irregularities of stockholders' meetings apply generally to directors' meetings. Ratification by directors at a subsequent legal meeting, or by stockholders through express ratification or through acquiescence with knowledge of the facts, may confirm illegal or irregular proceedings of the directors and give the action validity.¹²¹

Adjournment of directors' meeting for lack of quorum. The principles governing adjournment of stockholders' meetings apply to directors' meetings as well (see page 18). If there is less than a quorum present, the meeting must necessarily adjourn. To avoid interference with the conduct of the business through repeated failure of a quorum to attend, some corporations include in their by-laws a provision that, if a meeting adjourns for lack of a quorum, the president may send out notices, setting forth the failure of the meeting to convene for want of a quorum, and calling another meeting, at which a quorum shall consist of two or more directors, instead of the larger number ordinarily required.

The by-laws usually provide that a majority of those present at a meeting which fails because of the absence of a quorum may adjourn the meeting to another day. Unless authorized by statute, charter, or by-laws, less than a quorum of directors have no power to adjourn a meeting to another day.¹²² At an adjourned meeting, such business may be transacted as might have been transacted at the original meeting. (See page 139 for necessity of notice of adjourned meetings.)

Rescission of action taken at previous directors' meetings. The directors have the right to repeal any resolution passed at previous meetings, or to rescind any previous action, provided that the repeal or rescission does not involve a breach of contract or disturb a vested right.¹²³ The right of the directors to revoke declared dividends is treated separately on page 635.

Notification of action at directors' meetings. Provision is often made in the by-laws that notification regarding action taken at directors' meetings shall be given by the secretary. He is sometimes directed to notify the auditor of expenditures authorized at meetings, or to advise other officers or persons of

¹²¹ See page 250.

¹²² *Noremac, Inc. v. Centre Hill Court*, (1935) (Va.) 178 S. E. 877; *Cheney v. Canfield*, (1910) 158 Cal. 342, 111 P. 92.

¹²³ *Staats v. Biograph*, (1916) 236 F. 454.

any business transacted in which they are concerned. Usually copies of resolutions are distributed after meetings to interested persons who request them, to directors who were absent from the meeting, and to officers or executives who have been directed to take the action called for by the resolution.

Meetings of finance and executive committees. In many corporations, the executive and finance committees are the most active bodies. They are created generally in accordance with the provisions of the by-laws, or by resolution of the board of directors. The by-laws usually prescribe the manner of calling committee meetings, the number of persons necessary to constitute a quorum, the method of filling vacancies, the number of votes necessary to take action, and similar regulations. The by-laws or resolution creating the committee may provide that the committees shall set up their own rules of procedure. In the absence of special rules governing the conduct of committee meetings, the rules governing meetings of directors apply. Thus, the executive or other committee must act as a whole. In the absence of specific requirements, a majority of the committee will constitute a quorum and a majority of those present at any meeting will have power to decide questions that come before the meeting. Committee meetings are ordinarily not conducted with as much formality as meetings of the board of directors.

The function of the executive committee generally is to exercise all the powers of the board of directors, in accordance with the policy of the corporation, during intervals between formal meetings of the board of directors (see page 247). Frequently, the minutes of meetings of the executive committee, held since the last meeting of the board of directors, are read at each directors' meeting, and a motion to approve and ratify is passed.

CHAPTER 4

FORMS RELATING TO DIRECTORS' AND
COMMITTEE MEETINGS

CALLS, NOTICES, AND WAIVERS OF NOTICE OF
DIRECTORS' MEETINGS

No. 88

Call of regular meeting of directors by president.

....., 19...
To the Directors of.....Corporation:

The undersigned, President of theCorporation,
hereby calls the regular monthly meeting of the Board of Directors of
said Corporation, to be held at the office of the Corporation,
..... (Street), (City), (State), on the
.. day of, 19.., at o'clock in the noon.

.....
President

No. 89

Request of directors to president to call special meeting of board.

..... City, State
....., 19..

Mr., President of Corporation
..... Street
..... City, State

Dear Sir:

The undersigned, being a majority of the Board of Directors of the
.....Corporation, hereby request you to call a special
meeting of said Board, to be held at the office of the Corporation,
..... (Street), (City), (State), at
..... o'clock in the noon of (Day of Week), the
.. day of, 19...

.....
.....

No. 90

Call of special meeting of directors by president.

To,
Secretary of Corporation:

The undersigned, President of Corporation, pursuant to authority vested in him by Article, Section of the By-laws of said Corporation, hereby calls a special meeting of the Board of Directors of the said Corporation, to be held on the .. day of, 19.., at o'clock ..M., at the office of the said Corporation at (Street), (City), (State), for the purpose of:

(Here insert purposes of meeting; see form No. 98.)

As Secretary of the Corporation, you are hereby authorized and directed to give written notice, personally or by mail, of the time, place, and purpose of the said meeting to each member of the said Board of Directors, as required by Article, Section of the By-laws of the said Corporation.

Dated at (City), (State), this .. day of, 19...

.....
President

No. 91

Call of special meeting of board of directors by the directors.

To,
Secretary of Corporation:

We, the undersigned, directors of Corporation, pursuant to the authority vested in us by Article, Section of the By-laws of said Corporation, do hereby call a special meeting of the Board of Directors of the said Corporation, to be held on the .. day of, at o'clock in the noon, at the office and principal place of business of said Corporation, at (Street), (City), (State), for the purpose of:

(Here insert purposes of meeting; see form No. 98.)

We hereby authorize, empower, and direct you, as Secretary of the said Corporation, to give written notice of the time, place, and purpose

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of the said meeting to each member of the Board of Directors of the said Corporation, in accordance with the By-laws.

Dated at (City), (State), this .. day of, 19...

.....
.....
.....
Directors of Corporation

No. 92

Notice of annual meeting of directors.

To the Board of Directors of Corporation:

NOTICE IS HEREBY GIVEN That, pursuant to Article, Section of the By-laws of the Corporation, the annual meeting of the Board of Directors of said Corporation will be held at the office of the Corporation, located at (Street), (City), (State), on the .. day of, 19.., at o'clock ..M.

Dated, 19.. Secretary

No. 93

Notice of directors' meeting to be held immediately following annual stockholders' meeting.

NOTICE IS HEREBY GIVEN That, pursuant to Section of Article of the By-laws of the Company, there will be a meeting of the Board of Directors of the said Company, at the offices of the Company, (Street), (City), (State), on the .. day of, 19.., such meeting to be held immediately after the annual meeting of the stockholders, the said stockholders' meeting to be held at o'clock ..M. on said day.

Dated, 19.. Secretary

No. 94

Printed notice of regular meeting of directors.

A regular meeting of the Board of Directors of The Corporation will be held on, 19.., at

..... (Street), (City), (State).
 Business:

 Secretary

No. 95

Printed notice of regular or special meeting of directors.

On (Day of Week), the .. day of .., at
 o'clock .. M., a (insert regular or special) meeting of the
 Board of Directors of Manufacturing Company
 will be held at the office of the Company.

.....
 Secretary
 To.....
 City of .., State of .., .., 19..

No. 96

Notice of special meeting of directors (purposes not specified).

NOTICE IS HEREBY GIVEN That, pursuant to the call of the President
 of Corporation, a special meeting of the Board
 of Directors of the said Corporation will be held at the office of
 the Corporation at (Street), (City),
 (State), on the .. day of .., at o'clock
 .. M.

Dated .., 19..

 Secretary

No. 97

Notice of special meeting of directors (specifying purposes).

..... City, State
 To .., .., and ..,
 Directors of Corporation:

NOTICE IS HEREBY GIVEN That, in accordance with the provisions of
 Article .., Section .. of the By-laws of the
 Corporation, and in accordance with the requirements of the laws of
 the State of .., a special meeting of the Board of Directors of
 the said Corporation will be held at its office and principal place of
 business, (Street), (City),
 (State), on the .. day of .., 19.., at o'clock in
 the noon, for the purpose of:

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- 1. (Here insert particular purposes of meeting; see form No. 98.)
 - 2. To transact such other business as may lawfully come before said meeting.
- Dated this .. day of, 19..

.....
Secretary

No. 98

Purpose clauses for notices of directors' meetings.

To Employ Accountants

To employ accountants to audit the books and accounts of the corporation at the close of the fiscal year on the .. day of, 19...

To Ratify Charitable and Other Contributions

To consider and pass upon the ratification and confirmation of charitable and other lawful contributions made by any of the officers of this corporation during the year ending, 19.., in an amount not in excess of (\$.....) Dollars.

To Fill Vacancies in Board of Directors

To elect (.....) directors to fill the vacancies in the membership of the Board of Directors due to the resignations of and

To Consider Removal of Director

To consider whether sufficient cause exists for the removal of from the office of director of the corporation, and to remove him if such cause exists.

To Consider Annual Report of Officers

To receive and hear the annual report of the officers of the corporation, and to consider its confirmation and ratification.

No. 99

Notice of adjourned meeting of directors.

To the Directors of Corporation:

PLEASE TAKE NOTICE That the meeting of the Board of Directors, held at the office of the Corporation at (Street), (City), (State), on the .. day of, 19.., at o'clock .. M., has been adjourned to and will be held on the .. day of, 19.., at the same place.

.....
President

....., 19..

No. 100

Notice of failure of directors' meeting to convene for lack of quorum
and calling of another meeting.

....., 19..
To the Directors of the Corporation:

PLEASE TAKE NOTICE That the special meeting of directors of the
..... Corporation, called to be held at the office of the
Corporation, (Street), (City),
(State), on the .. day of, 19.., at o'clock in the
.....noon, failed to convene for lack of a quorum, and that, pursuant
to the provisions of the By-laws of the Corporation, another special
meeting of the directors is hereby called to be held on the .. day of
....., 19.., at the same place, at which or more directors
will constitute a quorum for the transaction of business.

.....
President

No. 101

Waiver by all directors of notice of meeting (annual, regular, or
special).

We, the undersigned, being all the directors of
Corporation, a corporation organized and existing under the laws of
the State of, do hereby waive any and all notice as pro-
vided by the laws of the State of, or by the Articles of
Incorporation or By-laws of the said Corporation, of the time, place, and
purpose of a (*insert annual, regular, or special*) meeting of
the Board of Directors of said Corporation, and do hereby fix the ..
day of, 19.., at o'clock in the noon, as the
time, and the office of the Corporation, (Street),
..... (City), (State), as the place, and the following
as the purposes of the said meeting:

(Here insert purposes of meeting; see form No. 98.)

We hereby consent to the transaction of any business, in addition to
the business herein noticed to be transacted, that may come before
the meeting.

Dated , 19..

.....
.....
.....
(To be signed by all the directors)

No. 102

Waiver by certain directors of notice of meeting.

We,, and
....., directors of the Corporation, a corpo-
ration organized under the laws of the State of, hereby
waive notice of the time, place, and purpose of a (*insert
annual, regular, or special*) meeting of the Board of Directors of the
said Corporation, to be held at the office of said Corporation,
..... (*Street*), (*City*), (*State*), on the
.. day of, 19.., at M., for the purpose of:

(Here insert purposes of meeting.)

.....
.....
.....

Directors

AFFIDAVITS AND CERTIFICATES RELATING TO
DIRECTORS' MEETINGS

No. 103

Affidavit of secretary that personal notice of meeting was served.

State of }
County of } ss:

....., being duly sworn, on oath deposes and says
that he is the Secretary of the Corporation, a cor-
poration organized and existing under the laws of the State of
.....; and that on the .. day of, 19.., he served
notice of a directors' meeting of the said Corporation, a copy of which
is hereto attached and is hereby made a part of this affidavit, upon
the following members of the Board of Directors: (*insert
names of members*), by handing personally to each of them a copy
thereof.

.....
Secretary

Subscribed and sworn to before me
this .. day of, 19...

.....
Notary Public

No. 104

Affidavit of service of notice of directors' meeting by mail.

State of }
County of } ss:

....., being duly sworn, deposes and says that he is Secretary of Corporation, a corporation existing under the laws of the State of

That on the .. day of, 19.., at the order and direction of the President of the said Corporation, he caused the notice of the (*insert annual, regular, or special*) meeting of the directors of the said Corporation, a copy of which is hereunto annexed and made a part of this affidavit as if herein fully set forth, to be deposited in a United States post-office box at the City of, in a sealed and post-paid wrapper, duly addressed to each member of the Board of Directors of the said Corporation, at his last-known post-office address.

Sworn to before me
this .. day of, 19..

.....
Secretary

.....
Notary Public

No. 105

Affidavit of secretary of publication of notice of directors' meeting.

State of }
County of } ss:

....., being duly sworn, deposes and says that he is Secretary of Corporation, a corporation existing under the laws of the State of; that the notice of which the annexed printed slip is a true copy has, by order of the Board of Directors of the said Corporation, been published in the, a newspaper printed and published in the City of, County of, State of, for a period of (*insert number of days or weeks*), commencing on the .. day of, 19...

Sworn to before me this ..
day of, 19..

.....
Secretary

.....
Notary Public

[*Note.* Notice of directors' meeting need not be published unless required by the by-laws, by statute, or by the articles of incorporation.]

158 FORMS—DIRECTORS' AND COMMITTEE MEETINGS

No. 106

Affidavit of service of notice of directors' meeting by mail setting forth names and addresses of directors served.

State of }
County of } ss:

....., being first duly sworn upon oath, deposes and says that he is the duly elected, qualified, and acting Secretary of the Corporation.

That pursuant to an order of as President of said Corporation, he personally gave notice to each and every director of said Corporation of the special meeting of the Board of Directors, to be held at o'clock .. M. on (*Day of Week*),, 19.., at the office of said Corporation, by depositing in the post office of the United States Mail, in the City of, State of, upon the .. day of, 19.., a notice to each of said directors, specifying the time, place, and objects for which said meeting was called (a full, true, and accurate copy of which notice is hereto attached), addressed to each of said directors at the address of each as shown by the books of said Corporation—to wit:

..... notices addressed as follows, respectively:

<i>Name</i>	<i>Address</i>
.....
.....
.....

Subscribed and sworn to before me
this .. day of, 19...

.....
Secretary

.....
Notary Public in and for the State of
....., Residing at

No. 107

Affidavit of publisher of publication of notice of directors' meeting.

State of }
County of } ss:

....., being duly sworn, deposes and says that he is and was at all the times hereinafter mentioned over the age of twenty-one (21) years and a citizen of the United States; that he is not a party to and is not interested in the matter herein; that he is and was

during all the time hereinafter mentioned the chief clerk of the printers and publishers of, a newspaper of general circulation printed and published daily (or weekly) in the City of, County of, State of, in charge of all advertisements in said newspaper; and that the notice, of which the annexed printed slip is a true copy, was published in said newspaper (....) times, commencing on the .. day of, 19.., and ending on the .. day of, 19.. (both days inclusive), and as often as said newspaper was regularly issued during said time.

Sworn to before me this
.. day of, 19..

.....
Notary Public

.....

[*Note.* This form may be used for proof of publication of other notices. As to necessity of publication of notice of directors' meetings, see note to form No. 105.]

No. 108

Certification of minutes of directors' meeting.

State of }
County of } ss:

....., being duly sworn, deposes and says that he is the Secretary of the Corporation, a corporation organized and existing under the laws of the State of, and having its principal place of business at (Street), (City), (State); that he has custody of the books of the said Corporation; and that the foregoing is a true and correct copy of the minutes of a (insert annual, regular, or special) meeting of the Board of Directors of the said Corporation, held on the .. day of, 19.., at its said principal place of business.

WITNESS my hand and the seal of the said Corporation this .. day of, 19...

.....
Secretary

(Corporate Seal)

Sworn to before me this
.. day of, 19..

.....
Notary Public

Certificate of passage of resolution at directors' meeting, with acknowledgment.

..... CORPORATION

....., 19..
At a duly constituted meeting of the Board of Directors of the
..... Corporation, held on, 19.., the
following resolutions were adopted:

(Here insert resolutions.)

I, the undersigned, hereby certify that the foregoing is a true copy
of the resolutions adopted by the Board of Directors of the above-
mentioned Corporation at a meeting of the said Board held on the
aforementioned date, and entered upon the regular minute book of the
said Corporation, and now in full force and effect, and that the Board
of Directors of the said Corporation has, and at the time of the adop-
tion of the said resolutions had, full power and lawful authority to
adopt the said resolutions and to confer the powers thereby granted to
the officers therein named, who have full power and lawful authority
to exercise the same.

.....
Secretary of the Board of Directors
(Corporate Seal)

State of } ss:
County of

On this .. day of, 19.., in the said County of,
before me, a Notary Public duly commissioned and qualified, in and
for the state and county aforesaid, personally came,
personally known to me, and known to me to be the person described in
and who executed the foregoing certificate, and acknowledged to me
that he executed the same; and being by me duly sworn, did depose
and say that he is the Secretary of the Board of Directors of the
..... Corporation; that, as such officer, he keeps the
corporate minute books and seal of the said Corporation; and that the
foregoing certificate is true to his own knowledge.

Subscribed and sworn to before me
this .. day of, 19...

.....
Notary Public

No. 110

Certificate of passage of resolution signed by secretary and certified by director.

I,, do hereby certify that I am the duly { elected }
 { appointed }
 and qualified Secretary and the keeper of the records and corporate seal of, a corporation organized and existing under the laws of the State of, and that the following is a true and correct copy of certain resolutions duly adopted at a meeting of the Board of Directors thereof, convened and held in accordance with law and the By-laws of said Corporation on the .. day of, 19.., and that such resolutions are now in full force and effect:

(Here insert copy of resolution.)

IN WITNESS WHEREOF, I have affixed my name as Secretary and have caused the corporate seal of said Corporation to be hereunto affixed, this .. day of, 19...

.....
 Secretary

Affix corporate seal below:
 (Here insert seal)

I,, a director of said Corporation, do hereby certify that the foregoing is a correct copy of certain resolutions passed as therein set forth.

.....
 Director

CHAPTER 5

MINUTES OF MEETINGS

Necessity for keeping minutes of all meetings. The purpose of minutes is to transcribe into permanent and official form the actions taken at a meeting of the corporation.¹ Minutes should always be kept of meetings of stockholders, directors, and committees, not only because the duty to keep minutes is imposed upon the secretary or some other officer by statute, charter, or by-laws, but because it is expedient to do so. Accurate minutes avoid future misunderstandings, and serve as a guide to the directors in carrying out their own decisions and those of the stockholders. They are particularly useful in litigation.

Minutes as evidence. Ordinarily, minutes of meetings are prima facie evidence of what they purport to show as to business transacted at the meeting.² They, together with the by-laws, are the best evidence of the powers of the corporate officers.³ They can be contradicted, however, by oral testimony.⁴

A formal resolution is not the only evidence of corporate action.⁵ The general rule is that the recorded minutes are presumed to cover the entire subject or transaction, and make the best evidence.⁶ But if the record is incomplete, or ambiguous,

¹ Chapin v. Cullis, (1941) 299 Mich. 101, 299 N. W. 824.

² Lincoln v. Christian, (1929) 94 Pa. Super. Ct. 145.

³ Supreme Kingdom, Inc. v. Fourth Nat. Bank of Macon, (1932) 174 Ga. 779, 164 S. E. 204.

⁴ Gentry-Futch Co. v. Gentry, (1925) 90 Fla. 595, 106 So. 473. See also McMullan v. Aiken et al., (1920) 205 Ala. 35, 88 So. 135; Kelley-Koett Mfg. Co. v. Goldenberg, (1924) 207 Ky. 695, 270 S. W. 15; Commissioner of Banks v. Cosmopolitan Trust Co., (1925) 252 Mass. 348, 148 N. E. 130; KoEune v. State Bank, (1939) 134 Pa. Super. Ct. 108, 4 A. (2d) 234; Keough v. St. Paul Milk Co., (1939) 205 Minn. 96, 285 N. W. 809.

⁵ In re Norton's Will, (1927) 129 N. Y. Misc. 875, 224 N. Y. Supp. 77, and cases there cited.

⁶ Green River Mfg. Co. v. Bell, (1927) 193 N. C. 367, 137 S. E. 132. See also Central Clay Drainage Dist. v. Hunter, (1927) 174 Ark. 293, 295 S. W. 19; Spina v. Goffe et al., (1923) 112 Kan. 693, 212 P. 1093; Wenban Estate v. Hewlett, (1924) 193 Cal. 675, 227 P. 723; American & British Mfg. Corporation et al. v. New Idria Quicksilver Mining Co., (1923) 293 F. 509.

everything that was said and done—the entire setting of the occasion—may help in deciding the purpose of the act adopted at the meeting,⁷ or in interpreting a resolution.⁸ If there are no formal resolutions in the minutes, corporate action is proved by parol evidence.⁹

Effect of failure to keep minutes. It is not essential to the validity or binding effect of acts done or authority given by the board of directors or stockholders that their votes or decisions be recorded, unless a record is required by statute, charter, or by-laws.¹⁰ While acts of directors and stockholders should appear in minutes of meetings,¹¹ failure to keep minutes, even when expressly required, will not invalidate the acts of the directors or stockholders, if the act is admittedly that of the corporation.¹² Furthermore, a company cannot avoid its obligations to third parties because of its failure to keep records. Thus, where a mortgage was given in accordance with a resolution, the company was bound by the mortgage, although minutes of the meeting were not written up and attested by officers of the company.¹³

Necessity for adopting resolutions. As indicated in the previous paragraph, it is not necessary that minutes be kept, from a legal standpoint. It follows, therefore, that adoption of a formal resolution is not essential either to bind the corporation or to confer authority to bind the corporation.¹⁴ Resolutions are, however, necessary from the standpoint of expediency. They minimize misunderstandings, form a permanent and accurate record of the action agreed upon, and are invaluable as proof of proceedings at a meeting.

Motions and resolutions. Most matters of business that come before a meeting are introduced by a motion recommending that the body assembled express an opinion, take certain action, or

⁷ In re Norton's Will, *supra* (Note 5).

⁸ Oakland Scavenger Co. v. Gandi, (1942) 51 Cal. App. (2d) 69, 124 P. (2d) 143.

⁹ McCay v. Luzerne & Carbon County Motor Transit Co., (1937) 125 Pa. Super. Ct. 217, 189 A. 772.

¹⁰ Altavista Cotton Mills, Inc. v. Lane, (1922) 133 Va. 1, 112 S. E. 637; Wright v. Phillips Fertilizer Co., (1927) 193 N. C. 305, 136 S. E. 716.

¹¹ Webb v. Duvall, (1940) 177 Md. 592, 11 A. (2d) 446.

¹² Central Trust Co. v. Southern Oil Corp., (1925) 8 F. (2d) 338; Redstone v. Redstone Lumber & Supply Co., (1931) 101 Fla. 226, 133 So. 882.

¹³ Sorge v. Sierra Auto Supply Co. et al., (1923) 47 Nev. 217, 218 P. 735, 221 P. 521. See also Webb v. Duvall, *supra* (Note 11).

¹⁴ Brown v. Crown Gold Milling Co., (1907) 150 Cal. 376, 386, 89 P. 86; Alabama City G. & A. Ry. Co. v. Kyle, (1918) 202 Ala. 552, 81 So. 54; First National Bank v. Frazier, (1933) 143 Ore. 662, 22 P. (2d) 325.

order something to be done. A motion, in other words, is a proposal, and the expression "I move" is equivalent to "I propose." A resolution is adopted by a motion, made and seconded, that the resolution be adopted. Every motion need not be followed by a resolution. For example, someone may move that the meeting be adjourned, that a particular discussion be postponed, or that the report of a committee be accepted. Action frequently takes place with neither motion nor resolution. For example, the report of the inspectors of election may be unanimously approved and the secretary directed to file a duplicate in the office of the county court in the state and to attach another to the minutes of the meeting.

No hard and fast rules specifying when action should be taken by resolution can be drawn. All that can be said is that, under the following circumstances, resolutions are either required or appropriate: (1) if the matter is one that the statute, charter, or by-laws require to be covered by a resolution; (2) if a certificate showing that the authority granted by stockholders or directors to perform a certain act is required to be filed, or likely to be required at some future time; (3) if the matter regulates the management of the corporation and is meant to be permanent until changed; (4) if the matter is one of importance; (5) if the matter is one that is likely to be referred to from time to time; and (6) if the matter consists of amendments to the charter or by-laws.

By-laws and resolutions. The by-laws of a corporation are the rules adopted to govern the corporation, its officers, directors, and stockholders. They are permanent and continuing, except insofar as they may be amended.¹⁵ A resolution, on the other hand, applies to a single act, and may be passed at any meeting of the directors or stockholders provided the meeting has been properly called. It may change a previous resolution if it does not interfere with the rights of persons who claim protection under the previous resolution.¹⁶ If a resolution conflicts with a by-law, the by-law prevails. For example, a resolution raising an officer's salary above the limit set in the by-law is ineffective, unless the by-law is repealed or amended.¹⁷

When should action be embodied in the by-laws, and when

¹⁵ For power to amend the by-laws, see page 728.

¹⁶ *Hingston v. Montgomery*, (1906) 121 Mo. App. 451, 97 S. W. 202. See also *Rosenfeld v. Inland Iron Works*, (1932) 267 Ill. App. 254.

¹⁷ *Ibid.*

should it be recorded as a simple resolution? If the decision is to become a fixed policy, it should be incorporated in the by-laws. Also, if notice of the action is intended to be conveyed to all the stockholders and directors of the corporation, it should be embodied in the by-laws. On the other hand, if it is likely that the future conduct of the corporation will be subject to changing conditions, a resolution will be a more appropriate form of recording the decision. Indeed, many corporations gain flexibility by passing a by-law permitting action to be determined by resolution. In such cases, provision is made in the by-laws to safeguard the interests of the corporation. For example, the by-laws may state that regular meetings of directors shall be held at the time fixed by resolution of the directors, but provision is made in the same by-laws that no meeting held in pursuance of such general resolution shall be valid unless a copy of the resolution is sent to each director at least five days before the first meeting to be held pursuant to the resolution fixing the date, or unless all the directors are present at the meeting at which the general resolution is passed.

Secretary's duty to keep minutes. The by-laws generally provide that the secretary of the corporation shall act as secretary of all corporate meetings, and shall keep minutes of such meetings. The secretary must therefore note carefully all discussions that take place at the meeting, and all action taken, in order that his minutes may constitute an accurate and full report of the proceedings. The minutes should be clear and concise, complete and accurate. The importance of simple, unambiguous language is apparent from the fact that the minutes are legal evidence of action taken. The contents of the minutes should be considered in the light of possible development in the future, and all language which might be used or construed to the company's disadvantage at some time in the future should be eliminated. The secretary should bear in mind that the directors of the corporation stand in a fiduciary relation which requires them to exercise the utmost good faith in managing the business affairs of the company. He should remember, in preparing his minutes, that acts of the directors are subject to the closest scrutiny.

The importance of using simple, unambiguous language in recording the minutes of the meeting cannot be too strongly emphasized. The courts have repeatedly held that a resolution of the directors or stockholders may constitute a contract. Surely the importance of carefully drawing a contract is obvious.

In writing up his minutes the secretary should use words in their ordinary and general sense. When taking action pursuant to a statute, it is a good plan, in framing the necessary resolutions, to follow as nearly as possible the wording of the statute.

Preparation for taking minutes of meetings. The secretary will find himself better able to perform his duties in connection

ORGANIZATION	<u>SECRETARY'S MEMORANDUM</u>		
	<u>MEETING OF BOARD OF DIRECTORS</u>		
DATE	19—	Stated Annual Special	Reg. Notice Personal Waiver
PRESENT	No. present	Hour	Standard
CHAIRMAN		Necessary for quorum	
SECRETARY			
MINUTES			
STATEMENTS			
RESOLUTIONS			
#1	Proposed by	Seconded by	
	Votes	For	
		Against	
#2	Proposed by	Seconded by	
	Votes	For	
		Against	
#3	Proposed by	Seconded by	
	Votes	For	
		Against	

SECRETARY'S MEMORANDUM FOR ENTERING NOTES OF MINUTES AT MEETING (PAGE 1).

with meetings if he will make the following preparations before attending the meeting:

1. Prepare in advance a statement of the order of business and the agenda. The agenda is a digest of action to be taken at the meeting. In some cases, a copy of the agenda of the directors' meeting is given to each director as well as to the presiding officer.
2. If important matters are to be considered, indicate on

the outline the names of those who are to present the business to the meeting.

3. Have with him all books, papers, contracts, and reports that are likely to be called for at the meeting.

4. Draft, in advance, motions or resolutions of the business that is to come before the meeting, if the subject has been thor-

RESOLUTIONS CONTINUED									
	#4	Proposed by		Seconded by					
		Votes		For					
				Against					
	#5	Proposed by		Seconded by					
		Votes		For					
				Against					
	#6	Proposed by		Seconded by					
		Votes		For					
				Against					
	#7	Proposed by		Seconded by					
		Votes		For					
				Against					
NOTES									
ADJOURNMENT									
DISBURSEMENT		Fees	Per member present						
		Expenses	" "	present	Sundries	Total			
				(Signed).....					
					Secretary				

SECRETARY'S MEMORANDUM FOR ENTERING NOTES OF MINUTES AT MEETING
(PAGE 2).

oughly worked out and is ready for the vote of the directors or stockholders. Resolutions prepared in advance save the time of the meeting, clarify the propositions, and simplify the entries in the minute book.

5. If payment is to be made immediately to the directors for attendance at the meetings, the secretary should have with him the necessary funds.

6. Bring with him to the meeting a memorandum form for entering the notes of the minutes of the meeting. (See above.)

Taking notes at meetings. Secretaries equipped to take shorthand notes usually find this training valuable in reporting minutes of meetings. Many secretaries take notes in longhand during the meetings. These notes are condensed, and no attempt is made to put everything down in full. Occasionally comments are inserted which do not really belong to the minutes, but which may explain statements made and decisions arrived at. Frequently proposals are made in an informal way, and a vote is taken with the understanding that the secretary will frame the proposition into a clear statement. The secretary should not permit the meeting to proceed to the next subject unless he has a clear understanding of what has been done. If a point is not clear to him at the time of the meeting, it is not likely to become clear after the meeting, when he prepares the minutes. If necessary, the secretary should ask for a formal wording of the proposition at the meeting.

Many secretaries destroy the typewritten notes dictated from memoranda taken at the meetings after entries are made in the minute book, but preserve the original notes as unofficial memoranda of what has taken place. Where the secretary prepares a memorandum (see illustration on pages 166 and 167), outline, digest, or rough draft of minutes in advance of the meeting, he usually fills in the information blanks left for that purpose as each matter is concluded.

Recording discussions at meetings. Generally, the argument on particular questions and the discussion that takes place at meetings are not made a part of the record, unless some member present specifically requests that his view be made a matter of record. Frequently, however, it is advisable to include a statement explanatory of the resolution or motion in order to clarify the proposal. Where this is necessary, the statement might well become a part of the resolution by being included in the preamble, under the "whereas" clauses. The secretary should not hesitate to record in his minutes full details of the transaction; too many secretaries err on the side of brevity in preparing minutes.

The practice followed by some secretaries is to report fully the discussions at committee meetings, but to limit the minutes of directors' meetings to a record of the motions and resolutions upon which action has been taken. Others, however, include in the minutes of the directors' meetings considerable matter in explanation of the resolutions. This not only serves to interpret

the resolutions but may help to refresh the recollection of directors on points of fact that may become the subject of future litigation.

Drafting resolutions. The drafting of resolutions is generally done by the secretary. Frequently, resolutions are drafted in advance of a meeting in order to clarify the subject matter and to facilitate discussions. The secretary may submit the draft of the resolution to the officer or department which originated the proposition to make sure that the resolution expresses the wishes of those sponsoring the matter. Resolutions involving routine matters are usually drafted by the secretary without the aid of counsel. Resolutions relating to matters that involve legal technicalities are generally drafted by counsel. However, the secretary sometimes prepares the initial draft of a resolution requiring legal knowledge, and then refers it to the legal department, with appropriate oral or written explanation. In some organizations, the resolutions are submitted to the president for his approval after they have been examined by counsel.

Certain action may require the passage of resolutions in a form satisfactory to some outside person or organization. For example, a resolution to amend the charter may have to be in a form prepared by the Secretary of State; in such cases, of course, counsel for the corporation or the secretary may obtain an official printed form and complete it as required. Resolutions relating to the cancellation of mortgages are frequently drawn in whole or in part by the trustee; the mortgagor corporation, in voting upon cancellation, simply follows the form required by the trust company which has acted as trustee for the bond issue. The appointment of a transfer agent is usually made by a resolution prepared by the transfer agent. The opening of a bank account generally calls for passage of a resolution in the form furnished by the bank.

Where new topics are brought up unexpectedly at a corporate meeting for discussion, and the secretary has had no opportunity before the meeting to draft a resolution, he may immediately write out the resolution in full and have it approved by the chairman, or he may follow the practice of writing out the resolution after the meeting. The resolution, under the second plan, is accurately worded in the typewritten minutes, but is not read until the succeeding meeting. This practice is more suitable for directors' than for stockholders' meetings. At stock-

holders' meetings, it is advisable that adequate time be taken to frame an exact resolution to be voted upon at the meeting.

Manner of recording motions, resolutions, and votes taken. The names of proposers and seconders of motions are generally omitted, although in some cases it may be advisable to show by whom a proposal was introduced. In most cases, it is not necessary that the names of those voting for or against a proposition be recorded, unless the statute, charter, or by-laws require this information to be shown. It is generally sufficient, in the case of stockholders' meetings, to show the number of shares voting for and against a proposition. Furthermore, by recording the vote in this way, the minutes show that a quorum was present when the business was authorized. Where a special request is made for the recording of dissenting votes by a minority, the entries should be so made by the secretary.¹⁸ It is advisable to indicate in the minutes that a director personally interested in a particular transaction did not vote, or that he left the room. In matters of great importance, such as sales of the corporation's property, consolidations, and like transactions, in addition to the exact wording of resolutions, the names of the proposers and seconders of the motions, and the names of those voting in favor of or contrary to the resolution, should be recorded.

If no vote is taken on a certain question, and the chairman obtains the consensus of the directors in an informal manner, it is sufficient to note in the minutes that "it was the consensus that," or that "each director present expressed his approval of," or that "doubt was expressed as to," and to follow with a statement of the facts. This puts on record some evidence of the points covered and the general reaction.

All important written proposals, contracts, or other papers brought before the meeting may be ordered "spread upon the minutes"—that is, written out in full in the minute book (see, however, page 176).

In certain actions, dissenting directors should be particularly careful to have their opposition noted. For example, where the statute places a personal liability upon directors who consent to the issuance of stock for property in excess of the actual value of the property, the minutes should show the names of the directors concurring in the judgment of the value of the property. In connection with the declaration of dividends, recording of dissent

¹⁸ See page 235 in regard to noting dissent generally.

may be necessary to save the directors from personal liability for dividends illegally declared (see pages 600 and 641).

Arrangement of minutes. The secretary is not required to write the minutes out in his own handwriting. The general form of minutes is fairly well standardized. The minutes usually begin with the time and place of meeting, establish that the meeting was properly called and that notice was given or waived, give the names of the chairman and the secretary of the meeting, and state the amount of stock represented in person or by proxy, thus indicating whether a quorum was present. The minutes then state that the minutes of the previous meeting were read.¹⁹ The additional subject matter of the minutes consists of a clear, accurate, and complete report of all business transacted. With respect to subject matter, the minutes of most companies are carefully arranged in accordance with the established order of business.

Some of the larger corporations have strict rules as to uniformity of arrangement, especially where frequent tabulations or enumerations appear. Independently of such rules, some secretaries take particular pains with details such as the arrangement, typing, spacing, and general appearance of the minute book.

The following is a suggestive list of rules relating to the form to be followed by those who typewrite the minutes into the minute book:

1. The heading designating the meeting should be capitalized and centered.
2. Paragraphs should be indented ten spaces.
3. Names of attending directors and absentees, or similar lists, should be indented fifteen spaces.
4. The text of the minutes should be double spaced.
5. Double space should be left between each paragraph, and triple space between each item in the order of business.
6. Resolutions should be indented fifteen spaces and single spaced.

¹⁹ Stockholders and directors of a corporation are entitled to have the minute book before the meeting, and the president may not refuse to produce it. *State ex rel. Dendinger et al. v. J. D. Kerr Gravel Co.*, (1925) 158 La. 324, 104 So. 60. The reading of minutes of a previous meeting is a mere acknowledgment that the secretary has correctly recorded what occurred at the meeting. *Hornady v. Goodman*, (1928) 167 Ga. 555, 146 S. E. 173. See also *Teiser v. Swirsky*, (1931) 137 Ore. 595, 2 P. (2d) 920, 4 P. (2d) 322, in which it was held that failure to read the minutes before they were signed by the secretary did not invalidate the record.

7. The words "Board of Directors" and the word "Corporation," when reference is made to the corporation whose minutes are being written, should be capitalized.

8. Captions in margin should be in capitals, or in red type.

9. A margin of an inch and a half or two inches should be left on the left- or the right-hand side of the page, depending upon whether it is a left- or a right-hand page, for captions and indexing.

10. The minutes should be summarized in marginal headings.

11. The words "Whereas" and "Resolved" should be capitalized and followed by a comma, and the word "that" should be in upper case.

12. Sums of money, when mentioned in a resolution, should be written first in words and then in figures in parentheses.

Approval of minutes. To speed up the approval of minutes, one company sends a copy of the minutes of each directors' meeting to the chairman of the board, the president, and the general counsel; other members of the board have access to any of these copies. Thus, there are seldom any changes to be made in the minutes at the following board meeting. (See page 173 as to correction of errors in minutes.)

Another company follows the practice of attaching to the directors' agenda copies of the previous minutes of the Board of Directors and of the Executive Committee. When the meeting is called to order, sufficient time is given for the directors to digest the agenda and to read the minutes of the previous meeting prior to any discussion of the agenda itself.

It is the practice of some corporations to send copies of minutes of the previous meeting to all directors prior to the meeting at which the minutes are to come up for approval. The minutes can then be "approved without reading," thus saving considerable time.

The minutes of a meeting of an old board of directors, held just before the election of a new board, should be read at the first meeting of the new board, not for the purpose of approval by that board, but to inform the new board of what took place. The new board does not need to approve the minutes of the last meeting of the old board, for the new directors were probably not present at this meeting, and thus they cannot tell whether the minutes record accurately what occurred there. The outgoing directors, for their own protection, should read over the minutes

of their last meeting even though no opportunity is given them to do so at a subsequent meeting. For example, a director who has dissented from some business that he believed was not for the best interests of the company should be sure to examine the minutes and note whether his dissent was entered.

Although a director is not present at a meeting, if he signs the minutes, he is bound by them.²⁰ The time when he signs is immaterial.²¹ Ordinarily, officers who certify to minutes cannot later challenge them.²² (See Form 108 for certification of minutes of directors' meeting.)

Correction of errors in minutes. One of the purposes of reading the minutes of a previous meeting is to offer an opportunity to make corrections of any misstatements or errors that may have crept into the record.²³

The manner of correcting errors depends upon the importance of the matter to be changed. The chairman may informally direct correction of simple errors such as mistakes in the spelling of names. If a dispute arises as to the correctness of a statement, motion, or resolution reported in the minutes, it may be necessary to put the matter to a vote to determine how the minutes shall read. If the error can be corrected immediately, the correction may be made at the meeting, and the minutes, as changed, may then be offered for approval. If the correction involves a revision of the minutes, the minutes of the current meeting will report the corrections of the minutes of the previous meeting.

The methods of inserting corrections in the minute book vary. One way is to strike out the erroneous matter by drawing a red line through each line of the incorrect material, and to write in between the red lines the correct minutes. Reference should be made in the margin of the minutes to the minutes of the following meeting, showing when the correction was ordered. If it is impractical to make the correction in this way, the erroneous material may be stricken out in red, and a note made in the margin showing where the revised minutes appear. The correct minutes may then be inserted at the end of the original minutes. Where loose-leaf books are used, it is inadvisable to throw away

²⁰ *Vance v. Mutual Gold Corp.*, (1940) 6 Wash. (2d) 466, 108 P. (2d) 799.

²¹ *Ibid.*

²² *Charles R. Hedden Co. v. Dozier*, (1926) 133 A. 857, *aff'd* 100 N. J. Eq. 560, 135 A. 915.

²³ Directors may properly correct minutes to show actual official action. *Bown v. Ramsdell*, (1931) 139 N. Y. Misc. 360, 249 N. Y. Supp. 387.

the pages that were incorrectly written. The better practice is to retain the original pages, to indicate that the minutes are obsolete by reference to the minutes of the meeting at which the errors were discussed, and to insert the corrected minutes in a subsequent page.

If the effect of a resolution adopted at a meeting is to create a contract between the corporation and some other party, the resolution cannot be changed by a memorandum entered on the records after the adjournment of the meeting, without the knowledge or consent of the parties to the agreement.²⁴ Clerical errors in the writing of minutes are immaterial where the proof is clear that the entry is erroneous. Thus, where it is evident that the directors met on the same day as the stockholders, immediately after the stockholders' meeting adjourned, and that both meetings were held on a certain day, a different date at the head of the minutes of the directors' meeting is simply a clerical error and is immaterial.²⁵ The fact that corrections are made after the minutes are prepared is comparatively unimportant, from a legal standpoint, if the entry faithfully shows what was done.²⁶

Indexing of minutes. Large corporations usually have their minutes carefully indexed so that any business which has been passed upon at a formal meeting, however remote in time, may be referred to and reviewed easily and quickly. Some corporations do not index the directors' meetings, but keep a complete index of the minutes of the executive committee. Card indexes, looseleaf binder indexes, or bound books may be used for the purpose. Many of the larger corporations have a separate index at the beginning of each minute book.

The making of the index is facilitated by the use of captions in the minutes. The index card contains the subject matter taken from the captions and a reference to the page on which the caption appears. If a more detailed index is desired, the captions appearing on the page may bear a number, and reference on the card may be made to the number rather than to the page. The numbers, of course, run consecutively through the minute book.

Systems of handling minutes. The usual practice is for the secretary to dictate the minutes immediately after the meeting while events are still fresh in his mind. The assistant secretary

²⁴ *Schlens v. Poe et al.*, (1916) 128 Md. 352, 97 A. 649.

²⁵ *Hatcher-Powers Shoe Co. v. Bickford*, (1925) 212 Ky. 163, 278 S. W. 615.

²⁶ *Caldwell v. Dean*, (1926) 10 F. (2d) 299.

of one company, the secretary of which is a practicing attorney, takes shorthand notes during the meeting and dictates the minutes to a stenographer, who indexes them and numbers and files any reports submitted at the meeting. The assistant secretary makes up the marginal notes, indicates the persons to be notified of action taken at the meeting, and attends to other similar details. His draft of the minutes is sent to the law offices of the secretary, where they are reviewed carefully by the secretary for omissions and inaccuracies of expression before they are copied by a stenographer into the minute book.

The practice followed by the secretary of one large corporation is typical of that of many others. This secretary personally takes down the minutes at all meetings upon loose sheets. Immediately after each meeting, he prepares the minutes, keeping the typewritten original in a book which he calls his "blotter." At the next meeting he reads the minutes of the previous meeting from his blotter, and only after approval are the actual minutes carefully typewritten and locked in the current minute book. Some secretaries who follow this plan include in the blotter minutes a record of the maker and seconder of each resolution, but eliminate such details in the minute book proper. The blotter minutes are either kept in a loose-leaf binder or filed in a meeting folder.

In many corporations, a duplicate of the minute book is made and is kept apart from the original; in this way, in case of mishap to one copy, there is always another one available.

Resolutions book. Some companies follow the practice of keeping a copy of all resolutions in a separate book, properly indexed. This avoids the inconvenience of having to leaf through pages of minutes of unrelated matter when reference is made to a particular action authorized by resolution. Furthermore, by keeping the resolutions in a separate place, the minute book is preserved, and perusal of confidential matters contained in the minute book by someone interested only in a particular resolution is prevented.

In some companies the set of resolutions is preceded by a copy of the by-laws, and the resolutions and by-laws are kept up-to-date in the following way: ample margin is provided at the left of each page, in which subsequent actions affecting a section or sub-section of a by-law or a resolution can be indicated by cross referencing to the minutes where the actions are recorded. A more convenient way is to enter a copy of the

actions on numbered supplementary sheets to which reference is made in the margin of the affected by-law provision or resolution. The marginal note may read "Repealed. Sup. p. 7" or "Changed to 15 days. Sup. p. 10." The latter note shows immediately what the change is and refers to supplementary p. 10. At supplementary page 10, the minutes which changed the notice, for example, required to be given for a certain purpose from 20 days to 15 days, will be found, as well as a cross reference to the minutes of the meeting from which the excerpt is taken. The purpose of the supplementary sheets, of course, is to avoid the necessity of hunting through the series of books in which minutes are recorded; the by-laws and resolutions book forms a single complete record.

Permanent records of reports. The methods of preserving reports submitted and discussed at meetings vary considerably. In some corporations, only very important reports that have been ordered by formal resolution to be spread on the minutes are bound in the minute book. In numerous other corporations, whether or not a motion is made to spread such reports on the minutes, the reports are bound in with the minutes, and immediately follow the last page of minutes of the meeting in which the report was discussed or formally accepted. Some corporations have inaugurated the system of binding with the minutes only bulky reports and the annual reports to stockholders containing the audited certified balance sheet. The test adopted by many secretaries to determine whether a report should be incorporated in the minutes is to ascertain whether the report is directly referred to in the resolution in such a way as to make it part of the resolution. If reports are not included in the minutes, they may be bound separately, filed in the meeting folders with other papers relating to action taken, or placed in a special locked report file. Where reports are bound or filed separately, the necessity for a carefully prepared cross-index system that will permit instant reference from the reports to the minutes, and vice versa, is obvious.

CHAPTER 6

FORMS OF MINUTES OF MEETINGS

MINUTES OF STOCKHOLDERS' MEETINGS

No. 111

Minutes of annual meeting of stockholders.

[*Note.* The headings in brackets sometimes appear in the minute book as marginal notes.]

[Time and place of meeting]

The annual meeting of the stockholders of Corporation was held at the principal office of the Corporation at (Street), (City), (State), on the (Day of Week), the .. day of, 19.., at o'clock in the noon, pursuant to written notice given by the Secretary.

[Presiding officer; Secretary]

Pursuant to the provisions of Article, Section of the By-laws, Mr., President of the Corporation, presided over the meeting, and Mr., Secretary of the Corporation, acted as Secretary of the meeting.

or

Pursuant to the provisions of Article, Section of the By-laws, in the absence of the Chairman of the Board, the meeting was called to order by Mr., Chairman of the Finance Committee, who acted as Chairman of the meeting.

[List of stockholders]

The Chairman announced that the transfer books and the stock books of the Corporation, together with a full, true, and complete list in alphabetical order of all the stockholders entitled to vote at the ensuing election, with the residence of each, and the number of shares held by each (which list has been on file at this office of the Corporation continuously since, 19..), were before the meeting and would remain open for inspection during the election.

[Proxies; quorum]

The Chairman stated that he was acting as proxy and representa-

tive of the holders of record of (....) shares of the Preferred Stock, and (....) shares of the Common Stock of this Corporation, as shown by the certificate of the Secretary, made under Section of Article of the By-laws of the Corporation, and by the original powers of attorney and substitutions and the list of the stockholders now filed and deposited with the Secretary.

The Chairman then asked if there were any stockholders present in person, or any persons present as attorneys or proxies for stockholders.

The following stockholders then appeared:

<i>In Person</i>	<i>Preferred</i>	<i>Common</i>
.....
.....
.....
<i>By Proxy</i>		
.....
.....
.....

The Chairman requested the Secretary to report the number of shares represented either by proxy, or in person, or by attorney.

The Secretary reported as follows:

Preferred:	shares
Common:	shares
		<hr/>
Total:	shares

Thereupon the Chairman announced that the holders of stock in excess of the amount necessary to constitute a quorum were present in person or represented by proxy.

The proxies presented were ordered to be filed with the Secretary of the meeting.

[Proof of notice of meeting]

The Secretary presented and read a copy of the notice of the meeting, together with proof that the same had been published as required by the By-laws once in each of the (....) calendar weeks next preceding the meeting—to wit: On the .. day of, and the .., .., .., and .. days of, in at least one newspaper in each of the following cities:,, and.....* The Secretary further presented proof that a copy of this notice, and also a copy of the annual report to stockholders for the year 19..., had been duly mailed, postage prepaid, to every stockholder of record at the closing of the books for this election on, 19...

* If the notice is not published, omit the statement as to publication.

or

The Secretary presented an affidavit, duly signed and sworn to by himself, showing that notice of the meeting had been mailed to each stockholder, addressed to such stockholder at the address given by him to the Corporation, postage prepaid, as required by the By-laws of the Corporation. The affidavit was approved and ordered attached to these minutes.

(Here insert affidavit; see form No. 64.)

[Inspectors of election]

Upon motion duly seconded, Messrs.,, and (none of whom were candidates for the office of director), who had been duly appointed inspectors by the Board of Directors, pursuant to Section of Article of the By-laws, were duly sworn.

or

Upon motion duly made and seconded,,, and were unanimously elected Inspectors of Election to count the votes presented to the meeting in person or by proxy. The Inspectors of Election thereupon submitted their oaths as such Inspectors, duly subscribed by them, and the Secretary was directed to attach the same to these minutes.

[Approval of minutes]

The Secretary then presented the minutes of the annual meeting of stockholders held on, 19.., which were read and approved.

[Approval of acts of directors and annual report]

Thereupon the Chairman presented to the meeting the following papers and documents, all of which were laid upon the table and were publicly declared by the Chairman to be open for inspection by any stockholder:

1. The minutes of the Board of Directors, covering all purchases, contracts, contributions, compensations, acts, proceedings, elections, and appointments by the Board of Directors since the annual meeting held on, 19..

2. The (*insert number*) annual report, a copy of which has been mailed to every stockholder of record.

Upon motion duly made and seconded, it was unanimously

RESOLVED, That all purchases, contracts, contributions, compensations, acts, proceedings, elections, and appointments by the Board of Directors since the Annual Meeting of Stockholders of the Corporation on, 19.., and all matters referred to in the Annual

Report to Stockholders for the fiscal year ending , 19... ,
be and the same hereby are approved and ratified.

[Nomination of directors]

The meeting then proceeded to the election of (....) directors as successors to the directors whose terms expire with this annual meeting, to hold office for a term of (....) year(s), and until their successors shall be elected and shall qualify.

The following were nominated and seconded to be directors:

.....
.....
.....

There were no other nominations.

Upon motion duly made, seconded, and unanimously carried, the nominations were closed.

[Request for election by ballot]

Mr. then asked that a ballot be taken upon the foregoing nominations, and on motion duly seconded, it was so ordered.

[Polls open]

The Chairman, before finally declaring the polls open, asked if there were any other nominations. Hearing none, he thereupon declared the polls open at o'clock ..M., and stated that they would remain open for at least one hour for the receipt of ballots upon the nominations made.

[Polls closed]

At o'clock ..M., the Chairman stated that the polls had now been open for over one hour, and he inquired whether there were any who had not voted and who desired to vote. No one requesting further opportunity to vote, the polls were then declared closed.

[Report of inspectors of election]

The Inspectors of Election thereupon inspected the proxies and counted the ballots, and submitted their report in writing.

Upon motion duly made and seconded, the report of the Inspectors of Election was unanimously approved, and the Secretary was directed to file the original report and to attach a copy to the minutes of this meeting.

[Declaration of election]

The Chairman thereupon declared that the persons receiving the highest number of votes, namely (*insert names*), had been duly elected directors of the Corporation, to serve for the term of year(s), and until their successors shall be elected and shall qualify.

[Insertion of papers in minutes]

The Secretary was directed to insert in the minute book, for the purpose of reference, a copy of each of the following papers:

1. Notice of meeting and proof of service thereof.
2. Form of proxy.
3. Certificate of the Secretary as to the regularity of the powers of attorney and the number of shares represented by the Proxy Committee.
4. Inspectors' oath and report.

(Here insert any other business before the meeting.)

No other business coming before the meeting, it was, on motion duly made and seconded, adjourned.

.....
President
.....
Secretary

No. 112**Minutes of special meeting of stockholders.**

[*Note.* The headings in brackets sometimes appear in the minute book as marginal notes.]

[Time and place of meeting]

A special meeting of the stockholders of Corporation was held at the office of the Corporation at (Street), (City), (State), on the .. day of, 19.., at o'clock ..M.

[Presiding officer; Secretary]

Mr., President of the Corporation, presided at the meeting, and Mr., Secretary of the Corporation, acted as Secretary of the meeting, as provided by the By-laws.

[Roll call]

The Secretary called the roll of stockholders, and all the stockholders were found present either in person or by proxy.*

The following notice of the meeting was read by the Secretary and ordered spread upon the minutes of this meeting:

(Here insert notice of meeting; see form No. 22.)

[Proof of mailing of notice of meeting]

The Secretary then presented an affidavit, showing that the notice of

* If less than all the stockholders are present, insert statement as in minutes of annual meeting, page 177.

meeting aforesaid had been duly mailed to each stockholder at his last-known address, more than (....) weeks (or days) preceding this meeting.

[Proof of publication of notice of meeting]

The Secretary also presented an affidavit of publication of the aforesaid notice of meeting in the, a newspaper published and having a circulation in the county where the principal business office of the Corporation is located, on the .. day of, 19.., and on the .., .., and .. days of, 19.., as required by law and by the By-laws of this Corporation.*

[Inspectors of election]

The President stated that the Board of Directors had heretofore chosen two Inspectors, Messrs. and, and that it was desirable that their appointment be confirmed at the meeting.

Upon motion duly made and seconded, the appointment of and as Inspectors was unanimously confirmed, and they and each of them took and subscribed to the prescribed oath.

The Inspectors thereupon took charge of the proxies, and upon examination thereof and of the stock books, reported that there were present in person or by proxy stockholders of record owning (....) shares of stock, being the entire outstanding capital stock of the Corporation.

[Vote on resolutions]

On motion duly made and seconded, and after due deliberation, the following resolution was voted upon:

(Here insert resolutions covering matters considered at meeting.)

The Inspectors of Election canvassed the votes and reported that the aforesaid resolution had been adopted by the affirmative vote of all the stockholders of the Corporation.

[Adjournment]

No other business coming before the meeting, the meeting was thereupon adjourned.

.....
President

.....
Secretary

* If publication is not required, omit this clause.

No. 113

Excerpt of minutes showing votes for and against motion.

Mr. thereupon moved that
 (state subject matter of motion). The motion was*seconded by Mr.
 A vote was taken which showed:

In Favor of Motion

....., representing shares
, representing shares
, representing shares
, representing shares

Opposed to Motion

....., representing shares
, representing shares

Not Voting on Motion

....., representing shares

No. 114

Excerpt of minutes showing adoption of minutes of previous meeting as corrected.

The Secretary then presented and read the minutes of the previous meeting of the stockholders (or directors),* held on , 19...

Upon motion duly made and seconded, it was

RESOLVED, That the minutes of the meeting of....., held on the .. day of .., 19.., be and they are hereby adopted and approved in their entirety, except that the words "....." be eliminated from the resolution (specify subject matter of resolution for identification) contained therein.

No. 115

Excerpt of minutes showing defeat of motion to amend minutes of previous meeting.

The minutes of the previous meeting were read. Mr. "C" made a motion that the minutes be amended by striking out from the last paragraph the words "....." The motion was not seconded and therefore not put to a vote. Mr. "A" then moved that the minutes be adopted as read. The motion having been duly seconded by Mr. "B," the Chairman called for a vote on the motion for approval of the minutes as read, which resulted as follows:

* This form may be used either for stockholders' or directors' meeting. See also form No. 128.

In Favor of Motion

"A"

"B"

Opposed

"C"

The Chairman thereupon declared the minutes approved as read.

No. 116

Excerpt of minutes showing amendment of motion.

The following motion was presented by "A" and seconded by "B."

(Here insert motion.)

After considerable discussion, "C" moved that the said motion be amended by striking out (or by adding) the following: "....."

The motion to amend was accepted by "A" and "B." The Chairman then called for a vote on the motion as amended. The motion as amended was carried by a unanimous vote.

No. 117

Excerpt from minutes of annual stockholders' meeting appointing committee to ascertain and report attendance of stockholders in person and by proxy.

Upon motion duly seconded, and were appointed a committee to ascertain and report what stockholders were present in person, and the number of shares owned by them, respectively, and to canvass the proxies of stockholders presented at the meeting, and to ascertain and report the number of shares owned by stockholders present by proxy.

The committee, after ascertaining the facts, announced that there were present more than a quorum of the stockholders of the Company, and presented their formal report, which is as follows:

..... City, State

....., 19..

To the Meeting of Stockholders of the Corporation:

Gentlemen:

The undersigned, having been appointed a committee for the purpose of ascertaining the stockholders of the Company present in person or by proxy at the meeting, with the number of shares owned by them, respectively, report that there are present in person at such meeting the following-named persons, owning the number of shares of stock of the par value of Dollars (\$.....) each set opposite their respective names—viz.:

<i>Name of Stockholder</i>	<i>Number of Shares</i>
.....
.....
.....
<hr/>	
Total shares

We have examined the proxies presented at the meeting and in the hands of the Secretary, and find that there are present by such proxies stockholders owning the number of shares of Dollars (\$.....) par value hereinafter indicated, and that their respective proxies are as follows—viz.:

<i>Name of Proxy</i>	<i>Number of Shares</i>
.....
.....
.....
<hr/>	
Total shares

Summarizing, we therefore report that there are stockholders present in person, owning shares; that there are stockholders present by proxies, owning shares; total, shares.

There being outstanding shares of such stock of Dollars (\$) par value, and shares being necessary for a quorum, we report that a quorum of stockholders is present.

Respectfully submitted,
.....
.....
Committee

No. 118

Excerpt from minutes of stockholders' meeting showing adoption of minutes of the present meeting.

The foregoing minutes of this meeting were then read by the Secretary to the stockholders, and, on motion duly made, seconded, and carried, they were adopted as and for the record of this meeting.

No. 119

Excerpt of minutes of stockholders' meeting showing ratification of acts of directors and officers.

The Secretary then presented to the meeting the minute book of the Corporation containing a record of the contracts, acts, and commitments of the Board of Directors and officers of the Corporation since the last annual meeting of the stockholders.

After consideration thereof, on motion duly made and seconded, the following resolution was unanimously adopted:

RESOLVED, That the minutes of the meetings of the Board of Directors of this Corporation since the last annual meeting of the stockholders be and they hereby are in all respects approved; that the resolutions therein set forth be and they hereby are severally adopted, approved, ratified, and confirmed; and that all action of every kind taken by any officer or officers of the Corporation, pursuant to any such resolution, action, or authorization, be and it hereby is authorized, adopted, approved, ratified, and confirmed.

MINUTES OF DIRECTORS' AND COMMITTEE MEETINGS

No. 120

Minutes of annual meeting of directors, following adjournment of annual stockholders' meeting.

[*Note.* The headings in brackets sometimes appear in the minute book as marginal notes.]

[Time and place of meeting]

The annual meeting of the Board of Directors of Corporation was held at the principal office of the Corporation, at (Street), (City), (State), on the .. day of .., 19.., at o'clock in the noon, immediately after the adjournment of the annual meeting of the stockholders.

[Attendance of directors]

The following directors were present:

.....
.....

The following directors were absent:

.....
.....

or, if all were present, say:

The following directors were present:

.....
.....
.....

being all of the directors of the said Corporation.

[Presiding officers]

Mr., President of the Corporation, called the meeting to order and acted as Chairman thereof, and Mr., Secretary of the Corporation, acted as Secretary of the meeting.

[Quorum]

The Chairman announced that a quorum of the directors was present, and that the meeting, having been duly convened, was ready to proceed with its business.

[Proof of service of notice of meeting]

The Secretary presented to the meeting a copy of the notice of this meeting, sent to all of the directors of the Corporation, with proof of due service thereof upon each of them. The notice, with proof of service thereof, which read as follows, was thereupon ordered to be spread upon the minutes of this meeting:

(Here insert form of notice of meeting; see form No. 93. Insert form of proof of service; see forms Nos. 103 et seq.)

[Presentation of minutes of stockholders' annual meeting]

The Chairman presented and read to the meeting the minutes of the stockholders' annual meeting held at the principal office of the Corporation, at (Street), (City), (State), on the .. day of .., 19.., at o'clock in the noon, at which the following persons were elected to act as members of the Board of Directors of the said Corporation, for a period of (....) year(s), commencing the .. day of .., 19.., and until their successors shall be duly elected:

.....
.....
.....

(Names of directors elected.)

[Election of officers]

Mr. moved to proceed with the election of officers for the ensuing year. The motion was duly seconded and carried.

Mr. was nominated for the office of President. There being no further nominations, Mr. was, upon motion duly made, seconded, and unanimously carried, duly elected and declared President of the Corporation.

(Here insert similar statement for election of every other officer.)

(If more than one nomination is made for any particular office, use the following form:)

The names of Mr. and Mr. were placed in nomination as candidates for the office of President. No other names being proposed, the nominations were closed and a ballot taken. The Chairman announced that the result of the vote

taken was as follows: Mr., votes, and Mr., votes, and declared Mr. the duly elected President for the ensuing year.

[Acceptance of office]

Each of the officers so elected thereupon accepted the office to which he was elected as aforestated.

[Salaries of officers]

Mr. moved to consider the salaries of the officers of the Corporation for the year commencing the .. day of .., 19... The motion was duly seconded and carried. The Chairman announced that the officer whose salary was under consideration would not participate in the vote, and that the salary of each officer would be considered separately.

Mr., President, having left the room, it was on motion duly made, seconded, and carried:

RESOLVED, That the salary of Mr. as President of the Corporation, beginning the .. day of .., 19..., and ending with the .. day of .., 19..., be fixed at Dollars (\$.....) per year, payable in (*insert weekly, semimonthly, or monthly*) installments of Dollars (\$.....) on the .. day (and the .. day) of each and every (*insert week or month*).

The salary of Mr. as President of the Corporation, having been duly voted upon, Mr. was recalled to the meeting.

Mr., Vice-president of the Corporation, then left the room.

(Here insert similar paragraphs fixing salary of each officer.)

[Adjournment of meeting]

There being no further business, on motion duly made, seconded, and carried, the meeting was thereupon adjourned.

.....
President
.....
Secretary

No. 121

Excerpt from minutes of annual directors' meeting, showing election of officers by ballot.

The following persons were nominated for officers of the corporation to serve until their respective successors are chosen and qualify:

Chairman of the Board of Directors,
 President,
 Vice-president,
 Treasurer,
 Secretary,

Ballots being duly cast by all the directors present, the Chairman announced that the aforementioned persons had been unanimously elected to the offices set before their respective names, to assume the duties and responsibilities fixed by the By-laws.

The Chairman of the Board of Directors [or the President] thereupon took the chair.

The Secretary was then sworn to the faithful discharge of his duties, and he immediately assumed the discharge thereof. The Secretary's oath was ordered filed.

No. 122

Excerpt from minutes of annual directors' meeting, showing election of officers (short form).

The following were duly elected officers of the company, to serve for one year, or until their successors are elected and qualify:

President,
 Vice-president,
 Secretary,
 Treasurer,

No. 123

Minutes of regular monthly meeting of directors.

[*Note.* The headings in brackets sometimes appear in the minute book as marginal notes.]

[Time and place of meeting]

The regular monthly meeting of the Board of Directors of the Corporation was held at the office of the Corporation, at (Street), (City), (State), on the .. day of, 19.., at o'clock in the noon.

[Attendance of quorum]

There were present and participating at the meeting:

.....

.....

.....

being all the directors of the Corporation.

[Presiding officers]

Mr., President of the Corporation, acted as Chairman of the meeting, and Mr., Secretary of the Corporation, acted as Secretary of the meeting.

[Proof of service of notice of meeting]

The Secretary presented to the meeting the following notice of the regular directors' meeting, a copy of which had been mailed on the .. day of .., 19.. to each of the directors of the Corporation, at his last-known post-office address as it appears on the books of the Corporation, in accordance with Article .., Section .. of the By-laws.

(Here insert notice of regular directors' meeting; see form No. 94.)

A quorum of the directors being present and the meeting having been duly called, the President announced that the meeting would proceed with the transaction of business.

[Approval of minutes of preceding regular directors' meeting]

The minutes of the regular meeting of the directors held on the .. day of .., 19.. were read and approved.

On motion duly made, seconded, and unanimously adopted, the following resolutions were adopted:

(Here insert resolutions adopted at meeting.)

[Adjournment of meeting]

There being no further business, the meeting was upon motion duly made, seconded, and carried, adjourned.

.....
Secretary

No. 124

Minutes of special meeting of directors.

[Note. The headings in brackets sometimes appear in the minute book as marginal notes.]

[Time and place of meeting]

A special meeting of the Board of Directors of the Corporation was held at the office of the Corporation,

(*Street*), (*City*), (*State*), on the .. day of
....., 19.., at o'clock in the noon.

[Attendance and quorum]

The following directors, being all of the directors of the Corporation, were present:

.....
.....
.....

[Presiding officers]

Mr., President of the Corporation, acted as Chairman of the meeting, and Mr., Secretary of the Corporation, acted as Secretary of the meeting.

[Waiver of notice of meeting]

The Secretary presented to the meeting the original call therefor, signed by the President, and the original waivers of notice of said meeting, signed by all the directors of the Corporation. Upon motion duly made, seconded, and carried, the call and waiver of notice were made a part of the records of this meeting, and the Secretary was instructed to spread the same upon the minutes. The call and waiver of notice read as follows:

(Here insert call and waiver; see forms Nos. 90 and 101.)

[Approval of minutes of previous meeting]

The minutes of the special meeting of directors held , 19.., were read and approved.

[Business of meeting]

The President stated that the purpose of the special meeting was to (*insert purpose of meeting*), and that discussion of the proposed action was in order.

(The discussion may be set forth in full, or may be summarized, or the minutes may simply state: "After a general discussion and careful consideration of the proposed (*insert nature of business*), upon motion duly made and seconded, the following resolution was unanimously adopted: RESOLVED, etc." Any other business considered or voted upon at the meeting should be set forth here.)

[Adjournment]

There being no further business before the meeting, the same was, on motion duly made, seconded, and carried, adjourned.

.....
Secretary

No. 125

Excerpt from minutes of adjourned meeting of directors.

An adjourned meeting of the Board of Directors of Corporation was held at the office of the Corporation, at (Street), (City), (State), on the .. day of, 19.., at o'clock in the noon, pursuant to an adjournment of a meeting held on the .. day of, 19.., at the same time and place.

(The rest of the minutes are the same as for an originally called meeting of directors. See forms Nos. 120 et seq.)

No. 126

Excerpt from minutes of directors' meeting dispensing with reading of minutes.

Copies of minutes of the meeting of the Board of Directors held on the .. day of, 19.., having been mailed to each director (....) days before the meeting, the directors present agreed to dispense with the reading of the minutes, and approved and adopted them as they appeared in the copies received by them.

No. 127

Excerpt from minutes of directors' meeting correcting minutes of previous meeting.

The minutes of the previous meeting were read. Mr. moved that the minutes be corrected and amended by striking out, from the next to the last paragraph, the words ".....," and by substituting in lieu thereof the following: ".....," and that as thus corrected the minutes be approved as read.

The motion was seconded by Mr. and unanimously carried.

No. 128

Excerpt of minutes showing approval of minutes with corrections.*

The minutes of the previous meeting were read. Mr. moved that they be adopted with the elimination of the words "and Executive Committee" from the resolution ratifying and confirming the acts of the Board of Directors for the previous year. The motion was seconded by Mr. A vote was taken which showed:

* This form may be used either for directors' or stockholders' meetings. See also form No. 114.

<i>In Favor of Adoption as Amended</i>	<i>Opposed to Adoption</i>	<i>Not Voting</i>
.....	None
.....	

The chairman declared the minutes approved as corrected.

No. 129

Excerpt of minutes showing amended motion.

The following motion was presented by Mr. A, and seconded by Mr. B:

"That the Secretary be and he hereby is requested to read the minutes of meetings of the Board of Directors and the Executive Committee held since the last meeting of stockholders."

After considerable discussion, it was moved by Mr. C that the motion be amended by adding: "So far as they are applicable to any matters mentioned in the report which the stockholders are asked to approve."

The motion to amend was accepted by Mr. A and Mr. B.

The motion as amended was carried by a unanimous vote.

No. 130

Minutes of meeting of directors adjourned for lack of quorum.

A regular meeting of the Board of Directors of the Corporation was scheduled to be held at the office of the Corporation, at (Street), (City), (State), on the .. day of .., 19.., at o'clock in the noon.

The following directors appeared at the time and place set for the said meeting:

.....
.....

No quorum being present, the meeting was duly adjourned, as provided by the By-laws of the Corporation, to the .. day of .., 19.., at the same hour and place.

.....
Secretary

No. 131

Excerpt from minutes of directors' meeting dispensing with next regular meeting.

A resolution was adopted by the Board of Directors to dispense with the next regular meeting of the Board of Directors, which was scheduled to be held on (*Day of Week*), , 19...

No. 132

Minutes of regular meeting of executive committee.

[*Note.* The headings in brackets sometimes appear in the minute book as marginal notes.]

[Time and place of meeting]

A regular meeting of the Executive Committee of the Corporation was held at the office of the Corporation, (*Street*), (*City*), (*State*), on the .. day of .., 19.., at o'clock ..M., notice of the said meeting having been duly given by the Secretary of the Corporation as prescribed by the By-laws.

[Presiding officers]

Mr., Chairman of the Executive Committee, acted as Chairman of the meeting, and Mr., Secretary of the Executive Committee, acted as Secretary of the meeting.

[Quorum]

The following members of the Committee were present at the meeting:

.....
.....
.....

The following members of the Committee were absent from the meeting:

.....
.....
.....

A majority being represented, a quorum was declared to be present.

[Business of meeting]

The Chairman stated that the Board of Directors, by resolution adopted at a regular meeting of the Board held on the .. day of .., had approved the Committee's resolution passed on the .. day of .., 19.., for the appointment of .., as

Assistant to the President, and had authorized the Executive Committee to fix the salary of the saidas such Assistant.

Upon motion duly made, seconded, and unanimously carried, it was

RESOLVED, That pursuant to the resolution of the Executive Committee adopted the .. day of, 19.., appointing as Assistant to the President, and pursuant to the resolution of the Board of Directors adopted the .. day of, 19.., approving the said appointment and authorizing the Executive Committee to fix the salary of the said as Assistant to the President, the Executive Committee does hereby fix the salary of the said, as such Assistant, at the sum of Dollars (\$.....) per year, payable monthly on the last day of each and every month.

(Here insert any other business of the meeting.)

There being no further business before the meeting, on motion duly made, seconded, and carried, it was adjourned.

.....
Secretary

No. 133

Minutes of meeting of investment committee.

[Note. The headings in brackets sometimes appear in the minute book as marginal notes.]

[Time and place of meeting]

A meeting of the Investment Committee of the Board of Directors of Corporation was held at the office of the Corporation, at (Street), (City), (State), on the .. day of, 19.., at o'clock ..M., pursuant to notice duly given to each member of the Committee.

[Attendance]

All the members of the Committee were present.

[Presiding officers]

Mr. acted as Chairman of the meeting.

Mr. acted as Secretary of the meeting.

[Approval of minutes of previous meeting]

The minutes of the previous meeting of the Investment Committee, held on the .. day of, 19.., were read and approved.

[Business of meeting]

The Chairman of the meeting reported that an offer had been made by the Company to sell to the

Corporation (....) shares of preferred stock of the
..... Company, at a price of Dollars (\$.....) per
share.

Since the said stock so offered represented more than a majority
of the total number of shares of stock of the Com-
pany issued and outstanding, and the purchase of the said stock would
involve the active participation of the Corporation
in the management of the business of the Com-
pany, the Chairman stated that it would be necessary to obtain the
approval of the Board of Directors of the Corpo-
ration before finally accepting the said offer. However, the Chairman
recommended that the Investment Committee pass upon the advis-
ability of accepting the offer aforesaid, subject to the approval of the
Board of Directors of the Corporation.

Upon motion duly made, seconded, and unanimously carried, it was

RESOLVED, That the offer of Company to sell to
the Corporation (....) shares of its pre-
ferred stock, at a price of Dollars (\$.....) per share, be
accepted, and that the question of obtaining the approval of the Board
of Directors of the Corporation be submitted to
it by the Chairman of the Investment Committee at the next regular
meeting of the Board of Directors, to be held on , 19...

(Here insert any other business of meeting.)

There being no further business before the meeting, the same was,
on motion duly made, seconded, and carried, adjourned.

.....
Secretary

No. 134

Excerpt from minutes of executive committee; regular meeting not
held because of failure of members to attend.

All the members of the Executive Committee having failed to appear
at the regular meeting of the Committee, scheduled to be held at the
office of the Corporation, at (Street),
(City), (State), on the .. day of, 19.., at
..... o'clock ..M., no meeting of the Committee was held and no
business transacted thereat.

.....
Secretary

No. 135

Excerpt from minutes of meeting of executive committee accepting resignation of director and member of committee.

The Secretary read a letter addressed to him on , 19.., by Mr., and, on motion duly made, seconded, and unanimously passed, it was

RESOLVED, That the Committee hereby accepts the resignation of Mr. from the Board of Directors of this Corporation, and greatly regrets that the pressure of other business necessitates the termination of his long and valuable service to the Corporation as a director and as a member of the Executive Committee.

CHAPTER 7

ORGANIZATION MEETINGS

Necessity for organization meetings. A corporation which has duly filed its articles of incorporation cannot begin to exercise its powers or to transact the business for which it was created until its corporate organization is completed.¹ In each state, the general corporation law prescribes the time when corporate existence officially begins.² Among the things required to be done for such completion are the selection and qualification of directors and officers³ and the adoption of by-laws.⁴ These matters are effected at the organization meeting.

The organization meeting may be (1) a meeting of the incorporators, (2) a meeting of the subscribers or shareholders,⁵ or

¹ *Murdock v. Lamb*, (1914) 92 Kan. 857, 142 P. 961.

Legality of existence of a de facto corporation is not subject to collateral attack by individuals. *Industrial Building & Loan Ass'n v. Williams*, (1928) 131 Okla. 167, 268 P. 228; *Interstate Airlines v. Arnold*, (1934) (Neb.), 256 N. W. 513; *Fatzer v. Najarian*, (1938) 16 N. J. Misc. 324, 199 A. 710, rev'g 15 N. J. Misc. 379, 191 A. 291; *Dunham v. Natural Bridge Ranch Co.*, (1944) 115 Mont. 579, 147 P. (2d) 902; *American Home Benefit Ass'n v. United American Benefit Ass'n*, (1942) 63 Idaho 754, 125 P. (2d) 1010; *Continental Illinois Nat. Bank & Trust Co. v. University of Notre Dame Du Lac*, (1945) 326 Ill. App. 567, 63 N. E. (2d) 127. For elements of a de facto corporation, see *Mootz v. Spokane Racing & Fair Ass'n*, (1937) 189 Wash. 225, 64 P. (2d) 516; *Municipal Bond & Mortg. Corp. v. Bishop's Harbor D. Dist.*, (1938) 133 Fla. 430, 182 So. 794; *Payne v. Bracken*, (1938) 131 Tex. 394, 115 S. W. (2d) 903, aff'g 90 S. W. (2d) 607.

² See *Walton v. Oliver*, (1892) 49 Kan. 107, 30 P. 172; *People v. Montecito Water Co.*, (1893) 97 Cal. 276, 32 P. 236; *Smith v. Sherman*, (1901) 113 Iowa 601, 85 N. W. 747; *Hammond, et al. v. Williams*, (1939) 215 N. C. 657, 3 S. E. (2d) 437.

³ *First Nat. Bank v. Henry*, (1906) 159 Ala. 367, 49 So. 97.

⁴ *Murdock v. Lamb*, (1914) 92 Kan. 857, 142 P. 961.

⁵ The states do not all use the same terminology as to who participates in the organization meeting of a corporation. There are four variations in terminology among the statutes:

(1) In the states that do not require each incorporator to be a subscriber to capital stock of the corporation (for example, Delaware), the incorporators are properly called "incorporators."

(2) In the states that require each incorporator to subscribe for at least one share of the capital stock of the corporation (for example, New York), the incorporators are properly designated "subscribers and incorporators."

(3) In the states that require that each incorporator shall subscribe for at least

(3) merely a meeting of the directors named in the certificate of incorporation. Generally, if an incorporators' or a subscribers' meeting is held, it is followed immediately by a meeting of the directors. The procedure depends upon the statutory requirements in the state in which the corporation is organized, and upon the practice that has grown up in the particular state.

The statutes of a few states require that a meeting of incorporators be held within a certain period after filing the certificate of incorporation. Where no time for the meeting is specified in the statute, the organization meeting should be held within a reasonable time after the certificate has been filed.⁶

If the incorporators deliberately refrain from taking the steps necessary to complete the incorporation, no corporation exists and the persons doing business in the assumed corporate capacity are liable as partners.⁷ Thus, where no stock was ever issued, the incorporators were personally liable for services rendered to the corporation.⁸ Incorporators have also been held individually liable for personal injuries sustained on the premises of a corporation whose organization was not completed.⁹

Place of organization meeting. Corporate organization must, of course, be completed in accordance with the provisions of the law to which the corporation owes its existence. It is generally held that, in the absence of statutory authority to the contrary, the corporate organization must be completed at a meeting of the incorporators held within the state¹⁰ in which the corporation is incorporated. The basis for this rule is that corporations can do no acts, except by agents, outside the state under the laws of which they are created, and the completion of corporate organization is not an act which can be done by agents.¹¹

If the meeting of incorporators is held outside the state under

one share of the capital stock of the corporation, and that such subscriber shall, upon the filing of the articles of incorporation, be shareholders (for example, Illinois), the incorporators are properly called "shareholders," or "stockholders."

(4) In the states that do not require each incorporator to be a subscriber to capital stock of the corporation, and the incorporators are all subscribers (signers) to the Articles of Incorporation, the incorporators are properly designated "subscribers."

⁶ *Bonaparte v. Baltimore, H. & L. R. R. Co.*, (1892) 75 Md. 340, 23 A. 784.

⁷ *Culkin v. Hillside Restaurant*, (1939) 126 N. J. Eq. 97, 8 A. (2d) 173.

⁸ *Geisenhoff v. Mabrey*, (1943) 58 Cal. App. (2d) 481, 137 P. (2d) 36.

⁹ *Beck v. Stimmel*, (1931) 39 Ohio App. 510, 177 N. E. 920.

¹⁰ See page 10.

¹¹ *Miller v. Ewer*, (1847) 27 Me. 509; *Hening & Hagedorn v. Glanton*, (1921) 27 Ga. App. 339, 108 S. E. 256.

the laws of which the corporation is organized, all acts done pursuant to the meeting may be wholly void,¹² although some courts hold that this fact cannot be taken advantage of in a collateral action, and that only the state can object.¹³

It is generally held that if by reason of failure to hold the meeting within the state defective organization results, it may be legalized by a subsequent meeting within the state, and acts done and contracts made prior to such meeting may be ratified.

Call and notice of incorporators' meeting—conduct of meeting. The statutes that make provision for the holding of an incorporators' meeting designate who shall call the meeting, what notice of the meeting shall be given, who shall sign the notice, and how the notice shall be transmitted to the incorporators. Where no statutory provisions are found for the calling of an incorporators' meeting, the incorporators should be guided by the general rules governing the calling of stockholders' meetings.¹⁴ In general, the procedure to complete corporate organization is determined by the laws under which the corporation was created.¹⁵ The prescribed procedure must, of course, be followed.

Organization meetings are conducted in the same manner as are other stockholders' or directors' meetings.¹⁶

Purposes of "dummy" incorporators. Organizers of a corporation are frequently far removed from the state selected for incorporation.¹⁷ This is so because, in choosing a state for incorporation, the organizers take into consideration the cost of incorporating, the annual taxes, and the general requirements of the corporation laws of the state. Proximity of operations to the state of incorporation is only a minor consideration in the selection of an incorporating state.

¹² *Welch v. Old Dominion Min. & Ry. Co.*, (1890) 56 Hun. (N. Y.) 650, 10 N. Y. Supp. 174.

¹³ *McKee v. Title Ins. & T. Co.*, (1911) 159 Cal. 206, 113 P. 140.

¹⁴ See page 3.

¹⁵ *Smith v. First Nat. Bank*, (1906) 43 Tex. Civ. App. 495, 95 S. W. 1111.

¹⁶ See page 16, et seq. and page 145, et seq.

¹⁷ If the statute requires the first directors to be named in the articles of incorporation and dummy incorporators have been used, it is entirely likely that the dummy incorporators will also have been named as the directors. In that case, the dummy incorporators will hold three meetings: (1) a first meeting of incorporators; (2) a first meeting of directors; and (3) a special meeting of the incorporators. At the first two meetings, all of the organizational matters will be attended to. At the third meeting, the dummy directors will resign, the actual directors will be elected, and the incorporators will transfer their shares to the real parties in interest.

Suppose the statute requires that all or a certain number of the incorporators shall be residents of the state of incorporation and that the incorporators' meeting shall be held within the state. The persons interested in the corporation, let us say, are nonresidents. How are the statutory requirements met? Temporary or "dummy" incorporators who meet the requirements of the statute subscribe to the shares necessary to qualify them as incorporators. They sign the certificate of incorporation and hold the incorporators' meeting. At the meeting, the qualifying shares subscribed for by the incorporators are transferred to the actual stockholders and the dummy incorporators fade from the picture entirely.

Suppose the statute specifies that two of the three incorporators shall be residents of the state and that the incorporators' meeting shall be held within the state. The corporation is organized, let us say, with three actual incorporators, two of whom are residents of the state and the third a nonresident. If any of the incorporators finds it inconvenient to attend the incorporators' meeting held within the state of incorporation, he may be represented at such a meeting by proxy.

Business transacted at organization meeting. The business transacted at an organization meeting depends largely upon the type of meeting, that is, whether it is a meeting of incorporators, subscribers, or directors. It is therefore impracticable to list the business generally transacted by the incorporators or subscribers, or by the directors at their organization meetings. The following list, however, may be helpful in checking the organization record to see that those items usually covered in the organization meetings are included in the minutes of the meetings.

1. Election of temporary chairman and secretary of the meeting.
2. Oath of office of temporary officers.
3. Presentation of notice of meeting or waiver if notice has been waived.
4. Report that certificate of incorporation has been filed as required by statute. This report should include date or dates (if the certificate is required to be filed in two places) of filing.
5. Order that certificate of incorporation be made a part of the record meeting.
6. Adoption of by-laws, or appointment of committee to draft by-laws.

7. Fixing number of directors (if not determined in the certificate of incorporation), and election of directors. Generally, where the board of directors is named in the certificate of incorporation, no election takes place at the first incorporators' meeting. If "dummy" directors have been named in the certificate of incorporation, these directors resign at the special incorporators' meeting and an election is held by the incorporators to fill the vacancies, as described on page 266.

8. Authorization for opening the books for subscriptions.

9. Report of subscriptions to capital stock.

10. Order that subscriptions be made a part of the record of the meeting.

11. Presentation of transfers of subscriptions. This step is necessary where temporary or "dummy" incorporators have been used in incorporating the company, and also where the state statute requires directors to own stock and the person to be elected is to acquire the qualifying shares of the incorporators.

12. Fixing capitalization and describing stock (if not determined in the certificate of incorporation). Authorization for board of directors to issue stock.

13. Election of officers.

14. Oath of office of permanent officers.

15. Call for bond from treasurer. (Bonds may, of course, be required from other officers.)

16. Approval of bond.

17. Adoption of corporate seal.

18. Adoption of form of corporate stock certificate.

19. Authority to purchase corporate record books.

20. Designation of principal office and appointment of resident agent in the state of incorporation, if one is required by statute, or appointment of agent for service of process.

21. Order that proper officers or directors execute and file any reports or records that the statute requires.

22. Appointment of regular date for directors' meeting, if by-laws do not provide for one.

23. Fixing the fiscal period.

24. Authorization for treasurer to open a bank account. If by-laws do not provide for the signing of checks and other instruments, the directors by resolution will assign the duty to some officer or officers.

25. Authorization for treasurer to pay the expenses incident to the organization of the company.

26. Transaction of any other business that is within the power of the persons meeting to transact, such as acquisition of property.

What the minute book contains upon completion of the organization. After the organization meetings have been held, the minute book of the corporation will contain the following information, subject, of course, to such variations as are made necessary by the requirements of the statute under which the corporation is organized and by the circumstances surrounding each particular case.

1. Certificate of incorporation, articles of association, articles of agreement, certificate of organization, and any other documents filed by the incorporators or officers in a public office. The minute book need not reproduce, however, the first annual tax report, or the first annual financial statement, where one is required to be filed upon organization of the company.

2. Pre-organization agreements and application for charter.

3. By-laws. It is well to annotate the copy of the by-laws that appears in the minute book, with references to the statute. The purpose of the annotation is to call to the attention of the officers sections of the by-laws which are subject to statutory provisions. The officers will thus avoid falling into the error of recommending amendments to the by-laws that conflict with the statutory requirements.

4. Receipt from the state treasurer, secretary of state, tax commissioner, or other official to whom the organization and filing fees have been paid. Some corporations prefer to file the receipt in their regular files. The better practice is to paste the receipt into the minute book.

5. The certificate issued by the secretary of state, or other official, showing that the charter has been filed.

6. Affidavit of publication of articles of incorporation; or other notice of organization.

7. Affidavit or certificate of paid-in capital, or certificate of initial payment of capital stock.

8. Notice or waiver of notice of the meeting of incorporators or stockholders.

9. Minutes of the first meeting of incorporators or stockholders.

10. Proxies used at the first meeting of incorporators or stockholders.

11. Subscription agreements.
12. Specimen forms of stock certificates.
13. Transfers of subscriptions.
14. Inspectors' oath and report.
15. Resignations of directors.
16. Notice or waiver of notice of first meeting of directors.
17. Minutes of first meeting of directors.
18. Oaths of secretary and other officers.
19. Oath of directors.
20. Bonds of treasurer and other officers.
21. Certificate of appointment of resident agent and location of principal office.

Many attorneys make it a practice to annex to the minutes the original documents, wherever it is possible to do so.

CHAPTER 8

CERTIFICATE OF INCORPORATION, BY-LAWS, AND ORGANIZATION RECORD OF A DELAWARE CORPORATION

No. 136

Delaware—Certificate of incorporation.

CERTIFICATE OF INCORPORATION OF

.....
FIRST.—The name of this Corporation shall be

(The name must contain one of the following words: "association," "company," "corporation," "club," "incorporated," "institute," "society," "union," "syndicate," or "limited," or one of the abbreviations, "co.," "corp.," "inc.," or "ltd." The word "trust" should not be used in the name of an ordinary business corporation.

The name must be such as to distinguish it upon the records in the office of the Secretary of State from the names of other corporations organized under the laws of Delaware.)

SECOND.—Its principal office in the State of Delaware is to be located at (Street), in the City of, County of The agent in charge thereof is, Inc. of, (Street),, Delaware.

THIRD.—The nature of the business and the objects and purposes to be transacted, promoted, and carried on are to do any or all of the things herein mentioned, as fully and to the same extent as natural persons might or could do, and in any part of the world—viz.:

(Here follow specific purpose and general power clauses.)

FOURTH.—The total number of shares that this Corporation shall have authority to issue is (.....).

(Here follow capital stock clauses. A corporation may be formed with one or more classes of stock, with or without par value. No maximum or minimum authorized capital stock is required by law. If the corporation is to be authorized to issue only one class of stock, state the total number of shares of stock that the corporation shall have authority to issue and (a) the par value of each of such shares, or (b) a statement that all such shares are to be without par value. If the corporation is to be authorized to issue more than one class of stock, state the total number of shares of all classes of stock that the corporation shall have authority to issue, and (a) the number of shares of each class that are to have a par value and the par value of each share of each such class, and/or

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(b) the number of such shares that are to be without par value, and (c) a statement of all or any of the designations and the powers, preferences, and rights, and the qualifications, limitations, or restrictions thereof, or a grant of authority to the Board of Directors to fix any or all of them.)

FIFTH.—The amount of capital with which this Corporation will commence business is Dollars (\$.....).

(The minimum amount of capital with which the corporation may begin business is One Thousand Dollars (\$1,000). Unless there is some good reason for pursuing another course, it is customary to make the certificate comply with the minimum requirements.

See General Corp. Law, Sec. 14, which provides, in effect, that the capital shall consist of the amount of the consideration received for stock (which must not be less in the case of par stock than the par value thereof), unless at the time of issuing shares of stock for cash, or within 60 days thereafter if the consideration is received for any shares in property other than cash, the directors shall designate what part of the consideration shall be designated as capital. The designation of capital by the directors has an important bearing on subsequent dividend and redemption policies.)

SIXTH.—The names and places of residence of each of the incorporators are as follows:

<i>Name</i>	<i>Residence</i>
.....
.....
.....

(The incorporators must be at least three in number. There are no restrictions as to residence or qualification. The incorporators, however, should always be persons of full age, since the charter in some respects constitutes a contract.)

SEVENTH.—The existence of this Corporation is to be perpetual.

EIGHTH.—The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatsoever.

NINTH.—(a) Subject to the provisions of the General Corporation Law of the State of Delaware, the number of directors of this Corporation shall be determined as provided in the By-laws.

(b) The election of directors need not be by ballot.

TENTH.—

(Here follow any provisions for the management of the business and for the conduct of the affairs of the corporation, and any provisions, creating, defining, limiting, and regulating the powers of the corporation, the directors, and stockholders.)

ELEVENTH.—(*The following provision may be included, if desired.*)

Whenever a compromise or arrangement is proposed between this Corporation and its creditors or any class of them, and/or between this Corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware, on the application in a summary way of this Corporation or of any creditor or stock-

holder thereof, or on the application of any receiver or receivers appointed for this Corporation under the provisions of Section 4407 of the Revised Code of 1935 of said state, or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of Section 43 of the General Corporation Law of the State of Delaware, may order a meeting of the creditors or class of creditors, and/or of the stockholders, or class of stockholders of this Corporation, as the case may be, to be summoned in such manner as the said Court directs. If a majority in number representing three fourths in value of the creditors or class of creditors and/or of the stockholders or class of stockholders of this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as a consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization, if sanctioned by the Court to which the said application has been made, shall be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders of this Corporation, as the case may be, and also on this Corporation.

TWELFTH.—(*The following provision may be included, if desired.*)

No contract or other transaction between this Corporation and any other corporation, whether or not a majority of the shares of the capital stock of such other corporation is owned by this Corporation, and no act of this Corporation, shall in any way be affected or invalidated by the fact that any of the directors of this Corporation are pecuniarily or otherwise interested in, or are directors or officers of, such other corporation; any director individually, or any firm of which such director may be a member, may be a party to, or may be pecuniarily or otherwise interested in, any contract or transaction of the corporation, provided that the fact that he or such firm is so interested shall be disclosed or shall have been known to the Board of Directors, or a majority thereof; and any director of this Corporation who is also a director or officer of such other corporation, or who is so interested, may be counted in determining the existence of a quorum at any meeting of the Board of Directors of this Corporation that shall authorize such contract or transaction, and may vote thereat to authorize such contract or transaction, with like force and effect as if he were not such director or officer of such other corporation or not so interested.

THIRTEENTH.—(*The following provision may be included, if desired.*)

The stockholders and directors shall have power to hold their meetings, if the By-laws so provide, and keep the books (except the original or duplicate stock ledger), documents, and papers of this Corporation, outside of the State of Delaware, and to have one or more offices within

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or without the State of Delaware, at such places as may be from time to time designated by the By-laws or by resolutions of the stockholders or directors, except as otherwise required by the laws of Delaware.

FOURTEENTH.—The Corporation reserves the right to amend, alter, or repeal any provision contained in this Certificate of Incorporation in the manner now or hereafter prescribed by the statutes of Delaware, and all rights and powers conferred on directors and stockholders herein are granted subject to this reservation.

WE, THE UNDERSIGNED, for the purpose of forming a corporation under the laws of the State of Delaware, do make, file, and record this Certificate, and do certify that the facts herein stated are true, and we have accordingly hereunto set our respective hands and seals.

Dated at (L. S.)
....., 19.. (L. S.)
..... (L. S.)
(Signatures of Incorporators)

State of }
County of } ss.:

BE IT REMEMBERED, That on this .. day of .., 19.. personally appeared before me .., a Notary Public,* .., and .., parties to the foregoing Certificate of Incorporation, known to me personally to be such, and I having first made known to them and each of them the contents of said Certificate, they did each severally acknowledge that they signed, sealed, and delivered the same as their voluntary act and deed, and each deposed that the facts therein stated were truly set forth.

GIVEN under my hand and seal of office the day and year aforesaid.
.....
Notary Public

No. 137
Delaware—By-laws.
BY-LAWS
of

.....
(Incorporated under the Laws of Delaware)

ARTICLE I—OFFICERS

1. The principal office shall be in the City of .., County of .., State of Delaware, and the name of the resident agent in

* A notary public's acknowledgment taken outside of Delaware is acceptable in Delaware without a county clerk's certificate of the notary's appointment. The notary's seal must be imprinted on the certificate.

charge thereof is Street,
City, County, Delaware.

2. The corporation may also have offices at such other places as the Board of Directors may from time to time appoint, or as the business of the corporation may require.

ARTICLE II—STOCKHOLDERS' MEETINGS

1. ALL MEETINGS of the stockholders shall be held at the principal office of the corporation in the City of, County of, State of Delaware, or at such other place as shall be determined, from time to time, by the Board of Directors, and the place at which such meeting shall be held shall be stated in the notice and call of the meeting. A change in the place of meeting shall not be made within sixty (60) days next before the day on which an election of directors is to be held, and a notice of any change shall be given to each stockholder twenty (20) days before the election is to be held.

2. AN ANNUAL MEETING of the stockholders of the corporation for the election of directors to succeed those whose terms expire and for the transaction of such other business as may properly come before the meeting, shall be held each year, after the year, on the day in, if not a legal holiday, and if a legal holiday, then on the day following, at o'clock in the noon. If the annual meeting of the stockholders be not held as herein prescribed, the election of directors may be held at any meeting thereafter called pursuant to these By-laws.

THE VOTING AT ALL MEETINGS of stockholders may be viva voce, but any qualified voter may demand a stock vote, whereupon such stock vote shall be taken by ballot, each of which shall state the name of the stockholder voting and the number of shares voted by him, and if such ballot be cast by a proxy, it shall also state the name of such proxy.

At any meeting of the stockholders, every stockholder having the right to vote shall be entitled to vote in person, or by proxy appointed by an instrument in writing subscribed by such stockholder and bearing a date not more than three years prior to said meeting, unless said instrument provides for a longer period. Each stockholder shall have one vote for each share of stock having voting power, registered in his name on the books of the corporation, and except where the transfer books of the corporation shall have been closed or a date shall have been fixed as a record date for the determination of its stockholders entitled to vote, no share of stock shall be voted which shall have been transferred on the books of the corporation within twenty days next preceding such election of directors.

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A complete list of the stockholders entitled to vote at the ensuing election, arranged in alphabetical order, and the number of voting shares held by each, shall be prepared by the Secretary, who shall have charge of the stock ledger, and filed in the office where the election is to be held, at least ten (10) days before every election, and shall, during the usual hours for business, and during the whole time of said election, be open to the examination of any stockholder.

3. THE ORDER OF BUSINESS at the annual meeting of stockholders shall be as follows:

- (a) Calling meeting to order.
- (b) Proof of notice of meeting.
- (c) Reading of minutes of last previous annual meeting.
- (d) Reports of officers.
- (e) Reports of committees.
- (f) Election of directors.
- (g) Miscellaneous business.

4. SPECIAL MEETINGS of the stockholders, for any purpose or purposes, unless otherwise prescribed by statute, may be called by the Chairman of the Board of Directors,* or the President, or in their absence by any Vice President, or by a majority of the Board of Directors, and shall be called at any time by the Chairman of the Board of Directors, the President, or any Vice President, or the Secretary or the Treasurer, upon the request of stockholders owning twenty-five per cent (25%) of the outstanding stock of the corporation entitled to vote at such meeting. Business transacted at all special meetings shall be confined to the objects stated in the call.

5. NOTICE of the time and place of the annual meeting of stockholders shall be given by mailing written or printed notice of the same at least ten (10) days, and not more than fifty (50) days, prior to the meeting, and notice of the time and place of special meetings shall be given by written or printed notice of the same at least five (5) days, and not more than fifty (50) days, prior to the meeting, with postage prepaid, to each stockholder of record of the corporation entitled to vote at such meeting, and addressed to the stockholder's last-known post-office address, or to the address appearing on the corporate books of the corporation. The Board of Directors may fix in advance a date, not exceeding fifty (50) days preceding the date of any meeting of stockholders, as a record date for the determination of the stockholders entitled to notice of and to vote at any such meeting.

* If it is not desired to have a chairman of the board of directors, Sec. 2, Art. IV should be omitted, and all references to the chairman of the board eliminated from Secs. 1, 2, 3, and 4 of Art. IV, Sec. 4 of Art. II and Sec. 6 of Art. III.

6. A QUORUM at any annual or special meeting of stockholders shall consist of stockholders representing, either in person or by proxy, a majority of the outstanding capital stock of the corporation entitled to vote at such meeting, except as otherwise specially provided by law or in the Certificate of Incorporation.

If a quorum be not present at a properly called stockholders' meeting, the meeting may be adjourned by those present, and if a notice of such adjourned meeting, sent to all stockholders entitled to vote thereat, contains the time and place of holding such adjourned meeting and a statement of the purpose of the meeting, that the previous meeting failed for lack of a quorum, and that under the provisions of this section it is proposed to hold the adjourned meeting with a quorum of those present, then, at such adjourned meeting, except as may be otherwise required by law or provided in the Certificate of Incorporation, any number of stockholders entitled to vote thereat, represented in person or by proxy, shall constitute a quorum, and the votes of a majority in interest of those present at such meeting shall be sufficient to transact business.

7. TWO INSPECTORS OF ELECTION shall be appointed by the Board of Directors before or at each meeting of the stockholders of the corporation at which an election of directors shall take place; if no such appointment shall have been made or if the inspectors appointed by the Board of Directors shall refuse to act or fail to attend, then the appointment shall be made by the presiding officer at the meeting. The inspectors shall receive and take in charge all proxies and ballots and shall decide all questions touching upon the qualification of voters, the validity of proxies, and the acceptance and rejection of votes. In case of a tie vote by the inspectors on any question, the presiding officer shall decide.

ARTICLE III—BOARD OF DIRECTORS

1. THE MANAGEMENT of all the affairs, property, and business of the corporation shall be vested in a Board of Directors, consisting of (...) persons, who shall be elected at the annual meeting of the stockholders by a plurality vote, for a term of one year, and shall hold office until their successors are elected and qualify. Directors need not (or must) be stockholders. In addition to the powers and authorities by these By-laws and the Certificate of Incorporation expressly conferred upon it, the Board of Directors may exercise all such powers of the corporation and do all such lawful acts and things as are not by statute or by the Certificate of Incorporation or by these By-laws directed or required to be exercised or done by the stockholders.

2. THE NUMBER OF DIRECTORS may at any time be increased or decreased by vote of a majority of the stockholders entitled to vote, at

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any regular or special meeting, if the notice of such meeting contains a statement of the proposed increase or decrease; and in case of any such increase, the stockholders at any general or special meeting shall have power to elect such additional directors to hold office until the next annual meeting of the stockholders, and until their successors are elected and qualify.

3. ALL VACANCIES in the Board of Directors, whether caused by resignation, death, or otherwise, may be filled by the remaining director or a majority of the remaining directors attending a stated or special meeting called for that purpose, even though less than a quorum be present. A director thus elected to fill any vacancy shall hold office for the unexpired term of his predecessor, and until his successor is elected and qualifies.

4. THE FIRST MEETING of each newly elected Board shall be held at such time and place, either within or without the State of Delaware, as shall be fixed by the vote of the stockholders at the annual meeting, and no notice of such meeting shall be necessary to the newly elected directors in order legally to constitute the meeting, provided a majority of the whole Board shall be present; or they may meet at such place and time as shall be fixed by the consent in writing of all the directors.

5. REGULAR MEETINGS of the Board of Directors may be held without notice at the principal office of the corporation or at such other place or places, within or without the State of Delaware, as the Board of Directors may from time to time designate.

6. SPECIAL MEETINGS of the Board of Directors may be called at any time by the Chairman of the Board of Directors * or President, or, in their absence, by any Vice President, or by any two directors, to be held at the principal office of the corporation, or at such other place or places, within or without the State of Delaware, as the directors may from time to time designate.

7. NOTICE of all special meetings of the Board of Directors shall be given to each director by three (3) days' service of the same by telegram, by letter, or personally.

8. A QUORUM at all meetings of the Board of Directors shall consist of a majority of the whole Board; but less than a quorum may adjourn any meeting, which may be held on a subsequent date without further notice, provided a quorum be present at such deferred meeting.

9. STANDING OR TEMPORARY COMMITTEES may be appointed from its own number by the Board of Directors from time to time, and the Board of Directors may from time to time invest such committees

* See footnote * on page 210.

with such powers as it may see fit, subject to such conditions as may be prescribed by such Board. An Executive Committee may be appointed by resolution passed by a majority of the whole Board; it shall have all the powers provided by statute, except as specially limited by the Board. All committees so appointed shall keep regular minutes of the transactions of their meetings, and shall cause them to be recorded in books kept for that purpose in the office of the corporation, and shall report the same to the Board of Directors at its next meeting.

10. No STATED SALARY shall be paid directors, as such, for their services, but, by resolution of the Board of Directors, a fixed sum and expenses of attendance, if any, may be allowed for attendance at each regular or special meeting of such Board; provided that nothing herein contained shall be construed to preclude any director from serving the corporation in any other capacity and receiving compensation therefor. Members of special or standing committees may be allowed like compensation for attending committee meetings.

ARTICLE IV—OFFICERS

1. THE OFFICERS OF THE COMPANY shall be a Chairman of the Boards of Directors,* a President, one or more Vice Presidents, a Secretary, and a Treasurer, who shall be elected for one year by the directors at their first meeting after the annual meeting of stockholders, and who shall hold office until their successors are elected and qualify. The Board of Directors may also choose additional Assistant Secretaries and Assistant Treasurers. The President and Vice Presidents must be members of the Board of Directors. Any two offices (but not more than two) may be held by the same person.

2. THE CHAIRMAN OF THE BOARD OF DIRECTORS ** shall preside at all meetings of stockholders and directors. Except where by law the signature of the President is required, the Chairman shall possess the same power as the President to sign all certificates, contracts, and other instruments of the corporation which may be authorized by the Board of Directors. During the absence or disability of the President, he shall exercise all the powers and discharge all the duties of the President.

3. THE PRESIDENT, in the absence of the Chairman of the Board, shall preside at all meetings of stockholders and directors, shall have general supervision of the affairs of the corporation, shall sign or countersign all certificates, contracts, and other instruments of the corporation as authorized by the Board of Directors, shall make reports

* See footnote * on page 210.

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to the Board of Directors and stockholders, and shall perform all such other duties as are incident to his office or are properly required of him by the Board of Directors.

4. THE VICE PRESIDENTS, in the order designated by the Board of Directors, shall exercise the functions of the President during the absence or disability of the President and the Chairman of the Board of Directors. Each Vice President shall have such powers and discharge such duties as may be assigned to him from time to time by the Board of Directors.

5. THE SECRETARY shall issue notices for all meetings, except that notice for special meetings of directors called at the request of two directors as provided in Sec. 6 of Art. III of the By-laws may be issued by such directors, shall keep minutes of all meetings, shall have charge of the seal and the corporate books, and shall make such reports and perform such other duties as are incident to his office, or are properly required of him by the Board of Directors.

6. THE ASSISTANT SECRETARIES, in the order of their seniority, shall, in the absence or disability of the Secretary, perform the duties and exercise the powers of the Secretary, and shall perform such other duties as the Board of Directors shall prescribe.

7. THE TREASURER shall have the custody of all moneys and securities of the corporation and shall keep regular books of account. He shall disburse the funds of the corporation in payment of the just demands against the corporation, or as may be ordered by the Board of Directors, taking proper vouchers for such disbursements, and shall render to the Board of Directors from time to time as may be required of him, an account of all his transactions as Treasurer and of the financial condition of the corporation. He shall perform all duties incident to his office or which are properly required of him by the Board of Directors.

8. THE ASSISTANT TREASURERS, in the order of their seniority, shall, in the absence or disability of the Treasurer, perform the duties and exercise the powers of the Treasurer, and shall perform such other duties as the Board of Directors shall prescribe.

9. IN THE CASE OF ABSENCE OR INABILITY TO ACT of any officer of the corporation and of any person herein authorized to act in his place, the Board of Directors may from time to time delegate the powers or duties of such officer to any other officer, or any director or other person whom it may select.

10. VACANCIES in any office arising from any cause may be filled by the directors at any regular or special meeting.

11. THE BOARD OF DIRECTORS MAY APPOINT such other officers and agents as it shall deem necessary or expedient, who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board of Directors.

12. THE SALARIES of all officers and agents of the corporation shall be fixed by the Board of Directors.

13. THE OFFICERS OF THE CORPORATION shall hold office until their successors are chosen and qualify. Any officer elected or appointed by the Board of Directors may be removed at any time, with or without cause, by the affirmative vote of a majority of the whole Board of Directors.

14. THE BOARD OF DIRECTORS MAY, by resolution, require any and all of the officers to give bonds to the corporation, with sufficient surety or sureties, conditioned for the faithful performance of the duties of their respective offices, and to comply with such other conditions as may from time to time be required by the Board of Directors.

ARTICLE V—STOCK

1. CERTIFICATES OF STOCK shall be issued in numerical order, and each stockholder shall be entitled to a certificate signed by the President or Vice President and the Treasurer or an Assistant Treasurer, or the Secretary or an Assistant Secretary, certifying to the number of shares owned by him. Where, however, such certificate is signed by a transfer agent or an assistant transfer agent, or by a transfer clerk acting in behalf of the corporation, and a registrar, the signatures of any of the above-named officers may be facsimile.

In case any officer who has signed, or whose facsimile signature has been used on, a certificate, has ceased to be an officer before the certificate has been delivered, such certificate may, nevertheless, be adopted and issued and delivered by the corporation as though the officer who signed such certificate or certificates, or whose facsimile signature or signatures shall have been used thereon, had not ceased to be such officer of the corporation.

2. TRANSFERS OF STOCK shall be made only upon the transfer books of the corporation, kept at the office of the corporation or respective transfer agents designated to transfer the several classes of stock, and before a new certificate is issued, the old certificates shall be surrendered for cancellation.

3. REGISTERED STOCKHOLDERS only shall be entitled to be treated by the corporation as the holders in fact of the stock standing in their respective names, and the corporation shall not be bound to recognize

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any equitable or other claim to or interest in any share on the part of any other person, whether or not it shall have express or other notice thereof, except as expressly provided by the laws of Delaware.

4. IN CASE OF LOSS OR DESTRUCTION of any certificate of stock, another may be issued in its place upon proof of such loss or destruction, and upon the giving of a satisfactory bond of indemnity to the corporation and/or to the transfer agent and registrar of such stock, in such sum as the Board of Directors may provide.

5. REGULATIONS. The Board of Directors shall have power and authority to make all such rules and regulations as it may deem expedient concerning the issue, transfer, conversion, and registration of certificates for shares of the capital stock of the corporation, not inconsistent with the laws of Delaware, the Certificate of Incorporation of the corporation, and these By-laws.

6. CLOSING OF TRANSFER BOOKS. The Board of Directors shall have power to close the stock transfer books of the corporation for a period not exceeding fifty days preceding the date of any meeting of stockholders, or the date for payment of any dividend, or the date for the allotment of rights, or the date when any change or conversion or exchange of capital stock shall go into effect, or for a period of not exceeding fifty days in connection with obtaining the consent of stockholders for any purpose; provided, however, that in lieu of closing the stock transfer books as aforesaid, the Board of Directors may fix in advance a date, not exceeding fifty days preceding the date of any meeting of stockholders, or the date for the payment of any dividend, or the date for the allotment of rights, or the date when any change or conversion or exchange of capital stock shall go into effect, or a date in connection with obtaining such consent, as a record date for the determination of the stockholders entitled to notice of and to vote at any such meeting, and any adjournment thereof, or entitled to receive payment of any such dividend, or to any such allotment of rights, or to exercise the rights in respect of any such change, conversion, or exchange of capital stock, or to give such consent; and in such case such stockholders, and only such stockholders as shall be stockholders of record on the date so fixed, shall be entitled to such notice of and to vote at such meeting, and any adjournment thereof, or to receive payment of such dividend, or to receive such allotment of rights, or to exercise such rights, or to give such consent, as the case may be, notwithstanding any transfer of any stock on the books of the corporation after any such record date fixed as aforesaid.

ARTICLE VI—DIVIDENDS AND FINANCE

1. DIVIDENDS may be declared by the Board of Directors and paid out of the annual net profits of the corporation or out of its net assets

in excess of its capital, subject to the conditions and limitations imposed by the Certificate of Incorporation of the corporation.

2. BEFORE MAKING ANY DISTRIBUTION OF PROFITS there may be set aside out of the net profits of the corporation, such sum or sums as the directors from time to time, in their absolute discretion, may deem expedient, as a reserve fund to meet contingencies, or for equalizing dividends, or for maintaining any property of the corporation, or for any other purpose, and any profits of any year not distributed as dividends shall be deemed to have been thus set apart until otherwise disposed of by the Board of Directors.

3. THE MONEYS of the corporation shall be deposited in the name of the corporation in such bank or banks or trust company or trust companies as the Board of Directors shall designate, and shall be drawn out only by check signed by persons designated by resolution by the Board of Directors.

4. THE FISCAL YEAR of the corporation shall begin on the first day of January in each year, unless otherwise provided by the Board of Directors.

ARTICLE VII—BOOKS AND RECORDS

1. THE BOOKS, ACCOUNTS, AND RECORDS of the corporation, except as may be otherwise required by the laws of the State of Delaware, may be kept outside of the State of Delaware, at such place or places as the Board of Directors may from time to time appoint. The Board of Directors shall determine whether and to what extent the accounts and books of the corporation, or any of them, other than the stock ledger, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by law or by resolution of the stockholders or directors.

ARTICLE VIII—NOTICES

1. WHENEVER THE PROVISIONS of the statute or these By-laws require notice to be given to any director, officer, or stockholder, they shall not be construed to mean personal notice; such notice may be given in writing by depositing the same in a post-office or letter box, in a post-paid, sealed wrapper, addressed to such director, officer, or stockholder at his or her address as the same appears in the books of the corporation, and the time when the same shall be mailed shall be deemed to be the time of the giving of such notice.

2. A WAIVER of any notice in writing, signed by a stockholder, director, or officer, whether before or after the time stated in said waiver for holding a meeting, shall be deemed equivalent to a notice required to be given to any director, officer, or stockholder.

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ARTICLE IX—SEAL

1. THE CORPORATE SEAL of the corporation shall consist of two concentric circles, between which shall be the name of the corporation, and in the center shall be inscribed the year of its incorporation and the words, "Corporate Seal, Delaware."

ARTICLE X—AMENDMENT OF BY-LAWS

1. ALTERATIONS, AMENDMENTS, OR REPEALS of the By-laws may be made by a majority of the stockholders entitled to vote at any meeting, if the notice of such meeting contains a statement of the proposed alteration, amendment, or repeal, or by the Board of Directors by a majority vote of the whole Board of Directors at any regular or special meeting, provided notice of such alteration, amendment, or repeal has been given to each director in writing at least three (3) days prior to said meeting.

No. 138

Delaware—Minutes of first meeting of incorporators.

[Note. This form, together with forms Nos. 139–145, constitutes the organization record of a Delaware corporation. The headings in brackets may appear as marginal notes in the minute book.]

[Time and place of meeting]

The first meeting of incorporators of the was held at, in the City of, State of, at o'clock in the noon of the .. day of, 19..., pursuant to a written waiver of notice signed by all of the incorporators, fixing said place and time.

The following incorporators were present in person or by proxy:

<i>Name of Incorporator</i>	<i>Name of Proxy *</i>
.....
.....
.....

being all of the incorporators named in the Certificate of Incorporation.

[Temporary officers]

On motion unanimously carried, Mr. was elected Chairman, and Mr. Secretary of the meeting.

[Waiver of notice]

The Secretary presented the waiver of notice of the meeting signed by all of the incorporators, and it was filed as part of the minutes.

* If the incorporator was present in person, write "In person" in this column. If not, write the name of the person who represented him as proxy.

The Secretary was ordered to file as a part of the minutes any proxies which had been accepted.

[Certificate of incorporation reported filed]

The Chairman reported that the Certificate of Incorporation of the Corporation was filed in the office of the Secretary of State of the State of Delaware on the .. day of, 19.., and a certified copy thereof was filed for record in the office of the Recorder of Deeds in the County of, on the .. day of, 19.., and a copy of said Certificate of Incorporation was ordered to be inserted in the minute book as a part of the records of the meeting.

[Adoption of By-laws]

The Secretary presented a proposed form of By-laws for the regulation and management of the affairs of the Corporation, which was read, section by section, and unanimously adopted and ordered to be made a part of the permanent records to follow the Certificate of Incorporation in the minute book.

[Election of directors]

Motions were then declared by the Chairman to be in order for the nomination of directors of the Corporation to hold office for the ensuing year and until their successors are elected and qualify, and the following gentlemen were nominated: (*insert names of nominees*).

No further nominations having been made, a ballot was taken and all of the incorporators having voted, and the ballots having been duly canvassed, the Chairman declared that the above-named persons were elected directors of the Corporation by the unanimous vote of all the incorporators.

Upon motion duly made, seconded, and unanimously carried, it was

[Issuance of capital stock]

RESOLVED, That the Board of Directors be and it hereby is authorized in its discretion to issue the capital stock of this Corporation to the full amount or number of shares authorized by the Certificate of Incorporation, in such amounts and for such considerations * as from time to time shall be determined by the Board of Directors and as may be permitted by law.

[Adjournment]

There being no other business to be transacted, the meeting was, upon motion duly made, seconded, and carried, adjourned.

.....
Secretary of the Meeting

* Stock with par value cannot be issued for less than par.

No. 139

Delaware—Waiver of notice of meeting of incorporators.

We, the undersigned, being all of the incorporators of the, a corporation organized under the laws of the State of Delaware, do hereby severally waive all the statutory requirements as to notice of the time, place, and purpose of the first meeting of incorporators of the said Corporation and the publication thereof, and consent that the meeting shall be held at, in the City of, State of, on the .. day of, 19..., at o'clock in the noon; and we consent to the transaction of any and all business that may properly come before the meeting.
Dated, 19..

.....
.....
.....

No. 140

Delaware—Proxy for first meeting of incorporators.

KNOW ALL MEN BY THESE PRESENTS:

That I, the undersigned, being an incorporator (and a subscriber for shares of the capital stock) * of the above-named Corporation, do hereby constitute and appoint as my true and lawful attorney to vote for me in my name, place, and stead (the stock subscribed for by me or standing in my name) and to act as my proxy at the first meeting of the incorporators to be held at in the City of, State of, on the .. day of, 19..., or on such other day as the meeting may be thereafter held by adjournment or otherwise (according to the number of votes I am now or may then be entitled to cast).

I hereby grant to the said attorney full power and authority to act for me and in my name at the said meeting or meetings in voting for directors of the Corporation, adopting the By-laws, and in the transaction of such other business as may come before the meeting, as fully as I could do if present in person. I hereby expressly ratify and confirm all that my said attorney or substitute may do in my place, name, and stead.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this .. day of, 19...

Witness: (Seal)
.....

* If incorporators subscribe for shares, the words in parentheses should be included in the proxy.

No. 141

Delaware—Transfer of subscription.

KNOW ALL MEN BY THESE PRESENTS:

That I,, in consideration of’s agreement to fulfill the obligation of my subscription for shares, contained in the original Certificate of Incorporation of a corporation organized under the laws of Delaware, have assigned and transferred and by these presents do assign and transfer unto said, all my right, title, and interest in said subscription, and I do hereby authorize and empower the proper officers to issue the certificates for the said shares to the order of said transferee.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this .. day of, 19...

In presence of:

..... (Seal)

No. 142

Delaware—Minutes of first meeting of directors.

[Note. The headings in brackets may appear as marginal notes in the minute book.]

[Time and place of meeting]

The first meeting of the Board of Directors of was held at, in the City of, State of, on the .. day of, 19.., at o’clock in the noon.

Present: Messrs.,, and, constituting * of the Board.

[Temporary officers]

Mr. was unanimously chosen temporary Chairman, and Mr. was unanimously chosen temporary Secretary of the meeting.

[Waiver of notice]

The Secretary presented and read a waiver of notice of the meeting signed by all the directors, which was ordered filed.

[Approval of minutes]

The minutes of the first meeting of incorporators were read and approved.

* Insert “a quorum” or “the full membership.”

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[Election of officers]

The following persons were nominated for officers of the Corporation to serve until their respective successors are chosen and qualify:

Chairman of the Board of Directors, *

President,

Vice-president,

Treasurer,

Secretary,

Ballots being duly cast by all the directors present, the Chairman announced that the aforementioned persons had been unanimously elected to the offices set before their respective names to assume the duties and responsibilities fixed by the By-laws.

The Chairman of the Board of Directors (*or* the President) thereupon took the chair, ** and the Secretary immediately assumed the discharge of his duties.

On motion duly made, seconded, and unanimously adopted, it was

[Adoption of seal]

RESOLVED, That a corporate seal, the impression of which is affixed in the margin hereof, be and the same shall be the corporate seal of the Corporation.

[Approval of form of stock certificate]

A form of stock certificate was presented, and upon motion duly made, seconded, and adopted, was unanimously approved.

[Treasurer's bond]

The Treasurer was then called upon to give a bond in the sum of Dollars (\$.....) with one surety. The form of the bond and the name of the surety were presented at this meeting for the approval of the Board, to determine the sufficiency of the surety, said bond being signed by as principal and by as surety, and both the form and the surety of the bond were approved and accepted. The Treasurer's bond was then ordered filed.†

Upon motion duly made, seconded, and unanimously carried, it was

[Resident agent and office]

RESOLVED, That the office of Corporation,

* If the by-laws so provide, the chairman may be omitted.

** This clause may be omitted if the temporary officers are the same as the permanent officers.

† The directors may or may not require a bond to be given by the treasurer. If the bond is not to be required, this paragraph will be omitted.

..... (Street), in the City of, County of, in the State of Delaware, be and is hereby designated as the principal office of this Corporation within the State of Delaware, and that Corporation be and is hereby appointed the Resident Agent of this Corporation, in charge of the Principal Office in Delaware and custodian of the books required by law to be kept in that office, and the agent upon whom process against this Corporation may be served in accordance with the laws of Delaware.

FURTHER RESOLVED, That said Corporation, may look for advice and follow the instructions of, Esq., counsel of this Corporation, on legal questions arising in connection with such agency.

FURTHER RESOLVED, That the Secretary be and he hereby is instructed to prepare and execute a certificate, sealed with the corporate seal, authorizing the said Corporation, to act in the capacity heretofore set forth.

FURTHER RESOLVED, That an office of the Corporation be established and maintained at, in the City of, State of, and that meetings of the Board of Directors from time to time may be held either at such office in the City of, or elsewhere, as the Board of Directors shall from time to time order, or at the Registered Office in, Delaware.

[Meetings of directors]

FURTHER RESOLVED, That until otherwise ordered, regular meetings of the Board of Directors be held at said office in the City of, on the .. day of each month at o'clock, .. M.

The following motion was made, seconded, and unanimously carried:

[Purchase of property for stock]

WHEREAS, has offered to sell to this Corporation the following property (*insert description of property*) in consideration that this Corporation will issue to the order of said, (.....) shares of capital stock of this Corporation, fully paid and non-assessable, as follows:*; and

WHEREAS, it appears to the Board of Directors that said property is necessary for the business of this Corporation, that the same is of a fair value at least equal to the ** value of the stock to be issued therefor,†

* Insert here a description of the shares and the number to be issued.

** If the stock has no par value, insert here, "fair"; if it has par value, insert "par"; if two classes are to be issued, one without par value and the other with par value, insert here "fair and par" and add an "s" to the succeeding word "value."

† If the whole or part of the stock to be issued has no par value and it is

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RESOLVED, That the offer of said to sell to this Corporation said property (which property the Board of Directors does hereby declare in its best judgment to be of the value above set forth and necessary for the business of this Corporation) be and it hereby is accepted, that the proper officers be and they hereby are authorized and directed to execute, issue, and deliver in the name and on behalf of this Corporation, and under its corporate seal, certificates of stock for shares to the order of, and be it further

RESOLVED, That of the consideration received or to be received for such stock, the sum of Dollars (\$.....) is hereby specified as capital.*

Upon motion duly made, seconded, and unanimously carried, it was

[Opening of bank account]

RESOLVED, That the Treasurer be authorized and directed to open a bank account for the Corporation with the, in the City of, which bank be and it hereby is authorized to honor from the deposits of the Corporation, checks drawn against such deposits signed by **, as long as there is a balance in favor of the Corporation.

Upon motion duly made, seconded, and unanimously carried, it was

[Qualification in other States]

RESOLVED, That the proper officers of this Corporation be and they hereby are authorized and directed, in behalf of the Corporation, and under its corporate seal, to make and file such certificate or certificates, report or reports, or other instrument or instruments as may be required by law to be filed in any State, territory, colony, or dependency of the United States, or in any foreign country in which said officers shall find it necessary or expedient to file the same to authorize the Corporation to transact business in such State, territory, colony, dependency, or foreign country.

Upon motion duly made, seconded, and unanimously carried, it was

[Payment of organization fees]

RESOLVED, That the Treasurer be and he hereby is authorized to pay all fees and expenses incident to and necessary for the organization of this Corporation.

desired to place a dollar value on the property for future bookkeeping, balance sheet, or other purposes, there may be added here, "that is, \$.....," stating here the reasonable cash value.

* In the case of par stock, the amount may not be less than par. In the case of no-par stock, any amount may be specified as capital.

** Designate the officer or officers; a convenient and not unusual provision is the following: "any two of the following officers: President, Vice President, Treasurer, Secretary."

[Adjournment of meeting]

Upon motion duly made, seconded, and unanimously carried, the meeting was adjourned.

.....
Secretary

No. 143

Delaware—Waiver of notice of first meeting of directors.

We, the undersigned, duly elected directors of, do hereby severally waive notice of time, place, and purpose of the first meeting of directors of said Corporation, and consent that the meeting be held at, in the City of, State of, on the .. day of, 19.., at o'clock in the noon, and we do further consent to the transaction of any business requisite to complete the organization of the Corporation and to any and all business which may properly come before the meeting.

Dated, 19..

.....
.....
.....

No. 144

Delaware—Treasurer's bond.

KNOW ALL MEN BY THESE PRESENTS, That, of, as principal, and, of, as surety, are held and firmly bound unto, its successors and assigns, in the sum of Dollars (\$.....) lawful money of the United States, to be paid to such Corporation, its successors and assigns, for which payment, well and truly to be made, we bind ourselves, our executors, administrators, and successors, jointly and severally, firmly by these presents.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this .. day of, 19...

WHEREAS, the said has been duly elected to the office of and is about to enter upon the duties as Treasurer of.....,

Now, THEREFORE, the condition of the above obligation is such that if said shall in all respects fully and faithfully discharge his duties as such Treasurer, as long as he shall hold the said office or continue therein during the term for which he is now or may hereafter be elected, appointed, or held over, and also, if in case of his death, resignation, or removal from office for any cause, all the books, papers, vouchers, money, or other property of whatever

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kind in his possession or under his control belonging to the Corporation shall be restored to the Corporation, then this obligation is to be void; otherwise it is to be in full force and effect.

Signed, sealed, and delivered (L. S.)
in the presence of: (L. S.)
.....

No. 145

Delaware—Certificate of appointment of resident agent and of location of principal office.

This is to certify that the Board of Directors of Corporation, on this .. day of .., 19.., upon motion duly made, seconded, and unanimously carried,

RESOLVED, That the office of Corporation, (Street), in the City of .., County of .., in the State of Delaware, be and is hereby designated as the principal office of this Corporation within the State of Delaware, and that Corporation, be and is hereby appointed the Resident Agent of this Corporation, in charge of the principal office and custodian of the books required by law to be kept in that office, and the agent upon whom process against this Corporation may be served in accordance with the laws of Delaware.

FURTHER RESOLVED, That said Corporation may look for advice and follow the instructions of .., Esq., counsel of this Corporation, on legal questions arising in connection with such agency.

IN WITNESS WHEREOF, I have hereunto by order of the Board of Directors, set my official hand, in behalf of the Corporation, and have hereunto affixed the corporate seal, this .. day of .., 19...

.....
By.....
Secretary

CHAPTER 9

MANAGEMENT OF THE CORPORATION

Scope of chapter. This chapter is devoted to a discussion of the place of the stockholders in the management of the corporation, the general powers of directors and officers in conducting the ordinary corporate affairs, the appointment of committees and agents, the execution of corporate instruments, and the resignation and removal of directors and officers. Forms of resolutions relating to these subjects are presented in Chapter 10. The principles governing compensation of directors, officers, and employees for their services to the corporation are discussed in Chapter 11.

Powers of Stockholders

Position of stockholders in management of the corporation. The business management of a corporation is specifically entrusted by the statutes of the various states to the board of directors, sometimes called the board of trustees. Stockholders do not participate in management of the business.¹ Their consent is not necessary in the conduct of the ordinary affairs of the corporation;² they do not vote on questions of management.³ Their control of the corporation lies only in their power to elect directors,⁴ and to approve or reject propositions that, according to statute, charter, or by-laws, cannot be undertaken without their approval. (See page 229.)

¹ *Hanrahan v. Andersen*, (1939) 108 Mont. 218, 90 P. (2d) 494; *S. E. C. v. Transamerica Corp.*, (1946) 67 F. Supp. 326, aff'd (1947) 163 F. (2d) 511. See also "Fiduciary Relation of Majority to Minority Stockholders," 41 *Ill. Law Review* 122 (1946).

² *Fowler v. Shaw*, (1925) 119 Kan. 576, 240 P. 970; *Hayes v. St. Louis Union Trust Co.*, (1927) 317 Mo. 1028, 298 S. W. 91; *Warren v. Fitzgerald*, (1948) Md. 56 A. (2d) 827.

³ *Geiman-Herthel Furniture Co. v. Geiman*, (1945) 160 Kan. 346, 161 P. (2d) 504.

⁴ *Dunlay v. Avenue M. Garage & Repair Co.*, (1930) 253 N. Y. 274, 170 N. E. 917, aff'g 227 N. Y. App. Div. 804, 237 N. Y. Supp. 762; *Elevator Supplies Co. v. Wylde*, (1930) 106 N. J. Eq. 163, 150 A. 347; *McQuade v. Stoneham*, (1934) 263 N. Y. 323, 189 N. E. 234; *Adams v. Farmers Gin Co.*, (1938) (Tex. Civ. App.), 114 S. W. (2d) 583; *S. E. C. v. Transamerica Corp.*, supra (Note 1).

Stockholders cannot exercise the powers that are vested in the directors, nor the powers that are delegated to the company's officers and agents.⁵ They do not instruct the directors in the management of the corporation.⁶ It has been held, however, that selection of independent auditors to audit the corporate books is a proper subject for stockholder consideration.⁷ Although stockholders can limit the directors' powers,⁸ a charter provision requiring that their acts must be endorsed by the stockholders is void.⁹ Even where approval of the stockholders is required by statute or charter before action may be taken, the stockholders acting alone cannot bind the corporation.¹⁰

Power of stockholders to make contracts. Stockholders cannot bind the corporation by the simplest contract, either individually or while acting together at a stockholders' meeting,¹¹ without authority from the corporation.¹² For example, a contract of employment made by the owners of a majority of the stock is not binding on the corporation.¹³ While, strictly speaking, this is the rule where management of the corporation has been vested in the board of directors, there are many exceptions. Action taken by the stockholders, that should have been authorized by the board of directors, will be binding on the corporation under the following circumstances: (1) if the directors have ratified the action; (2) if it has been the custom of the corporation to act through the authority of the stockholders; (3) if the corporation has acquiesced in the action taken by the stockholders; (4) if the corporation has accepted and retained the benefits of the transaction; (5) if the stockholders and the directors are the same people and all the directors were present

⁵ *Charlestown Boot & Shoe Co. v. Dunsmore*, (1880) 60 N. H. 85; *Bodel General Gas & Electric Corp.*, (1926) 15 Del. Ch. 119, 132 A. 442; *Klein v. Sq. Bank Bldg. Co.*, (1932) 110 N. J. Ch. 607, 160 A. 812.

⁶ *Ayres v. Hadaway*, (1942) 303 Mich. 589, 6 N. W. (2d) 905; *Com'r of Internal Revenue v. Laughton*, (1940) 113 F. (2d) 103.

⁷ *S. E. C. v. Transamerica Corp.*, (1947) 163 F. (2d) 511.

⁸ *Crowley v. Commodity Exchange, Inc.*, (1944) 141 F. (2d) 182.

⁹ *Kaplan v. Block*, (1944) 183 Va. 327, 31 S. E. (2d) 893.

¹⁰ *Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co.*, (1900) 130 Cal. 345, 62 P. 552.

¹¹ *Fowler v. Shaw*, (1925) 119 Kan. 576, 240 P. 970; *Sellers v. Greer*, (1898) 172 Ill. 549, 50 N. E. 246 (holding that corporate property is not subject to the control or disposition of the stockholders); *Manufacturers' Exhibition Bldg. Co. v. Landay*, (1905) 219 Ill. 168, 76 N. E. 146, and cases there cited; *Ayres v. Hadaway*, (1942) 303 Mich. 589, 6 N. W. (2d) 905.

¹² *Jones v. Williams*, (1897) 139 Mo. 1, 39 S. W. 486; *MacBrine-McAdams Realty Co. v. Morris*, (1938) 129 Pa. Super. 604, 196 A. 511.

¹³ *D'Arcangelo v. D'Arcangelo*, (1945) 137 N. J. Eq. 63, 43 A. (2d) 169.

and participated in the meeting at which the action was taken by the stockholders;¹⁴ and (6) if all the stockholders were present or represented at the meeting.¹⁵

The stockholders cannot by their consent give the corporation power to do something which the corporation has not the power to do under its charter.¹⁶ The effect of such consent is to preclude the stockholders from objecting that the corporation acted beyond its powers.

Acts requiring consent of stockholders. Consent of all or a certain proportion of the stockholders is generally required in the following matters: (1) acceptance of the corporate charter; (2) amendment of the corporate charter; (3) adoption of by-laws, unless this power is expressly vested in the governing board by statute or charter; (4) amendment of by-laws if the stockholders have the right to adopt them and if the power to amend them is not expressly given to the governing board; (5) removal of directors; (6) merger of the corporation with another company, or consolidation; (7) transfer of all the property of the corporation by sale or lease; (8) voluntary dissolution of the company; (9) assessments on fully paid stock; and (10) all other matters where approval of the stockholders is required by statute, charter, or by-laws.

The extent of the right of stockholders to control the actions of the corporate officers or agents is determined by the law of the state of incorporation.¹⁷

Powers of Directors and Officers

Management by the board of directors. The corporate powers are exercised, the corporate business conducted, and the corporate property controlled by the board of directors, acting as a body.¹⁸ The directors must direct.¹⁹ They cannot agree among

¹⁴ First Trust Co. v. Miller, (1915) 160 Wis. 336, 151 N. W. 813.

¹⁵ Colorado Springs Co. v. American Pub. Co., (1899) 97 F. 843.

¹⁶ See page 250 as to ratification.

¹⁷ Farmers Educational, etc. v. Farmers Educational, etc., (1940) 207 Minn. 80, 289 N. W. 884.

¹⁸ Brown v. Citizens' State Bank, (1939) 345 Mo. 480, 134 S. W. (2d) 116; In re Joseph Feld & Co., (1941) 38 F. Supp. 506. As to requirement that directors act as a board, see page 133.

Directors who have acted as general managers of the corporation have been called "managing directors," although the statute made no provision therefor. See Hartford v. Massachusetts Bowling Alleys, (1918) 229 Mass. 30, 118 N. E. 188; Cuppy v. Stollwerck Brothers, Inc., (1913) 158 N. Y. App. Div. 628, 143 N. Y. Supp. 967, rev'd, 216 N. Y. 590, 111 N. E. 249; Orvis v. H. H. Warner & Co.,

themselves or with other stockholders to abdicate their duties of management.²⁰ Thus, it has been held illegal for the controlling stockholders of a corporation to agree to elect certain directors who would act as nominal directors and who would not take part in the management of the corporation.²¹ An agreement to take authority away from the directors and place it in the hands of a stockholder, or one class of stockholders, is also illegal.²² Contracts providing for the election of a designated person as an officer have been held void,²³ because they take from the directors the right to exercise their own judgment in the management of the corporation's affairs.²⁴

The directors must consider conscientiously every question involving the interests of the company.²⁵ They must act in good faith and with reasonable care,²⁶ and must use that prudence in the handling of the affairs of the corporation that an

(1902) 75 N. Y. App. Div. 463, 78 N. Y. Supp. 328; *Walker v. Detroit Transit Ry. Co.*, (1882) 47 Mich. 338, 11 N. W. 187.

¹⁹ *Petition of Binder*, (1939) 172 N. Y. Misc. 634, 15 N. Y. Supp. (2d) 4; *D'Arcangelo v. D'Arcangelo*, (1945) 137 N. J. Eq. 63, 43 A. (2d) 169. See also "Directors Who Do Not Direct," 47 *Harvard Law Review* 1305 (1934); "A Defense of Non-Managing Directors," 5 *Univ. of Chicago Law Rev.* 668 (1938). See also *Van Schaick v. Aron*, (1938) 170 N. Y. Misc. 520, 10 N. Y. Supp. (2d) 550; *Golden Rod Mining Co. v. Bukvich*, (1939) 108 Mont. 569, 92 P. (2d) 316.

See also *Red Robin Stores, Inc. v. Rose*, (1948) (N. Y. App.) 84 N. Y. Supp. (2d) 685, in which participation in a joint venture by a corporation was held not to violate the rule that directors must direct.

²⁰ *Koelbel v. Tecktonius*, (1938) 228 Wis. 317, 280 N. W. 305; *Wheeler v. Layman Foundation*, (1939) 188 Ga. 267, 3 S. E. (2d) 645; *Ashman v. Miller*, (1939) 101 F. (2d) 85; *Long Park, Inc. v. Trenton-New Brunswick Hotel*, (1948) 287 N. Y. 174, 77 N. E. (2d) 633.

²¹ *Jackson v. Hooper*, (1910) 76 N. J. Eq. 592, 75 A. 568.

²² *Hamblen v. Horwitz-Texan Theatres Co., Inc.*, (1942) (Tex. Civ. App.) 162 S. W. (2d) 455. See also *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*, (1948) 297 N. Y. 174, 77 N. E. (2d) 633; comment, 14 *Brooklyn Law Rev.* 282 (Apr. 1948), 47 *Mich. Law Rev.* 119 (Nov. 1948), 61 *Harvard Law Rev.* 1251 (July, 1948); *Abbey v. Meyerson*, (1948) 274 N. Y. App. Div. 389, 83 N. Y. Supp. (2d) 503, aff'd, (1949) 299 N. Y. 557, 85 N. E. (2d) 789.

²³ *Williams v. Fredericks*, (1937) 187 La. 987, 175 So. 642; *Miller v. Vanderlip*, (1940) 259 N. Y. App. Div. 624, 20 N. Y. Supp. (2d) 330; *Roberts v. San Jacinto Shipbuilders, Inc.*, (1946) (Tex. Civ. App.) 198 S. W. (2d) 488, rehearing denied, 1/9/47.

²⁴ See *Rochester v. Bergen*, (1943) 265 N. Y. App. Div. 547, 39 N. Y. Supp. (2d) 840.

²⁵ *Ames v. Goldfield Merger Mines Co.*, (1915) 227 F. 292 (Wash.); *Walker v. Man*, (1931) 142 N. Y. Misc. 277, 253 N. Y. Supp. 458.

²⁶ *People's Bank & Trust Co. v. Thibodaux*, (1930) 170 La. 969, 129 So. 547; *Peabody v. Interborough Rapid Transit Co.*, (1923) 121 N. Y. Misc. 647, 202 N. Y. Supp. 287; *State ex rel. Blackwood v. Brast*, (1924) 98 W. Va. 596, 127 S. E. 507.

ordinary, prudent man would use.²⁷ They are presumed to know everything concerning corporate affairs that they might have learned by the use of reasonable care and diligence.²⁸ Although each director must use his independent judgment upon every problem that comes before the board,²⁹ he can take into consideration the views and arguments advanced by others, and can be guided by information supplied by others.³⁰

Directors as fiduciaries. Directors are fiduciaries.³¹ They occupy a position of trust and confidence and are considered by the courts as trustees for the stockholders,³² although they cannot be held to the standard of a trustee of an express trust.^{32a} They must represent fully the interests of the corporation,³³ and must not use their positions of trust and confidence to further their own private interests.³⁴ They must use their powers for the benefit of all the stockholders, and not for only a few.³⁵ The corporation and its stockholders have a primary right to expect the directors to perform their duties honestly and ef-

²⁷ *Ames v. Goldfield Merger Mines Co.*, (1915) 227 F. 292 (Wash.). See also *Sternberg et al. v. Blaine*, (1929) 179 Ark. 448, 17 S. W. (2d) 286.

²⁸ *Leterman v. Pink*, (1936) 249 N. Y. App. Div. 164, 291 N. Y. Supp. 249.

²⁹ *Marvin v. Solventol Chemical Products, Inc.*, (1941) 298 Mich. 296, 298 N. W. 782.

³⁰ *Miller v. Vanderlip*, (1941) 285 N. Y. 116, 33 N. E. (2d) 51.

³¹ *Pepper v. Litton*, (1939) 308 U. S. 295, 60 S. Ct. 238.

³² *Howell v. Poff*, (1932) 122 Neb. 793, 241 N. W. 548; *Arn v. Bradshaw*, (1939) 108 F. (2d) 125; *Pepper v. Litton*, supra (Note 31).

^{32a} *Manufacturers Trust Co. v. Becker*, (1949) 70 S. Ct. 127, aff'g *In re Calton Crescent*, (1949) 173 F. (2d) 944, comment, 59 *Yale Law Journal* 151, (Dec. 1949).

³³ *American Trust Co. v. California W. States Life Ins. Co.*, (1940) 15 Cal. (2d) 42, 98 P. (2d) 497. See also *Lyon v. Holton*, (1938) 167 N. Y. Misc. 585, 4 N. Y. Supp. (2d) 538.

³⁴ *Young v. Columbia Oil Co.*, (1931) 110 W. Va. 364, 158 S. E. 678; *Satterthwaite v. Eastern Bankers' Corp.*, (1931) 17 Del. Ch. 310, 154 A. 475; *McDonald v. Redding Lumber Co.*, (1931) 43 Ga. App. 656, 159 S. E. 888; *Enyart v. Merri- rick*, (1934) 148 Ore. 321, 34 P. (2d) 629; *Angelus Securities Corporation v. Ball*, (1937) 20 Cal. App. (2d) 423, 67 P. (2d) 158; *Bailey v. Jacobs*, (1937) 325 Pa. 187, 189 A. 320; *Ashman v. Miller*, (1939) 101 F. (2d) 85; *Lydia E. Pinkham Medicine Co. v. Gove*, (1939) 298 Mass. 59, 9 N. E. (2d) 573; *Pepper v. Litton*, (1939) 308 U. S. 295, 60 S. Ct. 238; *Guth v. Loft, Inc.*, (1939) 23 Del. Ch. 255, 5 A. (2d) 503; *In re Norcor Mfg. Co.*, (1940) 109 F. (2d) 407; *Arn v. Bradshaw Oil & Gas Co.*, (1939) 108 F. (2d) 125; *Citizens State Bank v. Adams*, (1940) 140 Fla. 578, 193 So. 281; *Kirwan v. Parkway Distillery Co.*, (1941) 285 Ky. 605, 148 S. W. (2d) 720; *Modern Heat & Power Co. v. Bishop Steamotor Corp.*, (1948) 239 Iowa 1257, 34 N. W. (2d) 581.

³⁵ *Atkins v. Hughes*, (1929) 208 Cal. 508, 282 P. 787.

³⁶ *Covey v. England & McCaffrey, Inc.*, (1931) 233 N. Y. App. Div. 332, 253 N. Y. Supp. 340.

ficiently.³⁶ Thus, directors cannot issue stock for their own benefit against the interests of the stockholders as a whole.³⁷

Directors, however, do not have a fiduciary duty to stockholders that keeps them from buying and selling the corporation's stock.³⁸ Their fiduciary duty is to the stockholder, not to his stock.³⁹ They can buy his stock on any terms they can get.⁴⁰ While they should not withhold facts that might influence the stockholder to demand a higher price,⁴¹ they are not under obligation to disclose inside information as long as they do not actively mislead the seller, or resort to fraud.⁴² The broad provisions of the Securities and Exchange Commission's regulations that make unlawful the use of manipulative and deceptive devices in the purchase and sale of securities probably go further than these decisions in demanding disclosure of facts.

While directors owe undivided loyalty to the corporation,⁴³ they may take advantage of a business opportunity that comes to them in their individual capacity.⁴⁴ Thus, where directors were given an option to purchase stock in a company engaged in

³⁷ First Mtg. Bond Homestead Ass'n v. Baker, (1929) 157 Md. 309, 145 A. 876.

³⁸ S. E. C. v. Chenery Corp., (1943) 317 U. S. 80, 63 S. Ct. 454. But see S. E. C. v. Chenery Corp., (1947) 332 U. S. 194, 67 S. Ct. 1575, in which the Supreme Court upheld S. E. C. in its refusal to grant certain voting rights to stock purchased by directors while reorganization of the company was pending, although purchased in good faith. The court based its opinion on S. E. C.'s administrative right, without approving the decision reached by S. E. C.

It has been held that a director may, ordinarily, deal in securities of his corporation without subjecting himself to any liability to account for profits. Hauben v. Morris, (1938) 255 N. Y. App. Div. 35, 5 N. Y. Supp. (2d) 721. See also Manufacturers Trust Co. v. Becker, *supra* (Note 32^a).

³⁹ Llewellyn v. Queen City Dairy, (1946) 187 (Md.) 49, 48 A. (2d) 322.

⁴⁰ S. E. C. v. Chenery Corp., (1943) 317 U. S. 80, 63 S. Ct. 454.

⁴¹ Wood v. McLean Drug Co., (1932) 266 Ill. App. 5. To the same effect, Hotchkiss v. Fischer, (1932) 136 Kan. 530, 16 P. (2d) 531; Timme v. Kopmeier, (1916) 162 Wis. 571, 156 N. W. 961. See also Central Bldg. Co. v. Keystone Shares Corp., (1936) 185 Wash. 645, 56 P. (2d) 697; Trinity-Universal Ins. Co. v. Maxwell, (1937) (Tex.), 101 S. W. (2d) 605; Whitfield v. Kern, (1937) 122 N. J. Eq. 332, 192 A. 48; Coeur d'Alenes Lead Co. v. Kingsburg, (1938) 59 Idaho 627, 85 P. (2d) 691; Whaley v. Matthews, (1938) 134 Neb. 875, 280 N. W. 159; Uhlman, "Legal Status of Corporate Directors," 19 *Boston U. Law Rev.* 19 (1939); Kearney, "The Ubiquitous Director," 12 *Univ. of Cincinnati Law Rev.* 399 (1938).

⁴² Llewellyn v. Queen City Dairy, *supra* (Note 39), and authorities cited. See also Connolly v. Shannon, (1930) 107 N. J. Eq. 180, 151 A. 905; Imbrie v. Community Loan Co., (1938) 131 Pa. Super. 398, 200 A. 149.

⁴³ Italo Petroleum Corp. of America v. Hannigan, (1940) 40 Del. 534, 14 A. (2d) 401.

⁴⁴ Solimine v. Hollander, (1940) 128 N. J. Eq. 228, 16 A. (2d) 203. See Blaustein v. Pan American Petroleum & Transport Co., (1944) 293 N. Y. 281, 56 N. E. (2d) 705 as to right of directors to take advantage of "business opportunity."

the same line of business as their corporation, because they were the sons of the owner of the stock, they did not violate their fiduciary duty by purchasing the stock in their individual capacity instead of on behalf of the corporation.⁴⁵

Personal liability of directors. So long as the directors conduct the business of the corporation in the manner indicated above, they remain free from personal liability, although the corporation may suffer losses through the poor judgment of the board.⁴⁶ Directors are bound to care for the corporation's property in good faith,⁴⁷ but good faith alone will not excuse them from responsibility.⁴⁸ Thus, they are liable for waste,⁴⁹ and for losses caused by failure to perform their duties in accordance with the statutes.⁵⁰ Directors may be held personally liable for injuries caused to the corporation by the directorate's labor policy.⁵¹ They are also liable for losses caused by negligence in the management of the corporation's business.⁵²

Should the directors prove to be incompetent to handle the affairs of the corporation, the stockholders' redress is to elect a new board at the next annual election. Of course, if the directors are guilty of fraud or bad faith, the stockholders may have the right to remove them. Furthermore, they may demand that the corporation sue the faithless directors,⁵³ unless the stockholders have acquiesced in the action of the directors or have

⁴⁵ *Solimine v. Hollander*, supra (Note 44).

⁴⁶ *Abbot v. Waltham Watch Co.*, (1927) 260 Mass. 81, 156 N. E. 897. For liability of a dummy director, see *Golden Rod Mining Co. v. Bukvich*, (1939) 108 Mont. 569, 92 P. (2d) 316, discussed in 25 *Iowa Law Review* 160 (1939).

⁴⁷ *Goff v. Emde*, (1928) 32 Ohio App. 216, 167 N. E. 699. See also *Speigel v. Beacon Participations*, (1937) 297 Mass. 398, 8 N. E. (2d) 895; *Jersawit v. Kaltenbach*, (1938) 253 N. Y. App. Div. 265, 1 N. Y. Supp. (2d) 756; *Mann v. Commonwealth Bond Corporation*, (1938) 27 F. Supp. 315; *Rous v. Carlisle*, (1939) 14 N. Y. Supp. (2d) 498, aff'd 15 N. Y. Supp. (2d) 721.

⁴⁸ *Fagerberg v. Phoenix Flour Mills Co.*, (1937) 50 Ariz. 227, 71 P. (2d) 1022.

⁴⁹ *Goff v. Emde*, supra (Note 47).

⁵⁰ *Pritchard v. Myers*, (1938) 174 Md. 66, 197 A. 620.

⁵¹ *Abrams v. Allen*, (1947) 297 N. Y. 53, 74 N. E. (2d) 305.

⁵² *Home Life Ins. Co. v. Arnold*, (1938) 196 Ark. 1046, 120 S. W. (2d) 1012; *Whitfield v. Kern*, (1936) 120 N. J. Eq. 115, 184 A. 333; *Van Antwerp Realty Corp. v. Cooke*, (1935) 230 Ala. 535, 162 So. 97; *South Penn Collieries Co. v. Sproul*, (1931) 52 (U. S. C. C. A.) F. (2d) 557; *Caldwell v. Eubanks*, (1930) 326 Mo. 185, 30 S. W. (2d) 976; *Martin v. Hardy*, (1930) 251 Mich. 413, 232 N. W. 197. See also *Minnis v. Sharpe*, (1932) 202 N. C. 300, 162 S. E. 606; *Burkhart v. Smith*, (1931) 161 Md. 398, 157 A. 299. The right to recover, however, is vested in the corporation and not in the stockholders. *Orlando v. Nix*, (1930) 171 La. 176, 129 So. 810. See also *Greenwood v. Greenblatt*, (1931) 173 Ga. 551, 161 S. E. 135.

⁵³ *Punch v. Hipsolite Co.*, (1936) 340 Mo. 53, 100 S. W. (2d) 878.

received any benefits from the actions challenged.⁵⁴ If the board of directors fails to institute an action, any stockholder may sue on behalf of the corporation and any amounts recovered go to the corporation. Such a suit is called a "derivative stockholder action."^{54a}

A director is not liable for acts done by his co-directors before he took office.⁵⁵

Indemnification of directors and officers. In recent years the legislatures of several states have recognized the justice of indemnifying or reimbursing directors and officers for expenses incurred in successfully defending stockholders' suits brought against them. The United States Supreme Court has held that such statutes are constitutional and that they also apply to suits in Federal court if jurisdiction is based upon diversity of citizenship.^{55a} Some of the states give the right of indemnification not only to past and present directors and officers, but also to employees.

The statutes that afford protection to the directors and officers are of two types: (1) they give the directors and officers the right to reimbursement whether or not the articles or by-laws of the corporation make provision for indemnification; or (2) they authorize provisions for indemnification in the articles of incorporation or the by-laws.

Even when there is no specific statutory authority, it is advisable, if permissible, to include an indemnification or reimbursement provision in the articles of incorporation or in the by-laws. Whether this can be done depends upon: (1) policy of state departments in accepting articles of incorporation including the provision; and (2) attitude of the courts in sustaining the provision. Most of the state departments allow articles of incorporation to include an indemnification provision, although the

⁵⁴ Griffin v. Smith, (1938) 101 F. (2d) 348. See page 257 as to ratification by stockholders of directors' unauthorized acts.

^{54a} For an account of some recent stockholder suits, see "Striking Out Strike Suits," by Richard F. Wolfson, *Fortune*, March, 1949, p. 137. The title of this article has reference to the tendency in recent years for the legislatures to pass laws that discourage such suits. Under these laws, generally, a complaining stockholder who does not own \$50,000 in stock or 5% of the outstanding stock of the company must post a bond covering the costs and attorneys' fees of the corporation and the individual defendants. If the suit is unsuccessful the defendants have recourse to the security.

⁵⁵ Solimine v. Hollander, (1940) 128 N. J. Eq. 228, 16 A. (2d) 203.

^{55a} Cohen v. Beneficial Industrial Loan Corp., Beneficial Industrial Loan Corp. v. Smith, (1949) 69 S. Ct. 1221, 337 U. S. 541.

statutes are silent on the subject. Some courts have allowed reimbursement even in the absence of statutory authority, particularly when the successful defense of the suit has preserved corporate property.⁵⁶ But the weight of authority, numerically at least, is against such reimbursement where there is no statute authorizing it.⁵⁷

A by-law that permits indemnification of directors and officers usually provides:

1. They must not be guilty of negligence or misconduct in their duties.
2. The liability against which they are indemnified includes attorney's fees and other expenses.
3. They are indemnified whether or not they are in office at the time the expenses are incurred.
4. Their right to indemnification passes to their heirs, executors, and administrators.
5. If the suit is compromised, it must be with the approval of the board of directors.
6. The indemnification may be against liability incurred for acts committed prior, as well as subsequent, to adoption of the by-laws.
7. The right to indemnification is not exclusive of other rights the directors and officers may have as a matter of law.

Notation of director's dissent in minutes. A director who is present at a meeting at which some action is taken that he believes to be against the best interests of the corporation should see that his dissent is noted in the minutes, for, unless his disapproval is recorded, he will be deemed to have concurred in the action. He should be sure to read over the minutes of meetings held during his absence and to require his disapproval of action he considers wrongful to be noted. If he remains a director some time after the action is taken, without requiring his dissent to be entered in the minutes, he is deemed to have concurred in the action.

Contracts in which directors are interested. A director has the right to enter into a contract with the corporation, provided that he deals openly with the corporation and that the contract

⁵⁶ *Solimine v. Hollander*, (1941) 129 N. J. Eq. 264, 19 A. (2d) 344.

⁵⁷ See *Bailey v. Bush Terminal Co.*, (1944) 293 N. Y. 735, 56 N. E. (2d) 739; *New York Dock Co. v. McCollum*, (1939) 173 N. Y. Misc. 106, 16 N. Y. Supp. (2d) 844.

is properly authorized.⁵⁸ He has the right to lend money to the corporation and to take a mortgage as security.⁵⁹ While a contract between a director and the corporation is subject to severest scrutiny, it will be upheld if the director has been open, fair, and honest in his dealing with the corporation, and has gained no advantage that injures the corporation.⁶⁰ The courts will set aside contracts that violate the director's fiduciary duties. Thus, where a director purchased a plant, knowing that it was needed for corporate purposes, and thereafter sold it to the corporation at a profit, the corporation recovered the profit made by the director.⁶¹

Voting on contracts by interested director. If a director is personally interested in a matter that is being authorized by the board, he should not vote upon the question.⁶² According to the decisions of most courts, where the director votes on a contract affecting his own private interest, and where his vote is necessary in order to carry the resolution or motion authorizing the action, the contract is voidable at the option of the corporation, regardless of whether or not the contract is fair or beneficial, provided that the option to avoid the contract is exercised within a reasonable time.⁶³ Where, however, a contract in which a director is

⁵⁸ See *Federal Mortgage Co. v. Simes*, (1932) 210 Wis. 139, 245 N. W. 169; *H. B. Rice & Co. v. Miners' Elkhorn Coal Co.*, (1930) 234 Ky. 580, 28 S. W. (2d) 783. See also *In re Country Club Bldg. Corporation*, (1937) 91 F. (2d) 713; *Johnson v. Kaiser*, (1937) 104 Mont. 261, 65 P. (2d) 1179; *Barber v. Kolowich*, (1938) 283 Mich. 97, 277 N. W. 189.

⁵⁹ *Scully v. Colonial Trust Co.*, (1929) 105 N. J. Eq. 309, 147 A. 776; *Arn v. Bradshaw*, (1939) 108 F. (2d) 125.

⁶⁰ *Claus v. Farmers & Stockgrowers State Bank*, (1936) 51 Wyo. 45, 63 P. (2d) 781. As to right of officer to contract with corporation, see *Swenson v. G. O. Miller Telephone Co.*, (1937) 200 Minn. 354, 274 N. W. 222; *Saunders v. Russell's, Inc.*, (1939) 173 Va. 125, 3 S. E. (2d) 193.

⁶¹ *Jno. Dunlop's Sons, Inc. v. Dunlop*, (1939) 172 N. Y. Misc. 66, 14 N. Y. Supp. (2d) 452.

⁶² *Elggren v. Woolley*, (1924) 64 Utah 183, 228 P. 906.

⁶³ *Higgins v. Lansingh*, (1895) 154 Ill. 301, 40 N. E. 362; *Jones v. Morrison*, (1883) 31 Minn. 140, 16 N. W. 854; *Mobile Land Imp. Co. v. Goss*, (1904) 142 Ala. 520, 39 So. 229; *Twin-Lick Oil Co. v. Marbury*, (1875) 91 U. S. 329; *New Blue Point Mining Co. v. Weissbein*, (1926) 198 Cal. 261, 244 P. 325. *Sacajawea Lumber & Shingle Co. v. Skookum Lumber Co.*, (1921) 116 Wash. 75, 198 P. 1112 held that the board of directors could not authorize the president to dismiss a legal action in which the corporation was plaintiff, where the vote of an interested director was necessary to pass the resolution. The interested director in this case was one of the defendants and a director in the plaintiff corporation. In some cases it has been held that contracts with directors who have voted on a question affecting their interests can only be set aside if actual bad faith, unfairness, or fraud is shown. *Minn. Loan & Trust Co. v. Peteler Car Co.*, (1916) 132 Minn. 277, 156 N. W. 255.

interested is authorized by a disinterested majority or quorum of the directors, it is voidable, according to the weight of authority, only upon a showing of unfairness, unreasonableness, or fraud.⁶⁴ If the good faith of the director is challenged, the court will scrutinize the contract and its origin with extraordinary care.⁶⁵

It is advisable, in authorizing a contract with an interested director, that the action be taken at a meeting of the directors at which there is a quorum present, not including the interested director, in order that the resolution or motion may be carried without the participation of the interested director⁶⁶ (see also footnote 116 in Chapter 11).

Tests to determine whether directors are acting within their powers. In determininig whether directors are acting within their powers, the following questions should be asked: (1) Is the act within the powers of the corporation? (2) Is the transaction prohibited by the charter or by-laws? (3) Is the transaction reasonably suitable and necessary for the conduct of the business for which the corporation was created and organized? (4) Is the act or transaction being performed in good faith, or as a mere cloak to cover some illegal or fraudulent act?⁶⁷ (5) In carrying out the powers of the corporation, are the directors limited by a statutory or charter provision requiring the consent of the stockholders? (6) Is the act one conferred by statute on the stockholders?

General powers of board of directors. The board of directors

⁶⁴ *McKittrick v. Arkansas Central Ry. Co.*, (1894) 152 U. S. 473, 14 S. Ct. 661; *De Moulin v. Magnesite Refractories Co. et al.*, (1921) 186 Cal. 128, 199 P. 42; *Todd v. Temple Hospital Ass'n*, (1928) 96 Cal. App. 42, 273 P. 595. The minority rule, which is followed in New York and some other states, is that a contract made by an interested director is not enforceable, even if it is authorized by a disinterested majority, irrespective of whether or not the contract was a fair one. *Munson v. Syracuse, Geneva & Corning R. R.*, (1886) 103 N. Y. 59.

⁶⁵ *Schnittger v. Old Home Consolidated Mining Co.*, (1904) 144 Cal. 603, 78 P. 9; *Hallam v. Indianola Hotel Co.*, (1881) 56 Iowa 178, 9 N. W. 111. See also *Gall v. Cowell*, (1937) 118 W. Va. 263, 190 S. E. 130; *Knudsen v. Burdett*, (1939) 67 S. D. 20, 287 N. W. 673; *Pepper v. Litton*, (1939) 308 U. S. 295, 60 S. Ct. 238.

⁶⁶ *Nicholson v. Kingery*, (1927) 37 Wyo. 299, 261 P. 122; *Billings v. Shaw*, (1913) 209 N. Y. 265, 103 N. E. 142; *Oliver v. Henry Quellmalz Lumber & Mfg. Co.*, (1926) 170 Ark. 1029, 282 S. W. 355.

⁶⁷ *Heinz v. National Bank of Commerce*, (1916) 237 F. 942. See also *Briggs v. Scripps*, (1936) 13 Cal. App. 43, 56 P. (2d) 277; *Smith v. Bunge*, (1933) 272 Ill. App. 182; *Menke v. Gold Medal Oil Co.*, (1933) 47 Ohio App. 180, 191 N. E. 472; *Consolidated Cement Corp. v. Pratt*, (1931) 47 F. (2d) 90; *Mercantile Trading Co. v. Rosenbaum Grain Corp.*, (1931) 17 Del. Ch. 325, 154 A. 457; *Smith v. Albright England Co.*, (1930) 171 Ga. 544, 156 S. E. 313; *Jones v. Van Heusen Charles Co.*, (1930) 230 N. Y. App. Div. 694, 246 N. Y. Supp. 204.

has the power to transact any business which the corporation itself has the power to perform.⁶⁸ The board cannot increase or decrease corporate powers. Thus, it is not beyond the corporation's power to perform a certain act, merely because the board has declared by resolution that such action will not be taken.⁶⁹

Generally, the board of directors has as much control over the affairs of the corporation as an individual has over his own business, but no more.⁷⁰ When directors act within the law, their authority in the conduct of the business is absolute.⁷¹ Questions of business policy must be determined by a majority of the board. The directors are free to change the policies of the company, provided they keep within its charter powers and do not change the essential character of the business in which the stockholders have invested their money.⁷² If there is no bad faith or abuse of powers, the courts will not interfere with corporate management.⁷³

Express, incidental, and implied powers of corporations. Every corporation has three classes of powers—express, incidental, and implied.

The express powers are those specifically given to it by the

⁶⁸ *Henderson Lumber Co. v. Chatham Bank & Trust Co.*, (1924) 33 Ga. App. 196, 125 S. E. 867; *Elggren v. Woolley*, (1924) 64 Utah 183, 228 P. 906; *Templeman v. Grant*, (1924) 75 Colo. 519, 227 P. 555; *Hall v. Woods*, (1927) 325 Ill. 114, 156 N. E. 258. See also *New York Mortgage Co. v. Garfinkel*, (1931) 258 N. Y. 5, 179 N. E. 33; *Palmetto Lumber Co. v. Gibbs*, (1932) (Tex. Civ. App.) 52 S. W. (2d) 120.

⁶⁹ *National Lock Co. v. Hogland*, (1939) 101 F. (2d) 576.

⁷⁰ *Merchants Life Ins. Co. v. Griswold*, (1919) (Tex. Civ. App.) 212 S. W. 807; *Berkeley County Court v. Martinsburg & Potomac Turnpike Co.*, (1922) 94 W. Va. 246, 115 S. E. 448; *Chicago Bank of Commerce v. Carter*, (1932) 61 F. (2d) 986; *In re Leventall*, (1934) 241 N. Y. App. Div. 277, 271 N. Y. Supp. 493. See also *Chicago Bank of Commerce v. Carter*, (1932) 61 F. (2d) 986.

⁷¹ *Ayres v. Hadaway*, (1942) 303 Mich. 589, 6 N. W. (2d) 905.

⁷² *Solimine v. Hollander*, (1940) 128 N. J. Eq. 228, 16 A. (2d) 203.

⁷³ *Carey v. Dalgarn Const. Co.*, (1930) 171 La. 246, 130 So. 344; *Chapman v. Troy Laundry Co.*, (1935) 87 Utah 15, 47 P. (2d) 1054; *Conruk v. Houston Civic Opera Ass'n*, (1936) (Tex. Civ. App.) 99 S. W. (2d) 382; *Helmbright v. John A. Gebelein, Inc.*, (1937) 19 F. Supp. 621; *Smith v. Banister*, (1940) 127 N. J. Eq. 385, 13 A. (2d) 485; *Ayres v. Hadaway*, *supra* (Note 71); *Murray-Baumgartner Surgical Instrument Co. v. Requardt*, (1942) 180 Md. 245, 23 A. (2d) 697; *Feldman v. Pennroad Corp.*, (1946) 155 F. (2d) 773; *Levin v. Sinai Hospital*, (1946) 186 Md. Ct. App. 174, 46 A. (2d) 298.

See also Pitts, "Equitable Intervention in Corporate Affairs, Meaning of 'Internal Management'," (1939) 37 *Michigan Law Rev.* 1085, discussing *Williams v. Salisbury Ice Co.*, (1939) 176 Md. 369, 3 A. (2d) 507. But if the directors overstep their authority, the stockholders may enforce, in behalf of the corporation, the resulting liability of the directors. *Orlando Orange Groves Co. v. Hale*, (1932) 107 Fla. 304, 144 So. 674.

corporation laws of the state in which it is organized and by the provisions of its charter; they are concerned largely with the purposes for which the corporation was organized.⁷⁴

The incidental powers are those that are inherent in the very nature of corporate existence,⁷⁵ such as the power of corporate succession, or the right to continuing existence irrespective of changes in corporate membership;⁷⁶ the power to sue⁷⁷ and be sued;⁷⁸ the power to purchase, hold, and convey real and personal property for corporate objects;⁷⁹ the power to have a common seal;⁸⁰ the power to make by-laws for its government;⁸¹ and the power, in proper cases, to remove members.⁸²

Implied powers are those which are reasonably necessary to enable the corporation to accomplish its objects.⁸³ For example,

⁷⁴ See *Joyce v. First Nat. Bank of Snyder*, (1936) (Tex. Civ. App.) 99 S. W. (2d) 1092.

⁷⁵ *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, (1896) 160 U. S. 514, 16 S. Ct. 379.

⁷⁶ *Andrews Bros. Co. v. Youngstown Coke Co.*, (1898) 86 F. 585; *People v. Wayman*, (1912) 256 Ill. 151, 99 N. E. 941; *State v. Scott, etc., Co.*, (1907) 207 Mo. 54, 105 S. W. 752.

⁷⁷ *F. H. A., Region 4 v. Burr*, (1940) 309 U. S. 242, 60 S. Ct. 488; *Allis-Chalmers Mfg. Co. v. Asmussen*, (1942) 14 Wash. (2d) 242, 127 P. (2d) 681; *Am. P. & L. Co. v. S. E. C.*, (1944) 143 F. (2d) 250. For the power of a corporation to sue for libel of its business, see *New York Society, etc. v. MacFadden Publications, Inc.*, (1932) 260 N. Y. 167, 183 N. E. 284.

⁷⁸ *Monarch Refrigerating Co. v. Farmers' Peanut Co.*, (1935) 74 F. (2d) 790; *Knight v. Industrial Trust Co.*, (1937) 38 Del. 480, 193 A. 723; *Box v. Roberts*, (1944) 112 Colo. 234, 148 P. (2d) 810; *Kell Cleaners & Laundry v. Com. Standard Ins. Co.*, (1947) (Tex. Civ. App.) 199 S. W. (2d) 673.

⁷⁹ *Lyndeborough Glass Co. v. Mass. Glass Co.*, (1873) 111 Mass. 315; *Stott v. Stott Realty Co.*, (1929) 246 Mich. 261, 224 N. W. 621; *Strong v. Efficiency Apt. Corp.*, (1929) 159 Tenn. 337, 17 S. W. (2d) 1; *Coates & Hopkins Realty Co. v. Kansas City T. Ry. Co.*, (1931) 328 Mo. 1118, 43 S. W. (2d) 817; *In re Koffend's Will*, (1944) 218 Minn. 206, 15 N. W. (2d) 590; *Medlinsky v. Premium Cut Beef Co.*, (1944) 317 Mass. 25, 57 N. E. (2d) 31; *Tuttle v. Junior Bldg. Corp.*, (1947) 227 N. C. 146, 41 S. E. (2d) 365.

But the power to convey its property cannot be exercised by an insolvent corporation. In *Frank v. Linkop Realty Corp.*, (1930) 106 N. J. Eq. 567, 151 A. 550, conveyance by an insolvent corporation was held valid where the corporation merely held legal title but had no beneficial interest therein. See also *Lane v. Hamilton Trust Co.*, (1932) 109 N. J. Eq. 423, 157 A. 855, in which it was held that a bankrupt corporation could mortgage its property or could sell it outright in order to realize funds for the purpose of composition.

⁸⁰ *Bank of U. S. v. Dandridge*, (1827) 25 U. S. 552; *Ransom v. Stonington Sav. Bank*, (1860) 13 N. J. Eq. 212.

⁸¹ *Peterson v. Gibson*, (1901) 191 Ill. 365, 61 N. E. 127; *Engelhardt v. Dime Sav. & Loan Ass'n*, (1896) 148 N. Y. 281, 42 N. E. 710.

⁸² *Cunningham v. Supreme Council*, (1914) 165 N. Y. App. Div. 52, 151 N. Y. Supp. 83.

⁸³ *McCraith v. Nat'l, etc., Bank*, (1887) 104 N. Y. 414, 10 N. E. 862; *Malone v.*

a corporation has the implied power to do acts in the usual course of business, such as to borrow money,⁸⁴ make ordinary contracts, execute promissory notes,⁸⁵ checks, and other bills of exchange, take notes or other securities, and perform acts to protect or aid employees, and so forth. An act done under an implied power must have a direct and immediate relation to the exercise of an express power.⁸⁶ For example, in the absence of express statutory provision, corporations generally cannot make gifts of their property.⁸⁷

General powers of officers. The officers of a corporation are merely its agents, vested only with authority given them by the corporation or by statute.⁸⁸ They can bind the corporation only when acting within the scope of their authority.⁸⁹ It is therefore usually immaterial, so far as powers are concerned, whether a person occupies a corporate office or is merely an employee. But it has been held that a corporate officer under a contract of employment is not bound to obey directors' orders that are unreasonable and undermine his authority.^{89a}

An officer may derive his power in one of the following ways: (1) by express statute, charter, or by-law provision; (2) by resolution or act of the board of directors, where powers are

Lancaster, etc., Co., (1897) 182 Pa. St. 309, 37 A. 932; Squaw Gulch Min. & Mill. Co. v. Kollberg, (1930) 36 Ariz. 442, 286 P. 822; American Surety Co. of New York v. 14 Canal St., Inc., (1931) 276 Mass. 119, 176 N. E. 785.

⁸⁴ J. K. Syphon Ventilator Co. v. Hutton, (1915) 116 Ark. 545, 175 S. W. 30; Taylor Feed Pen Co. v. Taylor Nat. Bank, (1915) (Tex. Civ. App.) 181 S. W. 534; Alton Mfg Co. v. Garrett Biblical Institute, (1910) 243 Ill. 298, 90 N. E. 704. In Malone v. Republic Nat. Bank & Trust Co., (1934) (Tex. Civ. App.) 70 S. W. (2d) 809, the corporation was held to have implied power to borrow in order to purchase a note of the president, secured by a pledge of the corporation's stock, to prevent a sale of the stock.

⁸⁵ See Granite Hall Farms Corporation v. Virginia Trust Co., (1930) 154 Va. 333, 153 S. E. 841. However, in Schloss Bros. & Co. v. Monongahela Nat. Bank, (1932) 60 F. (2d) 365, it was held that a corporation has no implied power to issue or indorse commercial paper.

⁸⁶ Nicollet Nat. Bank v. Frisk-Turner Co., (1898) 71 Minn. 413, 74 N. W. 160.

⁸⁷ Brayton v. Welch, (1941) 39 F. Supp. 537. For the power of a corporation to make a gift of property where no objection is made by stockholders or creditors, see Southern Hide Co. v. Best, (1932) 174 La. 748, 141 So. 449; Harry R. Roeder, Inc. v. Roeder, (1932) 236 N. Y. App. Div. 87, 258 N. Y. Supp. 44.

⁸⁸ Henderson Lumber Co. v. Chatham Bank & Trust Co., (1924) 33 Ga. App. 196, 125 S. E. 867; Anderson-Tully Lumber Co. v. Gillett Lumber Co., (1922) 155 Ark. 224, 244 S. W. 26; Moll v. Roth Co., (1915) 77 Ore. 593, 152 P. 235; Klein v. Journal Sq. Bank Bldg. Co., (1932) 110 N. J. Eq. 607, 160 A. 812; First Nat. Bank v. Tristate Equipment & Repair Co., (1930) 108 W. Va. 686, 152 S. E. 635.

⁸⁹ Johnson v. Maryland Trust Co., (1939) 176 Md. 557, 6 A. (2d) 383.

^{89a} Mair v. Southern Minnesota Broadcasting Co., (1948) (Minn.) 32 N. W. (2d) 177.

subject to delegation by the board;⁹⁰ (3) by implication, that is, through powers which are incidental to express powers; (4) by being clothed with power to act, that is, through apparent powers;⁹¹ or (5) by virtue of the nature of his office, that is, through inherent powers. The powers of a particular officer necessarily vary according to the nature of the business in which the corporation is engaged, and sometimes depend upon custom and usage of the business.⁹² Whether or not an officer has exceeded his authority in a particular instance depends upon the facts and circumstances in the case.⁹³

Persons dealing with corporate officers are generally chargeable with notice of limitations on their authority,⁹⁴ but a limitation contained in a by-law is not valid against an innocent person who has no knowledge of it.⁹⁵ Of course, an officer cannot bind a corporation beyond its charter powers, nor can a corporation ratify an ultra vires act of an officer, that is, an act which is beyond the powers of the corporation.⁹⁶

⁹⁰ No express written authority is necessary to empower a particular officer to do a particular act; an informal permission is sufficient. *Alabama City G. & A. Ry. Co. v. Kyle Co.*, (1918) 202 Ala. 552, 81 So. 54; *Hartley v. Ault Woodenware Co.*, (1918) 82 W. Va. 780, 97 S. E. 137.

⁹¹ *Erie R. Co. v. S. J. Groves & Son Co.*, (1935) 114 N. J. Law 216, 176 A. 377; *Sweeney v. Adam Groth Co.*, (1934) 269 Mich. 436, 257 N. W. 855; *Meder v. Superior Oil Co.*, (1928) 151 Miss. 814, 119 So. 318; *Uline Loan Co. v. Standard Oil Co.*, (1921) 45 S. D. 81, 185 N. W. 1012; *Schlesinger, Inc. v. Burstein Realty Co.*, (1939) 123 N. J. Law 190, 8 A. (2d) 327.

⁹² See *Betz v. Tacoma Drug Co.*, (1942) 15 Wash. (2d) 471, 131 P. (2d) 183; *Richardson v. Taylor Land & Livestock Co.*, (1946) 25 Wash. (2d) 518, 171 P. (2d) 703.

⁹³ It has been held that an officer has no implied authority to bind the corporation by a contract for life employment. *Litchfield v. Standard Oil Co. of Ohio*, (1939) 16 Ohio Opinions 67.

⁹⁴ *First Nat. Bank v. Asheville Furniture & Lumber Co. et al.*, (1895) 116 N. C. 827, 21 S. E. 948; *Winsted Hosiery Co. v. New Britain Knitting Co.*, (1897) 69 Conn. 565, 38 A. 310; *Slattery v. North End Sav. Bank*, (1900) 175 Mass. 380, 56 N. E. 606; *Alabama Nat. Bank v. O'Neil*, (1901) 128 Ala. 192, 29 So. 688; *Beach v. Palisade Realty & Amusement Co. et al.*, (1914) 86 N. J. Law 238, 90 A. 1118.

⁹⁵ *Bacon v. Montauk Brewing Co. et al.*, (1909) 130 N. Y. App. Div. 737, 115 N. Y. Supp. 617; *Western Investment & Land Co. v. First Nat. Bank*, (1912) 23 Colo. App. 143, 128 P. 476; *Bijur Motor Lighting Co. v. Eclipse Mach. Co. et al.*, (1917) 243 F. 600; *Meder v. Superior Oil Co.*, (1928) 151 Miss. 814, 119 So. 318; *Bennett v. Alumo Co.*, (1931) 277 Mass. 325, 178 N. E. 519; *Doehler v. Lansdon*, (1931) 135 Ore. 687, 291 P. 392, 298 P. 200; *Farmers' & Merchants' Bank of Toccoa v. Stovall Inv. Co.*, (1934) 50 Ga. App. 277, 177 S. E. 882; *W. C. Downey & Co. v. Kraemer Hosiery Co.*, (1939) 136 Pa. Super. 553, 7 A. (2d) 492; *Arts, Inc. v. Bowles*, (1944) (Mun. Ct. App., D. C.) 38 A. (2d) 660.

⁹⁶ *Stephens v. Gall et al.*, (1910) 179 F. 938; *McCorry et al. v. Wiarda & Co.*, (1912) 149 N. Y. App. Div. 863, 134 N. Y. Supp. 667; *State Ex. Bank v. Simms*, (1924) (Tex. Civ. App.) 266 S. W. 1111; *People's Bank v. Mobile Towing & Wrecking Co.*, (1924) 210 Ala. 678, 99 So. 87.

Meaning of implied, apparent, and incidental powers of officers. Express powers, indicated in (1) and (2) above, need no elucidation. Powers which are incidental to express powers come within the general rule of agency that every delegation of authority carries with it the power to do acts which are reasonably necessary to carry into effect the express powers conferred.⁹⁷ They are, in effect, express powers.

Apparent powers result from either of two situations:⁹⁸ (1) where a corporation holds an officer out as possessing certain powers; (2) where a corporation ratifies the unauthorized act of an officer by acquiescence,⁹⁹ or knowingly permits him to assume powers. When innocent third parties rely upon the apparent authority of an officer and deal with him, his acts are binding on the corporation.¹⁰⁰ The corporation is even liable for his fraudulent acts, made within the apparent scope of his authority, though the corporation gets no benefit from them.¹⁰¹

Inherent powers are those that an officer has by virtue of his holding office. A corporate officer has few inherent powers. They are limited, of course, to matters that arise in the ordinary course of business.¹⁰²

Rules of agency applicable to officers of corporation. Rules of agency applicable to agents of individuals are also applicable to agents, or officers, of corporations.¹⁰³ (See authority of agents,

⁹⁷ *New York Mortgage Co. v. Garfinkel*, (1931) 258 N. Y. 5, 179 N. E. 33, holding that an officer with authority to loan money for a corporation is authorized to receive payment.

⁹⁸ *Fink v. Gregg Realty Co.*, (1927) (Mo. App.) 296 S. W. 838; *Forgeson v. Corey Hill Garage, Inc.*, (1924) 249 Mass. 163, 144 N. E. 383; *Slayden v. Augusta Cooperage Co.*, (1924) 163 Ark. 638, 260 S. W. 741; *American Trust & Savings Bank of Waterloo v. de Jaeger*, (1921) 191 Iowa 758, 183 N. W. 369; *Huntington Park Improvement Co. v. Park Land Co.*, (1913) 165 Cal. 429, 132 P. 760; *Mahoney Min. Co. v. Anglo-Californian Bank, Ltd.*, (1881) 104 U. S. 707; *Roesch & Sons Co. et al. v. Mumford*, (1916) 230 F. 56; *Enterprise Foundry & Machine Works v. Miners' Elkhorn Coal Co.*, (1931) 241 Ky. 779, 45 S. W. (2d) 470.

⁹⁹ See *Shaten v. Am. Nat. Bank*, (1931) 109 N. J. Eq. 307, 157 A. 128; *Oliver v. Safe Deposit & Title Guar. Co.*, (1934) 315 Pa. 552, 173 A. 281.

¹⁰⁰ *Bloomington v. Cushman*, (1916) 134 Minn. 445, 159 N. W. 1078; *O'Donnell v. Union Paving Co.*, (1936) 121 Pa. Super. 68, 182 A. 709; *Betz v. Tacoma Drug Co.*, (1942) 15 Wash. (2d) 471, 131 P. (2d) 183.

¹⁰¹ *Morrison v. Bank of Mount Hope*, (1942) 124 W. Va. 478, 20 S. E. (2d) 790.

¹⁰² *Warszawa v. White Eagle Brewing Co.*, (1939) 299 Ill. App. 509, 20 N. E. (2d) 343; *Holtz v. S. Landow Fruit & Produce Co.*, (1939) 125 Conn. 358, 5 A. (2d) 882; *Nolan v. J. & M. Doyle Co.*, (1940) 338 Pa. 398, 13 A. (2d) 59; *Lydia E. Pinkham Medicine Co. v. Gove*, (1940) 305 Mass. 213, 25 N. E. (2d) 332.

¹⁰³ *Cushman v. Cloverland Coal & Mining Co.*, (1908) 170 Ind. 402, 84 N. E. 759; *Metzger v. Southern Bank*, (1910) 98 Miss. 108, 54 So. 241; *Gilbert et al. v. Sharkey*, (1916) 80 Ore. 323, 156 P. 789.

other than officers, on page 248.) For example, the corporation is not bound when it has no knowledge that an officer is presuming to act for it, without authority, and where the corporation has not held the officer out as having authority.¹⁰⁴ Nor is a corporation chargeable with knowledge of one of its officers in a transaction when he is not representing the corporation, but is dealing as a private individual and in his own interests. An official or executive of a corporation owes it a fiduciary as well as a contractual duty, and hence cannot recover on a contract with an outside party that involves a breach of duty to his corporation.^{104a} Knowledge acquired by him while acting for the corporation is chargeable to the corporation.¹⁰⁵

An officer who contracts for his corporation might become personally liable if he does not disclose that he is acting for the corporation,^{105a} or if he is acting without authority.^{105b}

Power of officers to delegate authority. An officer cannot delegate authority when the act to be done involves the use of discretion or implies that personal confidence and trust have been placed in him.¹⁰⁶ However, an officer may delegate authority insofar as it is necessary for the prosecution of his employment, or if the act to be done is merely ministerial.¹⁰⁷

Regulatory laws require caution. In exercising their duties, directors and officers must bear in mind that many of the newer regulatory laws provide penalties in one form or another for violations. In some instances, as in the Securities Act of 1933, and the Securities Exchange Act of 1934, civil and criminal liabilities are imposed directly against directors. (See page 399.)

¹⁰⁴ Security Building & Loan Ass'n of Los Angeles v. Seibert, (1935) (Cal. App.) 41 P. (2d) 556.

^{104a} Colonell v. Goodman, (1948) 78 F. Supp. 845, cert. denied, (1949) 69 S. Ct. 166.

¹⁰⁵ York Livestock Commission Co. v. Northwestern Livestock Commission Co., (1939) 136 Neb. 716, 287 N. W. 94; Federal Land Value Ins. Co. v. Taylor, (1932) 56 F. (2d) 351. See also Tinley v. Ammerman, (1931) 150 Okla. 215, 299 P. 918; The New York Mortgage Company v. Garfinkel, (1931) 231 N. Y. App. Div. 327, 247 N. Y. Supp. 313.

^{105a} Carelesimo v. Schwebel, (1948) (Cal. App.) 197 P. (2d) 167.

^{105b} Vulcan Corp. v. Cobden Machine Works, (1949) 336 Ill. App. 394, 84 N. E. (2d) 173.

¹⁰⁶ Citizens' Development Co. v. Kypawva Oil Co., (1921) 191 Ky. 183, 229 S. W. 88; Citizens Nat. Bank v. Florida Tile & Lumber Co., (1921) 81 Fla. 889, 89 So. 139; Dewey v. National Tank Maintenance Corp., (1943) 233 Iowa 58, 8 N. W. (2d) 593; Royal Theatre Corp., Inc. v. U. S., (1946) 66 F. Supp. 301.

¹⁰⁷ Bijur Motor Lighting Co. v. Eclipse Mach. Co. et al., (1916) 237 F. 89; Gerrish Dredging Co. v. Bethlehem Shipbuilding Corp., Ltd., (1923) 247 Mass. 162, 141 N. E. 867.

In other statutes, such as the Walsh-Healey Public Contracts Act, the penalty is applied against the corporation. Directors should be exceedingly cautious not to subject themselves to liability by authorizing or directing activities which might be violative of the laws. Resolutions authorizing the execution of contracts, or other action, which might be affected by such laws, should contain express provisions that the contract or other corporate action shall be in accordance with the applicable laws.

While an exhaustive list of the regulatory statutes cannot be given here, the following may be mentioned as of great importance to directors and officers because of the penalty provisions against them or the corporation: Fair Labor Standards Act (the Federal Wage and Hour Law); the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947; the Federal Trade Commission Act, as amended by the Wheeler-Lea Act against unlawful advertising of foods, drugs, devices, and cosmetics; the state unfair sales laws, and many state taxing and license laws.

Appointment of Committees and Agents

Delegation of authority by directors. It may be stated as a general rule that the board of directors has the right to delegate to officers, agents,¹⁰⁸ and committees the performance of ministerial acts.¹⁰⁹ Whether or not the directors can delegate a power or act requiring the exercise of discretion depends entirely upon the nature of the act and the reasonableness of the delegation of power involved. They may intrust to agents, officers, and committees the conduct of the ordinary business affairs of the corporation.¹¹⁰ They may delegate authority to execute leases and subleases;¹¹¹ they may authorize an attorney to execute a deed

¹⁰⁸ For a discussion of the distinction between an officer and agent, see *Varde-man v. Penn. Mut. Life Ins. Co.*, (1906) 125 Ga. 117, 54 S. E. 66; *Colby v. Klune*, (1949) 83 F. Supp. 159.

¹⁰⁹ *Schulte v. Ideal Food Products Co.*, (1929) 208 Iowa 767, 226 N. W. 174; *Philip Carey Mfg. Co. v. Dean*, (1932) 58 F. (2d) 737.

See "The Executive Committee in Corporate Organization—Scope of Powers," 42 *Michigan Law Review* 133 (1943).

¹¹⁰ *Boss v. Alms & Doepke Co.*, (1923) 17 Ohio App. 314; see also *Palmetto Lumber Co. v. Gibbs*, (1932) (Tex. Civ. App.) 52 S. W. (2d) 120; *Harris v. H. C. Talton Wholesale Grocery Co.*, (1929) 11 La. App. 331, 123 So. 480; *Wallace v. Int. Trade Exhibition*, (1930) 170 La. 55, 127 So. 362; *Wood Co. v. McCutcheon*, (1939) 136 Pa. Super. 446, 7 A. (2d) 564.

¹¹¹ *Holwick v. Walker*, (1935) 6 Cal. App. (2d) 669, 45 P. (2d) 374.

in behalf of the corporation; ¹¹² they may entrust the president with the management of the business. ¹¹³

Restrictions on delegation of authority. The right to delegate authority does not depend upon statutory authority. ¹¹⁴ However, it is limited by the statutes, the articles of incorporation, and the by-laws, which may restrict this right by requiring that specified acts must be done by a specified officer. ¹¹⁵

Ordinarily, directors have no implied power to bind the corporation by contracts of employment for a term beyond their tenure in office. ¹¹⁶ Circumstances may arise, however, where such a contract is valid. An example is where the services bargained for are peculiarly necessary to the corporation and cannot be obtained except for a stated term. ¹¹⁷ (See revocation of contracts of employment on page 249.)

The directors cannot completely abandon their duties and have others act for them. ¹¹⁸ For example, they cannot make installment contracts with a provision that upon default the voting rights of the directors shall go to the other party to the contract. ¹¹⁹

How authority is delegated. It is advisable that the appointment of committees, agents, officers, and employees who are to hold managerial positions, be made by resolution at a meeting of the board, and that special care be given to the preparation of resolutions authorizing the appointment and defining the powers of the appointees, since such resolutions have frequently been held by the courts to be contracts. ¹²⁰ It is not essential, how-

¹¹² Fed. Land Bank v. Bross, (1938) (Mo. App.), 122 S. W. (2d) 35.

¹¹³ San Antonio Joint Stock Land Bank v. Taylor, (1937) 129 Tex. 335, 105 S. W. (2d) 650, rev'g 101 S. W. (2d) 868.

¹¹⁴ Social Security Board v. Warren, (1944) 142 F. (2d) 974.

¹¹⁵ Dewey v. National Tank Maintenance Corp., (1943) 233 Iowa 58, 8 N. W. (2d) 593.

¹¹⁶ General Paint Corp. v. Kramer, (1932) 57 F. (2d) 698; Edwards v. Keller, (1939) (Tex. Civ. App.), 133 S. W. (2d) 823.

¹¹⁷ General Paint Corp. v. Kramer, supra (Note 116).

¹¹⁸ Smith v. California Thorn Cordage, Inc., (1933) 72 Cal. App. 397, 18 P. (2d) 393; Farmers' Gin Co. v. Kasch, (1925) (Tex. Civ. App.) 277 S. W. 746.

See also Lane v. Bogert, (1934) 116 N. J. Eq. 454, 174 A. 217; Stoneman v. Fox Film Corporation, (1936) 295 Mass. 419, 4 N. E. (2d) 63; Royal Theatre Corp., Inc. v. U. S., (1946) 66 F. Supp. 301. Divestment of control over property occasioned by leasing is not an abdication of duty which the law condemns as violative of the trusteeship of directors. Schneider v. Greater M. & S. Circuit, (1932) 144 N. Y. Misc. 534, 259 N. Y. Supp. 319.

¹¹⁹ Wheeler v. Layman Foundation, (1939) 188 Ga. 267, 3 S. E. (2d) 645.

¹²⁰ Houghtaling v. Upper Kittanning Brick Co., (1915) 92 N. Y. Misc. 228, 155 N. Y. Supp. 540.

ever, that the delegation of authority be made by formal action.¹²¹ Frequently authority is implied from a course of conduct,¹²² or from a recognized practice of the corporation.¹²³ A corporation is bound by the act of an agent with apparent powers that third parties, in good faith, believe the corporation has delegated to the agent.¹²⁴

Liability of directors after delegation of authority. Directors do not free themselves from liability by delegating the management of the business to someone else.¹²⁵ They must always exercise a general supervision over it.¹²⁶ Circumstances may arise where directors, by their careless supervision, make themselves liable for the wrongful acts of subordinate officers.¹²⁷ For example, if a subordinate officer makes a practice of committing wrongful acts that the directors can discover by proper supervision, the directors are liable for those acts. The courts, of course, are more lenient with a single act of wrongdoing. Thus, the directors were not liable where a subordinate officer made one fraudulent contract, without the directors' knowledge, and no corporate record came before them reflecting the transaction.¹²⁸

Appointment of committees by directors. Permanent or temporary committees may be appointed by the board of directors, subject to limitations made by statute and by the charter or by-laws of the corporation.¹²⁹ These committees may be endowed with such ministerial duties as are granted to them by the board of directors or by the by-laws. In the early history of corporations there was some doubt as to the right of the board

¹²¹ *Covington v. Covington & C. Bridge Co.*, (1873) 73 Ky. 69.

¹²² *Hahnemann Hospital v. Golo Slipper Co.*, (1939) 135 Pa. Super. 398, 5 A. (2d) 605.

¹²³ *Betz v. Tacoma Drug Co.*, (1942) 15 Wash. (2d) 471, 131 P. (2d) 183, citing 19 C. J. S., Corporation, §1083, p. 533.

¹²⁴ *Morris County Building & Loan Ass'n v. Walters*, (1938) 123 N. J. Eq. 548, 198 A. 756, rev'g 122 N. J. Eq. 475, 194 A. 784; *Severance v. Heyl & Patterson, Inc.*, (1936) 123 Pa. Super. 553, 187 A. 53.

¹²⁵ *Martin v. Hardy*, (1930) 251 Mich. 413, 232 N. W. 197; *Ames v. Goldfield Merger Mines Co.*, (1915) 227 F. 292.

¹²⁶ *Ibid.*; *Lowell Hoit & Co. v. Detig*, (1943) 320 Ill. App. 179, 50 N. E. (2d) 602.

¹²⁷ *Lowell Hoit & Co. v. Detig*, *supra*.

¹²⁸ *Ibid.*

¹²⁹ A resolution authorizing a committee to make a report upon an agreement is not sufficient authority to permit the committee to make and enter into a binding contract without reporting to the directors. *Greensboro Gas Co. v. Home Oil & Gas Co.*, (1908) 222 Pa. 4, 70 A. 940. However, the contract was ratified in this case.

of directors to delegate any part of its powers to an executive committee, but it is now settled beyond controversy that such a delegation may be made.¹³⁰

Authority of committees between board meetings. The by-laws frequently provide that, during intervals between meetings of the directors, the executive committee may exercise all the powers of the board in accordance with the policy of the corporation and the direction of the board of directors.¹³¹ An executive committee thus empowered does not have authority to inaugurate radical reversals of or departures from fundamental policies and methods of conducting the business prescribed by the directorate.¹³² Nor can the committee assume sole control of the corporation for an indefinite period.¹³³ The calling of a meeting of the board of directors suspends the power of the executive committee to act in place of the board.¹³⁴

Limitations upon authority of committees. An executive committee may not perform acts specifically required by statute to be performed by the directors, in the absence of statutory provision to the contrary. Thus, the committee cannot amend by-laws that only the directors, under the statute, are permitted to amend. If the statute indicates that directors shall declare dividends, it is doubtful whether the executive committee would have the power to do so. (See Chapter 21 for a discussion of directors' power to declare dividends.)

¹³⁰ *Haldeman v. Haldeman*, (1917) 176 Ky. 635, 197 S. W. 376; *Dyer Bros. Golden West Iron Works v. Central Iron Works*, (1920) 182 Cal. 588, 189 P. 445. *In re Lone Star Shipbuilding Co.*, (1925) 6 F. (2d) 192; *Schulte v. Ideal Food Products Co.*, (1929) 208 Iowa 767, 226 N. W. 174; *Harris v. Harris*, (1930) 137 N. Y. Misc. 73, 241 N. Y. Supp. 474.

¹³¹ For a discussion of the extent to which a board of directors may entrust its powers to the executive committee, see 20 *Harvard Law Review* 225. See also *Wallace v. International Trade Exhibition, Inc.*, (1930) 170 La. 55, 127 So. 362; *Fensterer v. Pressure Lighting Co.*, (1914) 85 N. Y. Misc. 621, 149 N. Y. Supp. 49; *Hayes v. Canada, Atlantic & Plant S. S. Co.*, (1910) 181 F. 289; *Tilden v. Goldy Mach. Co.*, (1908) 9 Cal. App. 9, 98 P. 39; *First Nat. Bank of Binghamton v. Com. Trav. Home Ass'n*, (1905) 108 N. Y. App. Div. 78, 95 N. Y. Supp. 454, *aff'd* 185 N. Y. 575, 78 N. E. 1103; *Tempel v. Dodge*, (1895) 89 Tex. 69, 33 S. W. 222, 32 S. W. 514.

¹³² *Fensterer v. Pressure Lighting Co.*, (1914) 85 N. Y. Misc. 621, 149 N. Y. Supp. 49.

For power of executive committee to authorize filing of voluntary petition in bankruptcy, see *Lawrence v. Atlantic Paper & Pulp Corp.*, (1924) 298 F. 246.

¹³³ For restriction on the right to delegate the management of a corporation for a long period of time, see *Sherman & Ellis, Inc. v. Indiana Mutual Casualty Co.*, (1930) 41 F. (2d) 588, 29 *Michigan Law Rev.* 367.

¹³⁴ *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*, (1907) 190 N. Y. 1, 82 N. E. 730.

Executive committees cannot change the number of members of the committee, remove a member by a majority vote, appoint or remove officers and fix their salaries,¹³⁵ or execute a contract upon which the corporation is about to act. The corporation, however, is bound by an act of the committee outside of its authorized powers, if the corporation accepts the benefits of the act.¹³⁶

The authority that can be delegated to an executive committee varies with the purpose for which the corporation was organized. For example, the executive committee of a corporation organized to deal in securities can sell stock held by the company,¹³⁷ but committees generally cannot dispose of the assets of the corporation.

Appointment of agents by directors. The board of directors may appoint such agents as may be needed to conduct the ordinary affairs of the corporation. The agents appointed are either general or special. A general agent has the authority to act for the corporation in all matters pertaining to the business or to a particular branch of the business. A special agent has the authority to act for the corporation only in a specific transaction.

An agent, however, has apparent authority commensurate with the business entrusted to him. A person may ordinarily deal with him in matters within such authority, without regard to limitations on his authority, if the limitations are not brought to the attention of outsiders.¹³⁸ Agents appointed by the directors become agents of the corporation and not of the directors.¹³⁹

How agents are appointed. Authority may be given to an agent in any of the following ways: (1) by appointment by a resolution defining the powers of the agent;¹⁴⁰ (2) by a contract with the corporation; (3) by a power of attorney to act; (see

¹³⁵ In *Wallace v. International Trade Exhibition, Inc.*, (1930) 170 La. 55, 127 So. 362, it was held that directors may delegate to an executive committee the exercise of their powers, including the power to fix the president's salary. See, however, *Tempel v. Dodge*, (1895) 89 Tex. 69, 32 S. W. 514.

¹³⁶ See *Respass v. Rex Spinning Co.*, (1926) 191 N. C. 809, 133 S. E. 391.

¹³⁷ *Wingate v. Bercut*, (1945) 146 F. (2d) 725.

¹³⁸ *Dallas Joint Stock Land Bank of Dallas v. Harrison*, (1939) (Tex. Civ. App.) 135 S. W. (2d) 573, error granted; *W. C. Downey & Co. v. Kraemer Hosiery Co.*, (1939) 136 Pa. Super. 553, 7 A. (2d) 492; *Wood Co. v. McCutcheon*, (1939) 136 Pa. Super. 446, 7 A. (2d) 564.

¹³⁹ *Kidd v. N. H. Traction Co.*, (1907) 74 N. H. 160, 66 A. 127.

¹⁴⁰ *North Carolina Mortgage Corporation v. Morgan*, (1935) 208 N. C. 743, 182 S. E. 450. See also *Houghtaling v. Upper Kittanning Brick Co.*, (1915) 92 N. Y. Misc. 228, 155 N. Y. Supp. 540.

following paragraph); and (4) by implication from the acquiescence of the directors in a course of dealings by the agents.

A corporation may appoint agents by resolution or by a writing signed by a duly authorized officer, without using its corporate seal, just as an individual may do.¹⁴¹

Appointment of agents by power of attorney. A power of attorney is a written instrument giving authority to the agent appointed to perform a certain act in the name and on behalf of the corporation. Usually, where a power of attorney is to be given to an agent, the board of directors appoints the agent by resolution and authorizes the proper officers to execute and deliver a power of attorney to the agent appointed. See form No. 203.

If a statute requires that an agent be appointed, for example, for the service of process, the appointment should be made in the form required by law. Thus, if the agent is required to be appointed by resolution, the form of resolution should meet the statutory requirements; if the agent is required to be appointed by a power of attorney, the proper resolutions should be passed authorizing the execution of a power of attorney. The blue-sky laws of some of the states, regulating the sale of securities in the state, require the corporation obtaining permission to market securities to appoint an agent for service of process in the state. Many of the states furnish the form of resolution to be passed by the directors to appoint an agent for service of process. Most of the states also require the appointment of an agent for service of process when a corporation organized in another state makes application to do business as a foreign corporation.

Revocation of agent's authority. Whoever has the power to appoint an agent has the power to revoke the agency at any time with or without good cause, unless the agency is irrevocable. Even if the agent has been appointed for a definite period, his authority may be revoked before the expiration of the term.¹⁴² But if, in revoking the agent's authority, the corporation breaks a contract of employment or other agreement, it may become liable for damages.¹⁴³ If a corporate by-law gives the board authority to terminate the appointment of an agent at any time, and the agent is chargeable with knowledge of that by-law, the

¹⁴¹ North Carolina Mortgage Corporation v. Morgan, *supra* (Note 140).

¹⁴² Hansen v. Columbia Breweries, Inc., (1942) 12 Wash. (2d) 554, 122 P. (2d) 489.

¹⁴³ *Ibid.*

board can revoke the appointment without being liable on a contract of employment.¹⁴⁴

If the agent has entered into contracts binding the corporation, the revocation of his authority cannot affect the rights of third persons.

An agency is irrevocable, regardless of whether or not such irrevocability is expressed in the appointment, where the appointment is coupled with an interest, or is part of a security for the payment of money or the performance of some other lawful act. The mere fact that an agency is called "irrevocable" does not make it so, if the nature of the agency is such that it would otherwise be revocable.¹⁴⁵

Agency coupled with an interest. An agency is coupled with an interest when the agent has an interest in the subject matter of the agency aside from an interest in the compensation he is to receive for his services. Following is an example of an agency "coupled with an interest." An agent for the corporation has advanced money for the corporation; to protect the agent, the corporation has given him the power to sell certain property and to reimburse himself out of the proceeds. The agency is irrevocable because of the interest of the agent in the subject matter.

Ratification of unauthorized acts of directors, officers, and agents. Acts done by directors, officers, and agents which are beyond the scope of their authority do not bind the corporation,¹⁴⁶ unless the corporation expressly or impliedly ratifies the acts.¹⁴⁷ Ratification of an unauthorized act validates it and makes it binding on the corporation to the same extent as if it had been expressly authorized.¹⁴⁸

Ratification will be implied from the adoption of the unauthorized act,¹⁴⁹ from acquiescence by those who had power to grant authority in the first place,¹⁵⁰ or from enjoyment by the

¹⁴⁴ *Cohen v. Camden Refrigerating & Terminals Co.*, (1943) 129 N. J. L. 519, 30 A. (2d) 428.

¹⁴⁵ *Frink v. Roe*, (1886) 70 Cal. 296, 11 P. 820.

¹⁴⁶ *Murray v. Standard Pecan Co.*, (1923) 309 Ill. 226, 140 N. E. 834.

¹⁴⁷ *Schmidt v. Paper Box Co.*, (1936) 185 *Pittsburgh Legal Journal* 541; *Hennessey v. Nelen*, (1938) 299 Mass. 569, 13 N. E. (2d) 431.

¹⁴⁸ *Eastern Public Service Corp. v. Funkhouser*, (1929) 153 Va. 128, 149 S. E. 503.

¹⁴⁹ Ratification dates from the time the unauthorized agent made the proposed contract; adoption dates from the time the principal adopts the contracts. Consequently, acts of promoters may ordinarily be adopted, but not ratified, because ratification would date back to a time when the corporation did not exist.

¹⁵⁰ *Bates Street Shirt Co. v. Waite*, (1931) 130 Me. 352, 156 A. 293; *Fayette*

corporation of the benefits of the acts.¹⁵¹ A corporation is not permitted to set up as a defense, when liability is being fixed upon it, the fact that a contract was made without authority by an agent, if it has impliedly ratified the agent's acts.¹⁵² Ratification may be necessary in order to bind the corporation not only in cases where a representative of the corporation has acted without authority, but where ratification by a certain body is required by statute, charter, or by the terms of a contract.¹⁵³

Essentials of valid ratification. In order for a ratification to be valid, the following elements must be present:

1. The ratification must be made by those who had authority in the first instance to authorize the acts to be done.¹⁵⁴ For example, stockholders cannot ratify an act which they cannot authorize¹⁵⁵ and therefore cannot, by a general resolution ratifying the acts of directors, validate action taken by the directors in violation of express statutory provision.¹⁵⁶ A corporation cannot ratify any acts of its directors, officers, or agents which it has not the power to perform.¹⁵⁷

2. The ratification must be the voluntary act of the principal.

3. Those ratifying an unauthorized act must, at the time of ratification, be fully informed of all material facts and circum-

Lumber Co. v. Faught, (1936) 102 Ind. App. 686, 5 N. E. (2d) 132; *Santarsiero v. Green Bay Transport, Inc.*, (1946) 249 Wis. 308, 24 N. W. (2d) 659.

¹⁵¹ *The Black Walnuts v. First Nat. Bank of Atlanta*, (1936) 53 Ga. App. 316, 185 S. E. 726; *Reynier v. Associated Dyeing & Printing Co.*, (1936) 116 N. J. Law 481, 184 A. 780; *Coldiron v. Good Coal Co.*, (1939) 276 Ky. 833, 125 S. W. (2d) 757; *Webb v. Duvall*, (1940) 177 Md. 592, 11 A. (2d) 446; *C. L. McClain Fuel Gordon*, (1942) 179 Va. 674, 20 S. E. (2d) 522; *Magruder v. Hagen-Ratcliff & Co.*, (1948) (W. Va.) 50 S. E. (2d) 488.

¹⁵² *Colorado Industrial Loan & Investment Co. v. Clem*, (1927) 82 Colo. 399, 260 P. 1019. It was held in this case that the corporation could not question the validity of a contract made in disagreement with its charter, where the corporation had retained the benefits of the contract, provided that the contract was not forbidden by statute and was not immoral or contrary to public policy.

¹⁵³ A contract will not be binding until it is approved by the board of directors, even though signed with authority, if the terms of the instrument require such approval. *Barnes v. Red Bayou Oil Co., Inc.*, (1921) 271 F. 297.

¹⁵⁴ See *Baltimore & O. R. Co. v. Foar*, (1936) 84 F. (2d) 67; *E. Clemens Horst Co. v. Grand Rapids Brewing Co.*, (1937) 280 Mich. 49, 273 N. W. 388; *Lammers v. Arkansas Power & Light Co.*, (1938) 196 Ark. 108, 116 S. W. (2d) 361.

¹⁵⁵ *Hotaling v. Hotaling*, (1924) 193 Cal. 368, 224 P. 455.

¹⁵⁶ *Shickel v. Berryville Land & Improvement Co.*, (1901) 99 Va. 88, 37 S. E. 813.

¹⁵⁷ *State Exchange Bank of New Boston v. Simms*, (1924) (Tex. Civ. App.) 266 S. W. 1111; *People's Bank v. Mobile Towing & Wrecking Co.*, (1924) 210 Ala. 678, 99 So. 87.

stances attending the unauthorized act.¹⁵⁸ The courts have held, in cases of agency, that knowledge required for ratification is ordinarily actual knowledge, and not merely an opportunity for acquiring knowledge, but that the principal cannot be justified in wilfully closing his eyes to knowledge. Thus, if the stockholders elect to ratify without inquiry into the facts, after having been given an opportunity to ascertain the facts, their ratification is equivalent to ratification with knowledge.

There can be no implied ratification of unauthorized acts unless there is evidence showing ratification, such as acceptance of benefits, knowledge of the transaction, a failure to protest, and acts of like character.¹⁵⁹ Nor is the knowledge that a corporate agent has of his own unauthorized act imputable to the corporation so as to result in ratification.¹⁶⁰

Corporate officers cannot ratify their own wrongful acts.¹⁶¹

Execution of Corporate Instruments

Manner of executing corporate instruments. In the execution of corporate instruments, a corporation need observe only such formalities as are required of individuals under similar circumstances, unless the statute or charter otherwise provides.¹⁶² A contract or instrument, to be binding on the corporation, should be executed in the name of the corporation by the person or persons authorized to execute the instrument. Ordinarily, the agent or officer should name the corporation as the contracting party, at the bottom of the contract, and sign as its agent or officer.¹⁶³ The signature should appear as follows:

¹⁵⁸ Greensboro Gas Co. v. Home Oil & Gas Co., (1908) 222 Pa. 4, 70 A. 940; McCray v. Sapulpa Petroleum Co., (1923) 102 Okla. 108, 226 P. 875; Old Mortgage & Finance Co. v. Pasadena Land Co., (1928) 241 Mich. 426, 216 N. W. 922; Union Discount Co., Inc. v. MacRobert et al., (1929) 134 N. Y. Misc. 107, 234 N. Y. Supp. 529; Baltimore & O. R. Co. v. Foar, (1936) 84 F. (2d) 67; Barclay v. Dublin Lake Club, (1938) 89 N. H. 500, 1 A. (2d) 633; Richardson v. Taylor Land & Livestock Co., (1946) 25 Wash. (2d) 518, 171 P. (2d) 703; Bowen v. Trust Co., (1948) 166 F. (2d) 264.

¹⁵⁹ Betz v. Tacoma Drug Co., (1942) 15 Wash. (2d) 471, 131 P. (2d) 183.

¹⁶⁰ McCray v. Sapulpa Petroleum Co., (1923) 102 Okla. 108, 226 P. 875; Old Mortgage & Finance Co. v. Pasadena Land Co., (1928) 241 Mich. 426, 216 N. W. 922.

¹⁶¹ Scrivner v. American Car & Foundry Co., (1932) 330 Mo. 408, 50 S. W. (2d) 1001.

¹⁶² Altavista Cotton Mills v. Lane, (1922) 133 Va. 1, 112 S. E. 637.

¹⁶³ Mastin Realty & Mining Co. v. Com'r of Internal Revenue, (1942) 130 F. (2d) 1003, citing Gottfried v. Miller, (1882) 104 U. S. 521, 26 L. Ed. 851.

“A B C Corporation
by”
(Name and title of officer.)

Other forms of execution. While the above form of execution is technically correct, it is not the only one that the courts recognize as sufficient to bind the corporation.¹⁶⁴ Where the body of an agreement or instrument indicates that it is the instrument of the corporation and not of the signer, and the signature itself indicates that the execution was made in a representative capacity, the instrument will be regarded as binding on the corporation, provided, of course, that the signer was acting within the scope of his authority.¹⁶⁵ The official designation of the one who signs is not absolutely necessary, for it may be otherwise established.¹⁶⁶ The use of a commonly understood abbreviation to designate the office of the person signing a corporate instrument is sufficient, since the courts take judicial notice of such abbreviations.¹⁶⁷ For example, where the name of the corporation is typed on a note, followed by the name of the secretary and an abbreviation of his official capacity, written in ink, the signing is sufficient to bind the corporation, provided the secretary is authorized to execute the note on its behalf.¹⁶⁸

The corporation may adopt or authorize the execution of documents by a typewritten, printed, or rubber-stamped signature, and, if the adoption or the authority to use such a signature is shown, the corporation is bound by it.¹⁶⁹

The contract must indicate that it is made in behalf of the corporation.¹⁷⁰ If the name of the corporation appears on an agreement without the name of the corporation's agent who was authorized to execute the instrument, the contract will be con-

¹⁶⁴ *Bickart v. Henry*, (1917) 67 Ind. App. 493, 116 N. E. 15.

¹⁶⁵ *Harris v. Fielding*, (1917) 109 Kan. 491, 199 P. 467; *Cochran v. Grand Theater Co.*, (1923) 29 Ga. App. 481, 115 S. E. 926; *Bickart v. Henry*, supra (Note 164); *Atlanta & C. A. L. Ry. Co. v. Limestone-Globe Land Co.*, (1917) 109 S. C. 444, 96 S. E. 188; *De Maria & Janssen v. Baum*, (1932) 227 Mo. App. 212, 52 S. W. (2d) 418; *State ex rel. Montana Flour Mills v. District Court of Sixth Judicial District*, (1940) 110 Mont. 55, 99 P. (2d) 213.

¹⁶⁶ *Greve v. Taft Realty Co.*, (1929) 101 Cal. App. 343, 281 P. 641.

¹⁶⁷ *Griffin v. Erskine*, (1906) 131 Iowa 444, 109 N. W. 13; *Santa Marina Co. v. Canadian Bank of Commerce*, (1918) 254 F. 391.

¹⁶⁸ *Reifeiss v. Barnes*, (1946) (Mo. App.) 192 S. W. (2d) 427.

¹⁶⁹ *Tabas v. Emergency Fleet Corp.*, (1926) 9 F. (2d) 648, aff'd in *Emergency Fleet Corp. v. Tabas*, (1927) 22 F. (2d) 398, in which case no evidence of adoption or of authority in anyone to bind the United States was shown.

¹⁷⁰ *Hasenfratz v. Berger Apartments, Inc.*, (1946) 61 N. Y. Supp. (2d) 12.

sidered the act of the corporation if the name of the corporation was placed there by someone authorized to act for the company.¹⁷¹ But where the instrument does not purport to be made by the corporation, the persons who subscribe to it, and not the corporation, are responsible even though the signers have added to their signatures a profession of some official title.¹⁷²

Acknowledgment. If an instrument requires an acknowledgment, the acknowledgment must associate the acknowledgor with the corporation. Thus, a certificate of acknowledgment is not sufficient when it does not recite that the acknowledging officer is an officer of the corporation named in the instrument.¹⁷³

Corporate name in instrument. A corporation, like an individual, can do business and contract in a name other than its legal name.¹⁷⁴ A misnomer of the corporation will not affect the validity of its contracts,¹⁷⁵ but if the name is not the corporation's regular name, and no agency to make the contract is disclosed, it is prima facie not a contract of the corporation.¹⁷⁶ The omission of the word "Company" from the corporate name is generally of no effect, so far as the corporation's liability is concerned.¹⁷⁷

Necessity for seal on corporate instruments. The corporation is required to use its seal in executing an instrument only when a seal is required by statute or charter, or when an individual executing a similar document would be required to do so under seal.¹⁷⁸ If a corporation intends to seal an instrument, it cannot avoid its obligation merely because it has not adopted and used

¹⁷¹ *Dougherty v. Becklenberg*, (1917) 205 Ill. App. 491; *Kull v. Dierks Lumber & Coal Co.*, (1927) 173 Ark. 445, 292 S. W. 695.

¹⁷² *Casco National Bank of Portland v. Clark*, (1893) 139 N. Y. 307, 34 N. E. 908, referring to negotiable instruments. *Birum Olson Co. v. Johnson*, (1931) 213 Iowa 439, 239 N. W. 123.

¹⁷³ *Haverell Distributors v. Haverell Mfg. Corp.*, (1944) 115 Ind. App. 501, 58 N. E. (2d) 372, citing *First National Bank v. Baker*, (1895) 62 Ill. App. 154.

¹⁷⁴ *Butler Mfg Co. v. Elliott & Cox*, (1930) 211 Iowa 1068, 233 N. W. 669.

¹⁷⁵ *H. W. Underhill Const. Co. v. Nilson*, (1928) (Mo. App.) 3 S. W. (2d) 399.

¹⁷⁶ *Stephens v. Brackin*, (1931) 16 La. App. 272, 134 So. 326.

¹⁷⁷ *Houston Press Co. v. Bawden Bros.*, (1932) (Tex. Civ. App.) 51 S. W. (2d) 438.

¹⁷⁸ *McKee v. Cunningham*, (1906) 2 Cal. App. 684, 84 P. 260; *Groel v. United Elec. Co.*, (1905) 69 N. J. Eq. 397, 60 A. 822; *Alabama Fidelity & Casualty Co. v. Jefferson County Savings Bank*, (1917) 198 Ala. 557, 73 So. 918; *Caruthers v. Peninsular Life Ins. Co.*, (1942) 150 Fla. 467, 7 So. (2d) 841, citing *Grand Lodge, Knights of Pythias v. State Bank of Florida*, (1920) 79 Fla. 471, 84 So. 528. Some states have relaxed the common law as to seals with respect to natural persons but not as to corporations. *Covington Virginian v. Woods*, (1944) 182 Va. 538, 29 S. E. (2d) 406.

a corporate seal of its own.¹⁷⁹ It can use a scroll, or the word "Seal," or any other device, just as individuals do.¹⁸⁰

In the absence of statutory prohibition,¹⁸¹ a corporation may enter into simple contracts¹⁸² and may convey and mortgage land without the use of its corporate seal.¹⁸³ Even where a seal is required to convey property, a deed that cannot convey legal title for want of a seal can pass equitable title.¹⁸⁴

In the present state of the law upon the point, every corporation should use a seal. If there is any doubt as to whether a seal should be used, the safest course is to use one.¹⁸⁵

Seal as evidence of authority. It is generally held that a seal on a corporate instrument is prima facie evidence that the instrument was executed by authority of the corporation.¹⁸⁶ The burden of showing lack of authority is upon the person attacking the instrument.¹⁸⁷

Who may sign corporate instruments. The authority to sign rests in the person or persons who are given that power in any of the following ways: (1) by statute, charter, or by-law provision; (2) by resolution conferring the power; or (3) by

¹⁷⁹ *Collins v. Tracy Grill & Bar Corp.*, (1941) (Pa. Super. Ct.) 19 A. (2d) 617.

¹⁸⁰ *Ibid.*

¹⁸¹ *Henderson v. Raymond Syndicate*, (1903) 183 Mass. 443, 67 N. E. 427.

¹⁸² *Gottfried v. Miller*, (1881) 104 U. S. 851; *Leinkauf v. Calman*, (1888) 110 N. Y. 50, 17 N. E. 389; *Robertson v. Burstein*, (1929) 105 N. J. Law 375, 146 A. 355.

¹⁸³ *Bank of Commerce of Anacortes v. Kelpine Products Co.*, (1932) 167 Wash. 592, 10 P. (2d) 238; *Armstrong v. Home Service Stores*, (1932) 203 N. C. 499, 166 S. E. 321.

¹⁸⁴ *Harris v. Zeuch*, (1931) 103 Fla. 183, 137 So. 135.

¹⁸⁵ *Garrett v. Belmont Land Co.*, (1895) 94 Tenn. 459, 29 S. W. 726; *Ismon v. Loder*, (1904) 135 Mich. 345, 97 N. W. 769.

¹⁸⁶ *Thomas v. Peterson*, (1931) 213 Cal. 672, 3 P. (2d) 306; *Henderson Lumber Co. v. Chatham Bank & Trust Co.*, (1924) 33 Ga. App. 196, 125 S. E. 867; *Fidelity & Deposit Co. of Md. v. Rieff*, (1930) 181 Ark. 798, 27 S. W. (2d) 1008; *York Ice Machinery Corporation v. Robbins*, (1936) 323 Pa. 369, 185 A. 626; *H. G. Hill Co. v. Taylor*, (1936) 232 Ala. 471, 168 So. 693; *Central Hanover Bank & Trust Co. v. United Traction Co.*, (1938) 95 F. (2d) 50; *Bonninghausen v. Roma*, (1939) 291 Mich. 603, 289 N. W. 921; *Port of Palm Beach Dist. v. Goethals*, (1939) 104 F. (2d) 706; *Feldmeier v. Mortgage Securities*, (1939) 34 Cal. App. (2d) 201, 93 P. (2d) 593; *Italo-Petroleum Corp. of America v. Hannigan*, (1940) 40 Del. 534, 14 A. (2d) 401; *May Tire & Service, Inc. v. Sinclair Refining Co.*, (1942) 240 Wis. 260, 3 N. W. (2d) 347; *Tuttle v. Junior Bldg. Corp.*, (1947) 227 N. C. 146, 41 S. E. (2d) 365. See also Ransom, "Corporate Seal—When Affixing Seal Makes the Instrument a Specialty," 36 *Michigan Law Review* 839 (1938), discussing *General Petroleum Corp. v. Seaboard Terminals Corp.*, (1937) 19 F. Supp. 882.

¹⁸⁷ *Bethel M. E. Church v. Dagsboro Council, etc.*, (1943) (Del. Ch.) 30 A. (2d) 273, citing *Miners Ditch Co. v. Zellerbach*, (1869) 37 Cal. 543, 99 Am. Dec. 30.

assumption and exercise of the authority in the past with the apparent consent and acquiescence of the corporation. If the corporation has not delegated the power to sign to any particular person, and the authority has not been assumed by usage, the person or persons who have power to enter into the contract and bind the corporation have the power to sign for the corporation.¹⁸⁸

General authority of officers to sign corporate instruments. The president of a corporation in active charge of the corporate business has the authority to sign the corporate name to any instrument executed in the course of the regular business.¹⁸⁹ Thus, if the corporation is created for the purpose of engaging in the business of buying and selling real estate, the president can make a contract for the sale of the corporation's realty, without special authorization.¹⁹⁰ If an instrument is signed by the vice president, and sealed with the corporation's seal, it is presumed that the vice president is acting in place of the president, in the absence of evidence to the contrary.¹⁹¹

A general manager who can exercise general authority has authority to sign a contract.¹⁹²

The secretary is a ministerial officer, not an executive officer as are the president and vice president. Therefore, an instrument signed by the secretary should recite that he has the authority to execute it.¹⁹³

Limitations on authority to sign corporate instruments. Authority given to an officer to sign and execute all documents does not mean that the officer thus empowered has the further power to make any contract that he pleases.¹⁹⁴

¹⁸⁸ *Raftis v. McCloud River Lumber Co.*, (1917) 35 Cal. App. 397, 170 P. 176.

¹⁸⁹ *Rosenthal v. Thirty-fourth St. Shop*, (1927) 129 N. Y. Misc. 822, 222 N. Y. Supp. 733; *Victoria Gravel Co. v. Neyland*, (1938) (Tex. Civ. App.) 114 S. W. (2d) 415; *Italo-Petroleum Corp. of America v. Hannigan*, (1940) 40 Del. 534, 14 A. (2d) 401. See also *Vincennes Savings & Loan Ass'n v. Robinson*, (1939) 107 Ind. App. 558, 23 N. E. (2d) 431, in which it was held that the president has power to execute negotiable instruments only where the board of directors expressly delegates such power or clothes the president with apparent authority by a continuity of acts and practices.

¹⁹⁰ *Hasenfratz v. Berger Apartments, Inc.*, (1946) 61 N. Y. Supp. (2d) 12.

¹⁹¹ *Hufstedler v. Sides*, (1942) (Tex. Civ. App.) 165 S. W. (2d) 1006, citing *Ballard v. Carmichael*, (1892) 83 Tex. 355, 18 S. W. 734.

¹⁹² *Raftis v. McCloud River Lumber Co.*, (1917) 35 Cal. App. 397, 170 P. 176.

¹⁹³ *Emmerglick v. Philip Wolf, Inc.*, (1943) 138 F. (2d) 661.

¹⁹⁴ *Catholic Foreign Mission Soc. of America v. Oussani*, (1915) 215 N. Y. 1, 109 N. E. 80.

Where authority to execute an instrument is given by a corporate resolution, that authority is limited by the resolution. Thus, if a resolution authorizes the president and secretary to give a deed to certain property, a deed covering additional property is invalid as to the additional property.¹⁹⁵ Authority to sign checks does not give authority to indorse the name of the corporation on a note.¹⁹⁶

Effect of improper execution of corporate instruments. Failure to comply with the provisions of the statute, charter, by-laws, or resolutions concerning execution of corporate instruments may render the instrument or contract invalid, and, consequently, not binding on the corporation. However, under the following conditions the corporation will not find the violation a good defense against liability: (1) if the provision in the statute or charter is directory, not mandatory;¹⁹⁷ (2) if the improper execution violates a by-law that was not required by statute or charter and of which persons dealing with the corporation had no notice;¹⁹⁸ (3) if the execution was made in the regular course of business, and in the manner in which the corporation usually executes its instruments or contracts;¹⁹⁹ (4) if the person dealing with the corporation entered into the agreement in good faith, with no knowledge that the requirement had been violated, and was justified in assuming that it had been complied with;²⁰⁰ (5) if the corporation has received the benefits of the contract;²⁰¹ (6) if the corporation has ratified the con-

¹⁹⁵ *Hasenfratz v. Berger Apartments, Inc.*, (1946) 61 N. Y. Supp. (2d) 12.

¹⁹⁶ *Bennett v. Corporation Finance Co.*, (1927) 258 Mass. 306, 154 N. E. 835. In the absence of evidence to the contrary, the president and treasurer of a corporation are the proper officials to execute notes of a corporation. *Downey v. People's State Bank*, (1935) 101 Ind. App. 121, 194 N. E. 793.

¹⁹⁷ *Rubottom v. Pioneer Life Insur. Co.*, (1921) 207 Mo. App. 616, 227 S. W. 835. What is directory and what mandatory is not definitely fixed, but is to be determined by the intention of the legislature, and the language, nature, and object of the provision.

¹⁹⁸ *Doehler v. Lansdon*, (1931) 135 Ore. 687, 298 P. 200.

¹⁹⁹ *Farmers' State Bank of Riverton v. Haun*, (1924) 30 Wyo. 322, 222 P. 45; *Blanc v. Germania Nat. Bank*, (1905) 114 La. 739, 38 So. 537.

²⁰⁰ Where the corporation's secretary, on signing and delivering an order for a broker's commission, stated that the president's signature was also necessary, upon failure of the president to sign, the order did not become a binding contract. *Harrop v. Coffman-Dobson Bank & Trust Co.*, (1931) 160 Wash. 449, 295 P. 165.

²⁰¹ *Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co.*, (1904) 127 F. 625; *Harlan Public Service Co. v. Eastern Const. Co.*, (1934) 254 Ky. 135, 71 S. W. (2d) 24; *East Texas Title Co. v. Parchman*, (1938) (Tex. Civ. App.) 116 S. W. (2d) 497; *Webb v. Duvall et al.*, (1940) 177 Md. 592, 11 A. (2d) 446.

tract;²⁰² or (7) if the contract has been carried out on both sides.²⁰³

Resignation and Removal of Directors and Officers

Right of directors and officers to resign. A director or officer may resign at any time, even though he has been elected or appointed for a definite period,²⁰⁴ unless some limitation is placed upon his right to resign by statute, charter, or by-laws of the corporation, or by the officer's contract with the company.²⁰⁵

A provision in the statute, charter, or by-laws that an officer shall hold office until his successor is elected, or appointed, and qualified, does not limit the right of the officer or director to resign.²⁰⁶ Nor will such a provision prevent a vacancy in office upon the filing of a resignation by one who is an incumbent of such office.²⁰⁷ The law differs in the various jurisdictions as to whether an officer's resignation is effective, for the purpose of service of process, before his successor is appointed.²⁰⁸

Should a director or officer resign without fulfilling obligations

²⁰² *Ryan v. Charles E. Reed & Co.*, (1929) 266 Mass. 293, 165 N. E. 396; *Bank of America Nat. Trust & Sav. Ass'n v. Cryer*, (1935) (Cal. App.) 49 P. (2d) 864; *Cache Valley Banking Co. v. Logan Lodge No. 1453*, (1936) 254 Ky. 135, 71 S. W. (2d) 24.

²⁰³ *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, (1912) 197 F. 347.

²⁰⁴ *Alabama Consolidated Coal & Iron Co. v. Baltimore Trust Co.*, (1912) 197 F. 347.

²⁰⁵ *Fearing v. Glenn*, (1896) 73 F. 116; *Briggs v. Spaulding*, (1891) 141 U. S. 132, 11 S. Ct. 924; *Manhattan Co. v. Kaldenberg*, (1900) 165 N. Y. 1, 58 N. E. 790; *Gerdes v. Reynolds*, (1941) 28 N. Y. Supp. (2d) 622; *Shuckman v. Rubenstein*, (1947) 164 F. (2d) 952.

²⁰⁶ *In re McNaughton's will*, (1909) 138 Wis. 179, 118 N. W. 997, 120 N. W. 288; *Modern Heat & Power Co. v. Bishop Steamotor Corp.*, (1949) 239 Iowa 1257, 34 N. W. (2d) 581.

²⁰⁷ *Western Pattern & Manufacturing Co. v. American Metal Shoe Co.*, (1921) 175 Wis. 493, 185 N. W. 535.

²⁰⁸ A resignation by a secretary and director, mailed to the corporation and the president thereof, was complete and effective, notwithstanding a by-law provision that "each director shall serve for the term for which he shall have been elected and until his successor shall have been duly elected and have qualified . . .," and service had upon an officer who had thus resigned was the same as if made upon a stranger. *Security Investors' Realty Co. v. Superior Court*, (1929) 101 Cal. App. 450, 281 P. 709. But see *Ross v. Western Land & Irrigation Co. et al.*, (1915) 223 F. 680, in which it was held that an officer elected under a by-law similar to the one mentioned in the preceding case, remains an officer on whom service of process against the corporation may be had, even if the officer has tendered his resignation, where the resignation has not been acted upon by the corporation, directors, or stockholders. See also *Liken v. Shaffer*, (1946) 64 F. Supp. 432.

The rule in New York is that, for the purpose of service of process, an officer's resignation is not effective until a successor has been appointed. *Timolate v. S. J. Held Co.*, (1896) 17 N. Y. Misc. 556, 40 N. Y. Supp. 962.

placed upon him either by his contract or by the statute, charter, or by-laws, he may become liable to the corporation for the damages caused by his breach of contract.

Directors or officers cannot resign, of course, for fraudulent reasons,²⁰⁹ as, for example, for the express purpose of instituting an action to procure the appointment of a receiver on the ground that the corporation is without officers.²¹⁰ Nor can they resign if the immediate effect would be to leave the interests of the corporation without proper care and protection.²¹¹

An agreement to resign for pecuniary gain is void, for it is deemed to be against public policy,²¹² but an agreement made in good faith, whereby the president was to resign in consideration of the purchase of his stock by the corporation, the payment to him of a reasonable salary allowance for the loss of his position, and the giving of a note for the amount owed to him by the company, was held not to constitute a breach of trust.²¹³

Acceptance of resignation; revocation before acceptance. Acceptance of a resignation is not necessary in order to terminate the directorship or office, unless this constitutes one of the limitations set forth in the statute, charter, by-laws, or contract.²¹⁴ However, if, in resigning, the director or officer has stated that the resignation is to take effect upon acceptance, he will remain a director or continue to hold office until the resignation is accepted.²¹⁵ Where a written resignation was tendered but never

²⁰⁹ *Bosworth v. Allen*, (1901) 168 N. Y. 157, 61 N. E. 163; *Inventions Corp. v. Hobbs*, (1917) 244 F. 430.

²¹⁰ *Zeltner v. Henry Zeltner Brewing Co.*, (1903) 174 N. Y. 247, 66 N. E. 810.

²¹¹ *Gerdes v. Reynolds*, (1941) 28 N. Y. Supp. (2d) 622, quoting 1 *Morawetz on Corporations*, §563.

²¹² *Forbes v. McDonald*, (1880) 54 Cal. 98; *Noel v. Drake*, (1881) 28 Kan. 265; *Elliott v. Chamberlain*, (1884) 38 N. J. Eq. 604; *Gerdes v. Reynolds*, *supra* (Note 211).

²¹³ *Joseph v. Raff*, (1903) 82 N. Y. App. Div. 47, 81 N. Y. Supp. 546.

²¹⁴ *Fearing v. Glenn*, (1896) 73 F. 116; *Briggs v. Spaulding*, (1891) 11 S. Ct. 924, 141 U. S. 132; *Manhattan Co. v. Kaldenberg*, (1900) 165 N. Y. 1, 58 N. E. 790; *Dodge v. Kenwood Ice Co. et al.*, (1913) 204 F. 577; *Bell v. Texas Employers' Ins. Ass'n*, (1931) (Tex. Civ. App.) 43 S. W. (2d) 290; *Du Bois v. Century Cement Products Co.*, (1936) 119 N. J. Eq. 472, 183 A. 188; *State ex rel. Northwestern Development Corp. v. Gehrz*, (1939) 230 Wis. 412, 283 N. W. 827.

²¹⁵ *International Bank of St. Louis v. Faber*, (1898) 86 F. 443; *President, etc. of Manhattan Co. v. Kaldenberg*, (1900) 165 N. Y. 1, 58 N. E. 790; *Lincoln Court Realty Co. v. Kentucky Title Savings Bank & Trust Co.*, (1916) 169 Ky. 840, 185 S. W. 156; *Clark v. Oceano Beach Resort Co.*, (1930) 106 Cal. App. 574, 289 P. 946; *Du Bois v. Century Cement Products Co.*, (1936) 119 N. J. Eq. 472, 183 A. 188.

acted upon, and the director continued to attend meetings, the resignation was ineffective.²¹⁶

A director can revoke his resignation at any time before it is accepted.²¹⁷ Participation in a directors' meeting is sufficient to revoke a resignation.²¹⁸ On the other hand, if a resignation is to become effective at once, it is effective when tendered, and no act of the officer revokes that resignation.²¹⁹

Notice of resignation of directors and officers. In order that a resignation may be effective, notice must be given to the corporation. The resigning director must cease to act as a director from the time his resignation is to take effect,²²⁰ but he can continue to act until that time.²²¹ No notice need be given to creditors or to the general public.²²² The proper person or body to receive the resignation is the one having the power to fill the vacancy.²²³ It has been held, however, that notice served on the president is sufficient in the absence of a contrary provision.²²⁴

Form of resignation. The resignation may be either in writing or oral;²²⁵ it need not be in any particular form,²²⁶ but the intent to resign must be clear. It is advisable that the resignation be in writing,²²⁷ in order that a record may be available for future use in case of controversy, and that it indicate when the resignation is to take effect. In the absence of such a statement, a resignation takes effect immediately.

²¹⁶ *Venner v. Denver Union Water Co.*, (1907) 40 Colo. 212, 90 P. 623.

²¹⁷ *In re Fidelity Assur. Ass'n*, (1941) 42 F. Supp. 973, rev'd on other grounds, (1942) 129 F. (2d) 442, aff'd, (1943) 318 U. S. 608, 63 S. Ct. 807.

²¹⁸ *Ibid.*

²¹⁹ *Harry Levi & Co., Inc. v. Feldman*, (1946) 61 N. Y. Supp. (2d) 639.

²²⁰ *J. L. Mott Iron Works v. West Coast Plumbing Supply Co.*, (1896) 113 Cal. 341, 45 P. 683; *Union Nat. Bank of Troy v. Scott*, (1900) 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145; *Chemical Nat. Bank of N. Y. v. Colwell*, (1890) 16 Daly (N. Y.) 28, 9 N. Y. Supp. 285, 288. Resignation may be implied. *University of Maryland v. Williams*, (1838) 9 Gill & J. 365 (Md.); *Sturges v. Vanderbilt*, (1876) 73 N. Y. 384; *Chem. Nat. Bank v. Colwell*, (1892) 132 N. Y. 250, 30 N. E. 644.

²²¹ *Mayo v. Interment Properties*, (1942) 53 Cal. App. (2d) 654, 128 P. (2d) 417.

²²² *Bruce v. Platt*, (1880) 80 N. Y. 379.

²²³ *Morrus v. Lee*, (1887) 30 F. 298.

²²⁴ *Goodrich Rubber Co. v. Helena Motor Co.*, (1917) 53 Mont. 526, 165 P. 454; *International Bank v. Faber*, (1898) 86 F. 443.

²²⁵ *Fearing v. Glenn*, (1896) 73 F. 116; *Briggs v. Spaulding*, (1891) 141 U. S. 132, 11 S. Ct. 924.

²²⁶ *Briggs v. Spaulding*, (1891) 141 U. S. 132, 11 S. Ct. 924.

²²⁷ See *Union Nat. Bank of Troy v. Scott*, (1900) 53 N. Y. App. Div. 65, 66 N. Y. Supp. 145, in which certain declarations of a director were held not to constitute a resignation. In *Dodge v. Kenwood Ice Co.*, (1913) 204 F. 577, however, a resignation was held to be implied from acts of the directors, without either oral or written statement.

Power to remove directors and officers. In most states, no provision is made in the statute for removal of directors or officers; the subject is usually covered by the by-laws.²²⁸ Even in the absence of express provision, however, a director or officer may be removed, since the corporation has the inherent right to do so if just cause exists.²²⁹ Under some circumstances a director or officer may be removed without cause. (See page 262.)

Acts that constitute cause for removal. The following illustrate acts that have been held to constitute cause for removal:

1. Conversion of funds by treasurer.²³⁰
2. Failure to disclose business transactions of the corporation to superior officers.²³¹
3. Making an unwarranted attack on the character of the president and refusing to work with him.²³²
4. Careless management by the president that resulted in embezzlement of funds by the bookkeeper.²³³
5. Attempting to induce corporation's chief suppliers to transfer their business to a new corporation to be formed by the vice president.²³⁴
6. Refusal on the part of the general manager to fulfill certain terms of his contract.²³⁵
7. Payment of rebates after directors had ordered the practice discontinued.²³⁶

Acts that do not constitute cause for removal. The following illustrate acts that have been held insufficient grounds for removal:

1. Mere friction between two officers.²³⁷

²²⁸ Although few statutes govern these matters, by-laws and charter provisions must be consistent with those which exist. *Bechtold v. Stillwagon*, (1922) 119 N. Y. Misc. 177, 195 N. Y. Supp. 66; *Rankin v. Tygard et al.*, (1912) 198 F. 795; *O'Neal v. F. A. Neider Co.*, (1904) 118 Ky. 62, 80 S. W. 451.

²²⁹ *Toledo Traction, Light & Power Co. v. Smith*, (1913) 205 F. 643; *Templeman v. Grant*, (1924) 75 Colo. 519, 227 P. 555; *Smock v. Buchanan & Smock Lumber Co.*, (1924) 96 N. J. Eq. 308, 125 A. 115; *Walker v. Maas*, (1926) 4 N. J. Misc. 230, 132 A. 322; *Fox v. Cody*, (1931) 141 N. Y. Misc. 552, 252 N. Y. Supp. 395; *Abberger v. Kulp*, (1935) 156 N. Y. Misc. 210, 28 N. Y. Supp. 273.

²³⁰ *Green Bay Fish Co. v. Jorgensen*, (1917) 165 Wis. 548, 163 N. W. 142.

²³¹ *Oliphant v. Home Builders*, (1917) 34 Cal. App. 720, 168 P. 700.

²³² *Gutmann Silks Corp. v. Reilly*, (1919) 189 N. Y. App. Div. 258, 178 N. Y. Supp. 457.

²³³ *Boulicault v. Oriel Glass Co.*, (1920) 283 Mo. 237, 223 S. W. 423.

²³⁴ *McClayton v. W. B. Cassell Co.*, (1946) 66 F. Supp. 165.

²³⁵ *Clark v. Dodge*, (1939) 28 N. Y. Supp. (2d) 442, aff'd, (1941) 261 N. Y. App. Div. 1086, 28 N. Y. Supp. (2d) 464.

²³⁶ *Koppitz-Melchers, Inc. v. Koppitz*, (1946) 315 Mich. 582, 24 N. W. (2d) 220.

²³⁷ *Mortimer v. D. T. McKeithan Lumber Corp.*, (1923) 127 S. C. 266, 120 S. E. 723.

2. Mere failure to use care—it must be a willful or negligent failure.²³⁸

3. Acts causing financial loss to the corporation, where the acts were done in good faith and the methods used were known and approved by the board of directors.²³⁹

Removal without cause. A director or officer may be removed without cause under the following circumstances: (1) if the director or officer has not been elected for a definite term, and removal for cause is not expressly required,²⁴⁰ or (2) if express provision is made in the statute, charter, or by-laws that a director or officer may be removed without cause.²⁴¹ If the person to be removed has been elected or appointed to his office for a definite term, he cannot be removed without cause, unless some statute or provision of the charter or by-laws authorizes the removal without cause.²⁴² However, some courts hold that a ministerial officer has no franchise in his office and may be removed from office at the pleasure of the board of directors.²⁴³ It has been held that a board of directors that has the right to create an office and appoint the officer has the right to remove him at pleasure.²⁴⁴

Who may remove directors and officers. The removal of an

²³⁸ *W. F. Boardman Co. v. Petch*, (1921) 186 Cal. 476, 199 P. 1047.

²³⁹ *Roberts v. J. A. Masquere Co., Ltd.*, (1925) 158 La. 642, 104 So. 484.

²⁴⁰ *In re A. A. Griffing Iron Co.*, (1898) 63 N. J. Law 168, 41 A. 931, 63 N. J. Law 357, 46 A. 1097; *Walsh et al. v. State ex rel. Cook*, (1917) 199 Ala. 123, 74 So. 45; *People ex rel. Manice v. Powell et al.*, (1911) 201 N. Y. 194, 94 N. E. 634.

²⁴¹ *In re Schwartz*, (1922) 119 N. Y. Misc. 387, 196 N. Y. Supp. 679; *Bechtold v. Stillwagon*, (1922) 119 N. Y. Misc. 177, 195 N. Y. Supp. 66; *Walker v. Maas*, (1926) 4 N. J. Misc. 230, 132 A. 322.

²⁴² *Walsh et al. v. State ex rel. Cook*, (1917) 199 Ala. 123, 74 So. 45; *People ex rel. Manice v. Powell*, (1911) 201 N. Y. 194, 94 N. E. 634; *Barker v. National Life Ass'n*, (1918) 183 Iowa 966, 166 N. W. 597; *Costello v. Thomas Cusack Co.*, (1922) 96 N. J. Eq. 83, 90, 124 A. 615, aff'd 94 N. J. Eq. 423, 120 A. 15. See also *In re Schwartz*, (1922) 119 N. Y. Misc. 387, 196 N. Y. Supp. 679; *Cohen v. Camden Refrigerating & Terminals Co.*, (1943) 129 N. J. Law 519, 30 A. (2d) 428. Under the Washington statute such removal does not prejudice contractual rights between the discharged officer and the corporation. *Hansen v. Columbia Breweries, Inc.*, (1942) 12 Wash. (2d) 554, 122 P. (2d) 489.

But see *Realty Acceptance Corp. v. Montgomery*, (1930) 51 F. (2d) 636, in which it was held that a contract authorized by directors employing the president of the corporation for a five-year period prevailed over an inconsistent by-law empowering a majority of the board to remove the president.

²⁴³ *Brindley v. Walker*, (1908) 221 Pa. 287, 70 A. 794; *Abbott v. Harbeson Textile Co. et al.*, (1914) 162 N. Y. App. Div. 405, 147 N. Y. Supp. 1031.

See also *Bussing v. Lowell Film Productions, Inc.*, (1931) 233 N. Y. App. Div. 493, 253 N. Y. Supp. 719, in which it was held that under the statute the directors had full authority to remove an officer "at pleasure."

²⁴⁴ *Christy v. Laclede-Christy Clay Products Co.*, (1923) (Mo. App.) 253 S. W. 106.

officer or a director must be undertaken by the body or person vested with the power to remove.²⁴⁵ Where authority to remove is not specifically granted to a particular body or person, the removal must be by the body or person who had the authority to elect or appoint the person to be removed.²⁴⁶ A director cannot be removed by his fellow directors, in the absence of express power in the board of directors to do so; he is an officer chosen by the stockholders and must be removed by the stockholders.²⁴⁷ The stockholders, by a by-law, can prohibit the directors from removing the chairman of the board.²⁴⁸

A person who is about to be removed cannot vote upon the question of his own removal, on the principle that a man cannot act as a judge in his own case.²⁴⁹

See page 264 for removal of directors and officers by the courts.

Unlawful removal. If an officer is unlawfully removed, he may apply to the court for reinstatement. Mandamus and quo warranto are legal remedies that have been resorted to for this purpose.²⁵⁰ The courts limit themselves, in cases concerning removal, to inquiring whether the person or body assuming the authority to remove acted within their power fairly and in good

²⁴⁵ *Ginter v. Heco Envelope Co.*, (1925) 316 Ill. 183, 147 N. E. 42, holding that, where the power to remove an officer is vested in the directors, action by them is necessary to constitute a removal.

²⁴⁶ *In re A. A. Griffing Iron Co.*, (1898) 63 N. J. Law 168, 41 A. 931, 63 N. J. Law 357, 46 A. 1097; *Stott v. Stott Realty Co. et al.*, (1929) 246 Mich. 267, 224 N. W. 623; *Kiel v. Fred Medart Mfg. Co.*, (1932) (Mo. App.) 46 S. W. (2d) 934; *Feldman v. Pennroad Corp.*, (1945) 60 F. Supp. 716.

If the statute gives the directors power to elect a treasurer, the directors may remove him, even though the by-laws provide that the stockholders shall elect the treasurer. A by-law that is inconsistent with a statute is invalid. *Bechtold v. Stillwagon*, (1922) 119 N. Y. Misc. 177, 195 N. Y. Supp. 66. Ordinarily the selection of the secretary and treasurer is committed to the board of directors; but, when the corporation itself has elected these offices, the stockholders only can remove them. *Brindley v. Walker*, (1908) 221 Pa. 287, 70 A. 794. See also *Spahn & Bielefeld v. Spahn Co. et al.*, (1917) 256 Pa. 543, 100 A. 987; *Birmingham Realty Co. v. Hale*, (1918) 16 Ala. App. 460, 78 So. 723; *Fensterer v. Pressure Lighting Co.*, (1914) 85 N. Y. Misc. 621, 149 N. Y. Supp. 49.

²⁴⁷ *Bruch v. National Guarantee Credit Corp.*, (1922) 13 Del. Ch. 180, 116 A. 738; *Whyte v. Faust*, (1924) 281 Pa. 444, 127 A. 234. In *Leviton v. North Jersey Holding Co.*, (1930) 106 N. J. Eq. 517, 151 A. 389, it was held that concerted action by stockholders controlling a majority of the stock, to oust a director owning a minority of the stock, was not an unlawful conspiracy warranting the appointment of a receiver and a termination of the affairs of the corporation.

²⁴⁸ *In re Buckley, Jr.*, (1944) 183 N. Y. Misc. 189, 50 N. Y. Supp. (2d) 54.

²⁴⁹ *Hinkley v. Sagemiller*, (1926) 191 Wis. 512, 210 N. W. 839.

²⁵⁰ *Fuller v. Plainfield Academic School*, (1827) 6 Conn. 532; *State ex rel. G. T. Welch v. Passaic Hospital*, (1904) 59 N. J. Law 142, 36 A. 702; *State ex rel. Weingart v. Board of Officers of Gegenseitige Unterstuetzungs Gesellschaft Germania*, (1911) 144 Wis. 516, 129 N. W. 630.

faith, after giving notice to the accused and affording him an opportunity to prepare and make his defense.²⁵¹

It has been held that officers continuing to act after removal and pending determination of litigation over their removal, are *de facto* officers, and contracts made by them bind the corporation, especially where the corporation acquiesced in their making and received their benefits.²⁵²

Removal of directors and officers by the courts. In the absence of fraud,²⁵³ the courts may remove officers only when they are given express power to do so by statutory provision.²⁵⁴ Removal of an officer is unwarranted interference with internal corporate affairs, unless the deposed officer is guilty of fraud of such a nature that directors or stockholders should have removed him and did not do so.²⁵⁵ The misconduct must be current—mere apprehension of future misconduct based upon prior mismanagement does not warrant removal.²⁵⁶ In one case, a court removed for a two-year period a director who continually and irresponsibly harassed officers and employees in the conduct of the business.²⁵⁷

Notice of removal of directors and officers. Where the removal of a director or an officer is being made for cause, notice of the proposal to remove must be given to the accused, as well as an opportunity to be heard in his own defense, after being given a reasonable time in which to prepare his defense.²⁵⁸ A corporation, however, is not required to act with the strict regularity that obtains in judicial proceedings.

Filling Vacancies Among Directors and Officers

Power to fill vacancies. Unless a vacancy in the board of directors causes the number of directors to fall below the num-

²⁵¹ *State ex rel. Blackwood v. Brast*, (1924) 98 W. Va. 596, 127 S. E. 507. Where business was always transacted with the plaintiff's (a member of the board's) acquiescence, without any formal meeting, the corporation had the right to discharge the plaintiff without a formal meeting. *Kahn v. Colonial Fuel Corp.*, (1923) 198 N. Y. Supp. 596.

²⁵² *American Concrete Units Co. v. National Stone Tile Corp.*, (1931) 115 Cal. App. 501, 1 P. (2d) 1084.

²⁵³ *Feldman v. Pennroad Corporation*, (1945) 60 F. Supp. 716, citing 16 *Fletcher Cyc. Corp.*, Perm. Ed. §358.

²⁵⁴ *Whyte v. Faust*, (1924) 281 Pa. 444, 127 A. 234; *Feldman v. Pennroad Corporation*, *supra* (Note 253).

²⁵⁵ *Nahikian v. Mattingly*, (1933) 265 Mich. 128, 251 N. W. 421.

²⁵⁶ *Feldman v. Pennroad Corporation*, *supra* (Note 253).

²⁵⁷ *Markovitz v. Markovitz*, (1939) 336 Pa. 145, 8 A. (2d) 46.

²⁵⁸ *Alliance Co-op. Insurance Co. v. Gasche*, (1914) 93 Kan. 147, 142 P. 882;

ber required to constitute a quorum, a vacancy does not interfere with the transaction of business.²⁵⁹ In the absence of express statutory, charter, or by-law provision on the subject, the power of filling vacancies in the board of directors rests with the stockholders.²⁶⁰ If a statute gives the directors permission to fill vacancies for an unexpired term, a resigning director can vote upon his successor before the resignation becomes effective.²⁶¹ Under such a statute, the directors do not have the right to appoint newly created directors; ^{261a} the stockholders must therefore elect directors to fill vacancies arising through an increase in the number of directors on the board.²⁶² The stockholders need not wait for an annual meeting to fill vacancies created by an increase in the number of directors, but may fill the vacancies at once.²⁶³

The statute, of course, may give the directors power to fill vacancies caused by an increase in the number of directors. The statutory provision giving directors the power to fill vacancies should be read carefully to see if there is any limitation on the right of the directors to fill vacancies when the number remaining falls below a quorum.²⁶⁴ (See page 144 for quorum requirements when the board has vacancies.)

Bruch v. National Guarantee Credit Corp., (1922) 13 Del. Ch. 180, 116 A. 738; *Costello v. Thomas Cusack Co.*, (1922) 96 N. J. Eq. 83, 96 N. J. Eq. 90, 124 A. 615, aff'd in 94 N. J. Eq. 423, 120 A. 15. An attempted removal of a director was held void where no notice was given to the director of the meeting at which his removal was voted upon. *Piedmont Press Ass'n v. Record Pub. Co.*, (1930) 156 S. C. 43, 152 S. E. 721.

²⁵⁹ *A. E. Touchet, Inc. v. Touchet*, (1928) 264 Mass. 499, 163 N. W. 184; *Dodge v. Kenwood Ice Co.*, (1913) 204 F. 577 (Minn.); *Porter v. Lassen County Land & Cattle Co.*, (1899) 127 Cal. 261, 59 P. 563; *Matter of the Union Insurance Co.*, (1840) 22 Wend. (N. Y.) 591.

²⁶⁰ *Sylvania & G. R. Co. v. Hoge*, (1907) 129 Ga. 734, 59 S. E. 806.

²⁶¹ *Mayo v. Interment Properties*, (1942) 53 Cal. App. (2d) 654, 128 P. (2d) 417.

^{261a} *Belle Isle v. MacBean*, (1948) (Del. Ch.) 61 A. (2d) 699; *Automatic Steel Products, Inc. v. Johnston*, (1949) (Del.) 64 A. (2d) 416, aff'g (1949) (Del. Ch.) 60 A. (2d) 455, comment, 47 *Mich. Law Rev.* 383 (Jan. 1949). The 1949 Delaware Legislature amended G.C.L. §30, to overcome the Court's decision on this point.

²⁶² *In re A. A. Griffing Iron Co.*, (1898) 63 N. J. Law 168, 41 A. 931, 63 N. J. Law 357, 46 A. 1097; *Gold Bluff Min. & Lumber Corp. v. Whitlock*, (1903) 75 Conn. 669, 55 A. 175.

²⁶³ *Moon v. Moon Motor Car Co.*, (1930) 17 Del. Ch. 176, 151 A. 298.

²⁶⁴ *In re Chelsea Exchange Corp.*, (1932) 18 Del. 442, 159 A. 432, it was held that under the statute a majority of the remaining directors may elect directors to fill vacancies regardless of whether or not a quorum of the board is then in office. But see *Moses v. Thompkins*, (1887) 84 Ala. 613, 4 So. 763, in which the filling of vacancies by directors when the board had fallen below a majority was held invalid. See *Harris v. Brown*, (1925) 6 F. (2d) 922; also *People ex rel. Weber v. Cohn*, (1930) 339 Ill. 121, 171 N. E. 159 interpreting statutes relating to filling of vacancies.

Vacancies occurring among the officers should be filled according to the by-laws. Where no provision whatever is made in the statute, charter, or by-laws, vacancies may be filled by those who had the power to appoint or to elect the officers in the first instance. When the office of president becomes vacant, the vice-president has authority to act in the place of the president until the office of president is filled as provided in the by-laws.

Conduct of meeting to fill vacancies. A meeting of stockholders, called to fill vacancies among directors, is conducted in the same manner as any meeting for the election of directors. If vacancies are to be filled by the directors, it is advisable that they be filled promptly, for further vacancies in the board may reduce the number to less than a quorum and interfere with the directors' power to fill vacancies.

If, at a meeting of the board, several directors are to be elected to fill vacancies caused by resignations to be tendered at the same meeting, it is advisable not to accept all the resignations at one time and then proceed to fill the vacancies; if this procedure is followed, it is likely that a quorum will not be present when the vacancies are being filled. Each resignation should therefore be accepted separately, and, immediately after acceptance, the successor to the resigning director should be elected and should, upon election, assume his duties as a director. He then becomes qualified to act in the election of the director to fill the vacancy caused by the acceptance of the next resignation. The secretary should be assured in advance that the directors who are to replace the resigning directors will be present at the meeting.

If the statute provides that where a resignation is tendered, to be effective at a future date, the board shall have the power to fill the vacancy caused by the resignation, such vacancy to take effect when the resignation becomes effective, the above procedure is, of course, unnecessary.²⁶⁵ The resignations may be accepted together, the minutes indicating that they are to take effect at the close of the meeting, or at some future time, and the directors may proceed immediately to elect directors to fill the vacancies which will occur upon the effective date of the resignations.

²⁶⁵ See *In re Vicksburg Bridge & Terminal Co.*, (1937) 22 F. Supp. 490.

CHAPTER 10

FORMS OF RESOLUTIONS CONCERNING MANAGEMENT OF THE CORPORATION

MEETINGS OF DIRECTORS AND STOCKHOLDERS

No. 146

Directors' resolution fixing date of regular meeting of board, and dispensing with further notice.

RESOLVED, That the regular (*insert monthly or weekly*) meeting of the Board of Directors of the Corporation, other than the regular annual meeting of the Board of Directors, be held at the principal office of the Corporation, at (*Street*), (*City*), (*State*), on the .. day of each and every (*month or week*), at o'clock in the noon, and that no further notice of such regular meetings need be given.

No. 147

Directors' resolution fixing date of meeting of board and executive committee when regular meeting date falls on holiday.

RESOLVED, That whenever the date for a regular meeting of the Board of Directors or the Executive Committee falls upon a holiday, or upon a day on which business is generally suspended by request or direction of any Federal, State, or municipal authority, whether declared to be a holiday or not, such meeting shall be held on the next succeeding business day at the usual hour and place, or at such other hour and place as the Chairman of the Board may designate.

No. 148

Directors' resolution changing date of regular meeting of board.

RESOLVED, That until otherwise provided by resolution of the Board of Directors, regular meetings of the Board shall be held at the office of the Corporation, (*Street*), (*City*), (*State*), on the .. day of each and every month, at o'clock .. M., instead of on the .. day thereof at o'clock .. M., and that the Secretary of this Corporation be and he hereby is directed to serve notice of this resolution forthwith on each and every director not present at this meeting.

No. 149

Directors' resolution adjourning meeting to a specified date.

RESOLVED, That this meeting adjourn to the .. day of, 19.., at o'clock .. M., the said adjourned meeting to be held at the office of this Corporation, (Street), (City), (State).

No. 150

Directors' resolution extending invitation to board meeting.

WHEREAS, this Board of Directors has under advisement the purchase of property located at (Street), (City), (State), and

WHEREAS, has expressed his willingness to advise, assist, and co-operate with this Corporation in financing the purchase aforesaid,

NOW, THEREFORE, BE IT RESOLVED, That the said be invited to attend a (*insert regular or special*) meeting of the Board of Directors, to be held at the office of the Corporation at (Street), (City), (State), on the .. day of, 19.., at o'clock .. M., to discuss with the members of the Board the matter of financing the purchase aforesaid, and the Secretary of this Corporation is hereby directed to transmit forthwith to the said a written invitation to the meeting aforesaid.

No. 151

Directors' resolution authorizing holding of directors' meetings outside of state.

RESOLVED, That until otherwise ordered by resolution of the Board of Directors, meetings of the Board of Directors may be held either at the principal office of this Corporation in the state, at (Street), (City), (State), or at the office established and maintained by this Corporation at (Street), (City), (State).

No. 152

Directors' resolution calling stockholders' meeting to elect directors upon failure to hold annual meeting.

WHEREAS, the annual meeting of stockholders for the election of directors was not held at the time designated therefor by Article,

Section of the By-laws, and no Board of Directors has been elected for the year 19..,

RESOLVED, That the Secretary of this Corporation be and he hereby is authorized and directed to serve notice of a meeting of the stockholders for the election of directors for the ensuing year, to be held at the office of the Corporation at (Street), (City), (State), on the .. day of, 19.., at o'clock in the noon.

No. 153

Resolution of executive committee fixing time and place of its regular meetings.

RESOLVED, That until otherwise provided by the Executive Committee, the regular meetings of the Committee shall be held at the office of the Corporation, (Street), (City), (State), on the of each, at o'clock .. M., or at such other time and place as the Chairman of the Committee or the Board of Directors may designate.

No. 154

Directors' resolution fixing record date to determine stockholders entitled to notice of and to vote at annual meeting.

RESOLVED, That pursuant to Article of the By-laws and Section of the Corporation Laws of the State of, the Board of Directors does hereby declare that stockholders of record at the close of business on the .. day of, 19.., shall be entitled to notice of and to vote at the annual meeting of stockholders to be held on the .. day of, 19..

No. 155

Stockholders' resolution approving affidavit of notice of meeting and other forms.

RESOLVED, That the affidavit of notice of the time, place, and purpose of this meeting, together with a form of notice thereto attached, be and they hereby are approved, and that copies thereof be attached to the minutes of this meeting and marked "Exhibit A."

No. 156

Stockholders' resolution dispensing with regular order of business.

RESOLVED, That the regular order of business, as prescribed in Section of Article of the By-laws of this Corporation, be dispensed with, and that the meeting proceed to a consideration of the matters contained in the notice of this meeting.

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ELECTION, RESIGNATION, AND REMOVAL

No. 157

Stockholders' resolution authorizing a vote upon a proposed resolution and election of directors by the same ballot.

RESOLVED, That to avoid delay, the stockholders shall vote by ballot at the same time upon the resolution offered by Mr. to (*insert subject matter of resolution*), and for the election of directors, and that action upon the said resolution and for the election of directors shall be by stock vote.

No. 158

Stockholders' resolution classifying directors.

WHEREAS, under the laws of the State of, the state in which this corporation is organized, the stockholders have the power to divide the Board of Directors into three (3) classes when the Board of Directors consists of (....) or more members; and

WHEREAS, the Board of Directors of this corporation consists of (....) members; and

WHEREAS, the stockholders of this corporation deem it advisable to divide the Board of Directors into three (3) classes so that the term of office of one class shall expire in each year, be it

RESOLVED, That the directors shall be divided into three (3) classes, each of which shall consist of (....) directors. The term of office of the first class shall expire on the day of the annual election of this corporation next ensuing; the term of office of the second class shall expire one year thereafter; and that of the third class two (2) years thereafter. At each annual election after such classification, the number of directors equal to the number of the class whose term expires on the day of such election shall be elected for a term of three (3) years.

No. 159

Directors' resolution requesting resignation of officer.

RESOLVED, That, President of this Corporation, be and he hereby is requested to resign as President of the Corporation, and the Secretary of the Corporation is hereby authorized and directed to send a copy of this resolution to the said

No. 160

Directors' resolution accepting resignation of a member of board.

RESOLVED, That the resignation of as a member

of the Board of Directors of the Corporation, as evidenced by his letter to the said Corporation, dated the .. day of, 19..., be and it hereby is accepted, and the Secretary of this Corporation is hereby instructed to notify the said of the acceptance of his aforesaid resignation.

No. 161

Directors' resolution accepting resignation of officer.

RESOLVED, That the resignation of Mr. as (*insert office*) be and it hereby is accepted to take effect on the .. day of, 19...

No. 162

Resolution of directors expressing gratitude for services of resigning officer.

WHEREAS, has, for the past (....) years, been President of the Company, and whereas the said declines to be a candidate for re-election, this Board of Directors desires to spread the following resolution upon the minutes:

RESOLVED, That we recognize the excellent, energetic, and intelligent service which has rendered the Company during his incumbency. We feel that the high position which the Company has attained has been in large measure due to his earnest efforts and untiring devotion.

RESOLVED FURTHER, That in recognition of his services to the Company, the aforesaid be elected Chairman to preside at the meetings of the Board for the ensuing year.

No. 163

Directors' resolution recording disqualification of director and filling vacancy.

RESOLVED, That ceased to be a director of this corporation on the .. day of, 19..., by reason of his ceasing on the said day to be a stockholder of the corporation (*or insert any other reason for disqualification*).

RESOLVED FURTHER, That the Secretary of this corporation be and he hereby is directed to send written notice to the said of his disqualification as director.

RESOLVED FURTHER, That the office of said as director of this corporation is hereby declared vacant, and that be and he hereby is appointed director of this corporation to fill the said vacancy.

No. 164

Stockholders' resolution removing entire board of directors.

RESOLVED, That the entire Board of Directors of this Corporation, consisting of,, and, be and it hereby is removed, and the office of each member of the Board is hereby declared vacant.

RESOLVED FURTHER, That an election of a new Board of Directors, to fill the vacancies caused by the removal of the said Board, be held immediately.

No. 165

Directors' resolution removing director for cause.

WHEREAS, has participated in the organization of the Company, a competitor of this Corporation, and is now an officer and director of, and is otherwise interested in, said Company; and

WHEREAS, the conduct of said has not, in the judgment of this Board of Directors, been for the best interests of this Corporation; be it

RESOLVED, That sufficient cause exists for the removal of the said from the office of director, and that the removal of said from such office is desirable and for the best interests of this Corporation.

RESOLVED FURTHER, That pursuant to Article, Section of the By-laws of this Corporation, the said be and he hereby is removed from the office of director of this Corporation, and the Secretary of the Corporation is hereby directed to send written notice of his removal to the said

No. 166

Directors' resolution removing officer on charges.

WHEREAS, the Board of Directors has read and considered the charges of "A," "B," and "C" against, President of this Company, and the reply to the same by the said; and

WHEREAS, the said has absented himself from this meeting and given the Board no opportunity to examine into the points made controversial; and

WHEREAS, there is disclosed, in the judgment of the Board, a sufficient amount of undisputed facts to warrant the removal of said as President of this Company; and

WHEREAS, said has advised the officers of this Company, through his attorney, of his willingness to retire from the Company upon the disposal of his stock, be it

RESOLVED, That this Board finds that said charges are sustained, and the office of President is hereby declared vacant by the removal of the said

No. 167

Directors' resolution removing officer without specifying cause.

RESOLVED, That pursuant to Article, Section of the By-laws of this corporation, be and he hereby is removed from his office as of this corporation.

RESOLVED FURTHER, That the Secretary of this corporation be and he hereby is authorized and directed forthwith to give notice of such removal to the said

No. 168

Directors' resolution suspending officer pending determination of charges.

WHEREAS, and did, on the .. day of, 19.., file with the Secretary of this Corporation specifications in writing of certain charges preferred by them against as (*insert title of officer*) of this Corporation; and

WHEREAS, a copy of the said charges against him was duly served upon the said on the .. day of, 19.., together with a notice that the said charges would be heard at a regular meeting of the Board of Directors, to be held on the .. day of, 19..; and

WHEREAS, the said has asked further time within which to prepare himself to meet the aforesaid charges, be it

RESOLVED, That the hearing of the said charges against the said be and the same hereby is adjourned to a special meeting of the Board of Directors of this Corporation, to be held on the .. day of, 19.., at .. o'clock in the noon, at the office of the Corporation, (*Street*), (*City*), (*State*).

RESOLVED FURTHER, That, pending the hearing and determination of said charges, any and all of the powers of the said as (*insert title of officer*) of this Corporation shall be

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suspended, and the (*insert title of officer next in rank*) of this Corporation shall, during such time, exercise all the powers and perform all the duties of the said

No. 169

Stockholders' resolution removing officer and director.

WHEREAS, it appears that, Vice-president of the Corporation, and a director thereof, has been remiss in his duties as such officer, and has shown himself to be inefficient, untrustworthy, and generally unfit to discharge the duties of his office, it is

RESOLVED, That the said be and he hereby is removed as Vice-president and director of the Corporation, and the said offices are hereby declared vacant.

No. 170

Directors' resolution dismissing charges against officer.

WHEREAS, the Board of Directors has read and considered the written specifications of charges preferred by and as (*insert title of officer*) of this Corporation, and filed with the Secretary of this Corporation on the .. day of, 19..; and

WHEREAS, a hearing on the said charges has been duly had, pursuant to the notice served upon (*insert name of accused*), upon (*insert name of accusers*), and upon each member of this Board of Directors; and

WHEREAS, the members of this Board are unanimously agreed that the said charges are unwarranted, unjustified, and entirely without foundation, be it

RESOLVED, That the said charges of and against be and they hereby are dismissed.

No. 171

Directors' resolution filling vacancy in board until next annual stockholders' meeting.

RESOLVED, That be and he hereby is appointed a director of the Corporation until the next annual stockholders' meeting, to fill the vacancy caused by the resignation of

No. 172

Directors' resolution appointing executive committee, defining its powers, and providing for its meetings.

RESOLVED, That pursuant to Article, Section of the By-laws of this Corporation, Messrs.,, and be and they hereby are appointed an Executive Committee, to hold office for a period of, commencing on the .. day of, 19.., and until their respective successors are appointed.

RESOLVED FURTHER, That the said Executive Committee shall have the following powers while the Board of Directors is not in session:

1. To appoint officers of the Corporation and determine their salaries.
2. To appoint agents of the Corporation and determine their salaries.
3. To borrow money, and issue bonds, notes, or other obligations and evidences of indebtedness therefor.
4. To authorize the corporate seal to be affixed to documents of the Corporation.
5. To determine questions of general policy with regard to the business of the Corporation.
6. To make recommendations as to declaration of dividends.

RESOLVED FURTHER, That the Executive Committee shall have such other powers as may lawfully be delegated to it by the Board of Directors, not in conflict with specific powers conferred by the Board of Directors upon any other committee appointed by it.

RESOLVED FURTHER, That the Executive Committee shall report all its actions to the Board of Directors.

RESOLVED FURTHER, That meetings of the Executive Committee shall be called by the Secretary of the Corporation, from time to time, at the direction and upon the request of the President or any two members of the Executive Committee; that notice of such meetings shall in each instance be given to each member of the Committee at his last-known business address, at least (.) (*insert hours or days*) before the meeting, either orally or in writing, delivered personally or by mail, telegraph, telephone, or radio.

No. 173

Directors' resolution granting powers to executive committee between board meetings.

RESOLVED, That beginning with the .. day of, 19..,

and until otherwise provided by resolution of this Board of Directors, the Executive Committee, between the meetings of the Board and while the Board is not in session, shall have all the powers and exercise all the duties of the Board of Directors in the management of the business of the Corporation which may lawfully be delegated to it by the said Board.

No. 174

Directors' resolution authorizing executive committee to suggest nominations for new members of board of directors for subsidiaries.

RESOLVED, That the Executive Committee be and it here is authorized to nominate new members of the Board of Directors for the various subsidiaries of this Corporation, such nominations to be approved later by the Board of Directors.

No. 175

Directors' resolution fixing fee for attending executive committee meetings.

RESOLVED, That beginning with the meeting of the Executive Committee called for the .. day of, 19.., the fees of members of the said Committee for attending its meetings be and the same hereby are fixed at Dollars (\$.....) per meeting.

No. 176

Directors' resolution fixing quorum for committee meetings.

RESOLVED, That the presence in person of (....) members of any committee appointed by the Board of Directors shall be necessary to constitute a quorum of the said committee, at any meeting thereof, for the purpose of passing upon any matter that may come before the said meeting or of taking any action thereon, unless the Board of Directors shall otherwise provide by resolution with regard to any particular committee.

No. 177

Directors' resolution appointing finance committee.

RESOLVED, That a Finance Committee be and hereby is appointed to consist of Messrs. and, with power in such Committee to increase the number by naming another member who shall be a director or officer of this company; and

FURTHER RESOLVED, That such Committee shall have power to supervise the financial affairs of this company, and that it shall report to the Board of Directors from time to time, or whenever it shall be called upon to do so.

No. 178

Directors' resolution appointing investment committee.

RESOLVED, That, and be and they hereby are appointed to act as an Investment Committee, to invest the funds of this Corporation in the purchase and acquisition of stocks, bonds, and other securities, in the name and in behalf of this Corporation, and to sell and dispose of the stocks, bonds, and other securities owned by this Corporation, at such times and upon such terms as it may deem wise and advantageous to this Corporation.

RESOLVED FURTHER, That except where the investment of such funds in stocks, bonds, or other securities involves the active participation of the Corporation in the management of the business represented by such securities, the said Investment Committee may make the investments aforesaid without consulting with or obtaining the approval of the directors, the officers, or any other committee of this Corporation.

No. 179

Stockholders' resolution recommending that the management form a committee to work with it on certain matters.

RESOLVED, That it is the sense of the stockholders voting in person at this Annual Meeting that a committee including small and large stockholders should be formed by the Management of this Company to work with Management on labor and government matters in order to emphasize the fact that both Management and labor employment is made possible by the stockholders' investments; and

BE IT FURTHER RESOLVED, That in this manner the stockholders' interest may at all times be prominently set forth and their investments and reasonable income assured and safeguarded.

No. 180

Directors' resolution abolishing committee.

WHEREAS, the purpose for which the Committee was appointed has now been fulfilled, and it is the judgment of the Board of Directors that the said Committee is no longer required by this Corporation, be it

RESOLVED, That the Committee be and it hereby is abolished, and the members thereof be and they hereby are relieved of all the duties imposed, and divested of all the powers conferred upon them as members of such Committee.

No. 181

Directors' resolution appointing special investigating committee.

RESOLVED, That, and are hereby appointed a Committee for the purpose of investigating, inquiring into, and considering (*state purpose of Committee*).

RESOLVED FURTHER, That the said Committee shall have all the powers of the Board of Directors necessary to carry on the said investigation and inquiry, subject to any qualifications, limitations, or restrictions that may be imposed upon it from time to time by the Board of Directors.

RESOLVED FURTHER, That the said Committee be and it hereby is directed to report to the President from time to time, and at his request, as to the progress and result of the said investigation and inquiry.

No. 182

Directors' resolution adopting report of committee and sending copy to stockholders.

RESOLVED, That the report dated the .. day of, 19.., submitted to the Board of Directors by the Committee, with regard to (*insert nature of report*), be and it hereby is adopted and confirmed, and the Secretary of this Corporation is hereby directed to send a copy of the said report forthwith to each and every stockholder of record on the .. day of, 19.., with notice of the adoption of this resolution.

No. 183

Directors' resolution adopting report of and discharging special committee.

RESOLVED, That the report of the Committee, appointed by the Board of Directors on the .. day of, 19.., to (*insert purpose of Committee*), and submitted to this meeting, be and it hereby is adopted and accepted, and that the said Committee be and it hereby is discharged and relieved from further service.

No. 184

Directors' resolution appointing assistant secretary.

RESOLVED, That be and he hereby is appointed Assistant Secretary of this Corporation, to hold office during the pleasure of the Board of Directors, and to receive such compensation as shall be fixed by the Board.

RESOLVED FURTHER, That the said Assistant Secretary shall perform the duties and have the powers of the Secretary during his absence, and shall perform such other duties as the Secretary may designate from time to time.

No. 185

Directors' resolution authorizing officer to appoint assistants.

RESOLVED, That the (*insert title of officer*) of this Corporation be and he hereby is authorized to appoint one or more assistants to the (*insert title of officer*) from time to time as he may deem advisable, the said assistant or assistants to hold office during the pleasure of the (*insert title of officer*), and to perform such duties as may be delegated by, and to receive such compensation as may be fixed by, the said officer.

No. 186

Directors' resolution ratifying appointment of officers' assistants.

RESOLVED, That the action of the (*insert title of officer*) in appointing as assistant to the (*insert title of officer*) be and the same hereby is ratified, confirmed, and approved.

No. 187

Directors' resolution appointing general manager.

RESOLVED, That be and he hereby is appointed General Manager of this Corporation for a period of (....) years, to commence on the day of, 19.., and the proper officers of this Corporation be and they hereby are authorized and directed to make and execute, for and in behalf of this Corporation, an agreement with the said, in the form of the proposed agreement presented to and approved by this meeting, employing him as such General Manager for the said period.

No. 188

Directors' resolution appointing branch manager.

WHEREAS, this corporation has duly qualified to do business as a foreign corporation in the State of, be it

RESOLVED, That the officers of this Corporation establish a branch office in said state, in the City of, and that be and he hereby is appointed Manager of the said branch office, for a period of, at a salary of (\$.....) Dollars per year.

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RESOLVED FURTHER, That the proper officers of this Corporation be and they hereby are authorized to enter into a formal contract with the said, employing him to act as such branch manager for the period and at the salary aforesaid.

[*Note.* A branch manager is distinguished from a general manager in that the former has control over only a particular section of the business of the corporation. *Braman, Dow & Co. v. Kennebec Gas & Fuel Co. et al.*, (1918) 117 Me. 291, 104 A. 3. See also *Thomas v. International Silver Co.*, (1905) 48 N. Y. Misc. 509, 96 N. Y. Supp. 218. A manager of a branch office ordinarily has wider discretion than the home office manager. *Hedman v. Security Title & Guaranty Co.*, (1935) 245 N. Y. App. Div. 224, 281 N. Y. Supp. 565.]

No. 189

Stockholders' resolution appointing auditor.

RESOLVED, That the firm of..... Company, of (*City*), (*State*), be and they hereby are appointed to make an audit of the books and accounts of the Company and its subsidiary companies for the calendar year 19.. and to make a report as of the last day of such calendar year, at a remuneration to be fixed by the Board of Directors, and such audit to be of the scope as shall be fixed and determined by the Board of Directors of the Company.

No. 190

Directors' resolution engaging auditor.

RESOLVED, That be engaged to make the annual audit of the books of this Corporation for the year ending, 19.., the said to be paid the sum of (\$.....) Dollars for such services; and that the proper officers of this Corporation be and they hereby are authorized and directed to make and execute a written retainer of the said for the services as aforesaid.

No. 191

Directors' resolution authorizing employment of new auditor.

RESOLVED, That, upon expiration of the contract of employment, dated, 19.., with, Auditors for this Corporation, the said contract of employment shall not be renewed.

RESOLVED FURTHER, That the President of this Corporation be and he hereby is authorized to enter into a contract with, employing the said to act as Auditors for this Corporation for a period of, beginning with the .. day of, 19.., at a yearly compensation of (\$.....) Dollars.

No. 192

Directors' resolution removing one auditor and increasing salary of remaining auditor.

RESOLVED, That be and he hereby is removed as Auditor of this Corporation, and that shall hereafter take full and sole charge of the auditing of the accounts of this Corporation, the compensation of said to be increased from (\$.....) Dollars per annum to (\$.....) Dollars per annum.

RESOLVED FURTHER, That the Secretary of this Corporation be and he hereby is directed to send written notice forthwith to the said of his removal as Auditor of this Corporation, and to of his appointment as sole Auditor, and of the increase in his compensation.

No. 193

Directors' resolution appointing a special agent.

RESOLVED, That be and he hereby is appointed as agent for this corporation for the sole purpose of entering into a contract, in the name and in behalf of this corporation, with the Company for the construction of all the fixtures and equipment required by this corporation in its store to be located at (Street), (City), (State), the price and terms of payment of said fixtures and equipment to be in accordance with the written statement submitted by the said Company on , 19...

No. 194

Directors' resolution appointing purchasing agent.

RESOLVED, That be and he hereby is appointed Purchasing Agent of this Corporation with power to make purchases in an amount not exceeding in the aggregate (\$.....) Dollars, for and in behalf of this Corporation, in his own name and in the name of this Corporation, of (*enumerate articles which he may purchase*), and such other furniture, fixtures, machinery, and other materials and supplies as may be required for the branch of this Corporation at (Street), (City), (State).

No. 195

Directors' resolution ratifying resolution of executive committee appointing agent plenipotentiary to negotiate contract.

RESOLVED, That the resolution of the Executive Committee adopted

on, 19.., to the effect that Mr. be appointed Agent Plenipotentiary of the Corporation in Mexico, for the purpose of negotiating a contract to provide for the construction of a railroad from, or from a point on the line running between and, to, Mexico, and for an option to construct a railroad from, Mexico, to the American border at or near the town of, be and the same hereby is ratified and confirmed.

No. 196

Directors' resolution appointing fiscal agent.

WHEREAS, this Corporation desires to employ Company, of the City of, State of, as its fiscal agent, to arrange with & Company a permanent plan of financing for this Corporation, in connection with the proposed authorized issue of (\$) Dollars of its 5 Per Cent Bonds secured by a first mortgage on all of its property; and

WHEREAS, the said Company has agreed to act as such fiscal agent on the terms presently set forth, and to assist this Corporation from time to time in any other financing that may be necessary, both in regard to advances of further funds and in using its information and facilities in obtaining such funds, be it

RESOLVED, That this Corporation hereby employs said Company to act as such fiscal agent during the pleasure of this Corporation; and

FURTHER RESOLVED, That, in consideration of such services, this Corporation agrees to pay said Company, while it acts as such fiscal agent, a sum equal to one half of one per cent of the par value of bonds which may be issued under said proposed mortgage, and sold to and purchased by said & Company.

No. 197

Directors' resolution authorizing officer to execute agreement employing selling agent.

RESOLVED, That the President of this Company be and he hereby is authorized to enter into an agreement with the Corporation, a corporation of the State of, appointing the said Corporation to act as exclusive agent of this Company, for and during the term of (.) years, beginning, 19.., and any extension of said term, for the sale and distribution in the State of of the (*insert nature of product*)

manufactured by this Company, upon the terms and conditions set forth in said agreement, a copy of which was submitted to this meeting and is hereby approved.

No. 198

Directors' resolution employing renting agent.

RESOLVED, That be employed as the renting agent for this Corporation of the building owned by it and located at (Street), (City), (State), the said to perform all the usual duties of a renting agent, including the following:

1. Collection of rents from month to month.
2. Rental of vacant apartments to responsible tenants.
3. Signing of leases of apartments in the name and in behalf of this Corporation.
4. Supervision of repairs necessary to maintain the building in good and tenantable condition.

RESOLVED FURTHER, That the said shall receive as compensation for his services as such renting agent, a commission of per cent (....%) of the gross rents received from the said building.

RESOLVED FURTHER, That the said shall be under a duty and obligation to render to this Corporation on the .. day of each and every month, an itemized account of all rents received from, and all expenditures made in connection with, said building, and to transmit to this Corporation on the said day the full amount so received, less the expenditures so made, and less the commissions to which he is entitled as aforesaid.

No. 199

Directors' resolution appointing agent for service of process.

RESOLVED, That be and he hereby is appointed agent of this Corporation in charge of its registered office, upon whom process against the Corporation may be served in accordance with the laws of the State of

No. 200

Directors' resolution changing resident agent.

WHEREAS, the principal office in the State of of Corporation is now located at (Street), (City), (State), and the authorized registered agent in charge thereof is,

RESOLVED, That the authorization of the said as registered agent be and it hereby is withdrawn, and the Company, a corporation of the State of, be and it hereby is constituted and appointed the agent of said Corporation in charge of its principal office located at (Street), (City), (State), where service of process against this Corporation may be made.

RESOLVED, That the Company be and it hereby is authorized to do and perform all the things required by the statutes of the State of to be done and performed by the resident agent of a corporation created by the laws of the State of

RESOLVED, That the President or a Vice President, and the Secretary or an Assistant Secretary of this Corporation be and they hereby are authorized and instructed to file a copy of this preamble and resolution, duly signed by them and sealed with the seal of this Corporation, with the Secretary of State of the State of, and a copy thereof, certified by said Secretary of State, recorded in the office of the Recorder of County.

No. 201

Resolution approving power of attorney granted by officers and empowering agent to represent corporation in foreign territory.

WHEREAS, Corporation has entered into a contract with, Ltd., dated the .. day of, 19.., for the development and drilling of certain acreage in Field in the Island of Trinidad, in which this Corporation has undertaken to drill certain wells, and for which purpose it is necessary to appoint a general agent in the Island of Trinidad to conduct the business of this Corporation there and particularly under the aforesaid contract, and

WHEREAS, a general power of attorney was executed and delivered to on the .. day of, 19.., in the name of this Corporation by, President, and Secretary, which power of attorney is presented to this meeting,

NOW, THEREFORE, BE IT RESOLVED, That the said power of attorney heretofore executed and delivered to be and the same hereby is ratified and approved, and the said is hereby authorized and empowered to represent Corporation in all its business in the Island of Trinidad, before any and all political, administrative, and judicial authorities of Trinidad, and before all private persons and companies, with all the powers which this Corporation might have if actually present in Trinidad.

No. 202

Directors' resolution empowering president to grant powers of attorney for purposes indicated.

RESOLVED, That the President of this Corporation be and he hereby is authorized and empowered to grant, sign, and deliver, in the name and under the seal of the Corporation, such power or powers of attorney, either general or special, to such person or persons as the President may, from time to time, deem advisable and convenient, such power or powers of attorney to include any or all the following powers and faculties: To appear and represent the Corporation before all governmental departments, tribunals, and officials; to make and enter into agreements for the purchase, sale, and transfer of real and personal property, and to execute and accept conveyances and transfers thereof; to buy, sell, trade, exchange, deal in, import, and export any and all kinds of goods, wares, and merchandise; to draw, sign, indorse, accept, and negotiate checks, drafts, bills of exchange, bills of lading, and other commercial documents (except promissory notes); to demand, collect, and receive any and all sums of money, securities, documents, and property of every kind which may be due or belonging to the Corporation; to adjust, settle, and compromise debts, accounts, and claims pertaining to the business of the Corporation, and to give receipt and acquittances therefor; together with such other general and special powers and subject to such limitations as the President may, in his discretion, deem necessary or expedient to prescribe.

No. 203

Directors' resolution authorizing officers to execute power of attorney.

RESOLVED, That the officers of the Corporation be and they hereby are authorized and directed to execute and deliver a power of attorney, substantially in form as that presented to the meeting, to Mr., to represent the Corporation in the Republic of.....

No. 204

Resolution of directors authorizing officers to execute powers of attorney for transaction of business with Collectors of Customs.

WHEREAS, it is convenient and often necessary to issue power of attorney for the transaction of the customs business of the Company,

Now, THEREFORE, BE IT RESOLVED, That the President, the Vice Presidents and the Treasurer of The Company be, and any of them is hereby authorized, severally, on behalf of said Company to execute such powers of attorney appointing agents and

attorneys with such powers as may be necessary and convenient to transact the business of the Company with Collectors of Customs, including authority to execute owner's or consignee's declarations provided for in section 485 (d) and 485 (f), respectively, of the Tariff Act of 1930, and the Company hereby ratifies and confirms whatsoever the said persons, or any of them, may lawfully do by virtue of the authority herein granted to them.

No. 205

Directors' resolution revoking power of attorney.

RESOLVED, That any and all powers of attorney heretofore executed and delivered by the Company to Mr. be and the same hereby are revoked.

No. 206

Directors' resolution revoking power of attorney and authorizing execution of new one.

The President presented to the Board of Directors a form of power of attorney proposed to be given by the Company to, of the City of, State of, and stated that this power was intended to revoke and supersede a prior power of attorney given to Mr.

Upon motion duly made and seconded, it was

RESOLVED, That the President be authorized to execute such power of attorney to Mr., of the City of, State of, in behalf of the Company; and

FURTHER RESOLVED, That the power of attorney heretofore given to Mr. to act for and in behalf of the Company in, and his authority to manage the funds of the Company deposited in the Trust Company of the City of, State of, hereby are revoked and rescinded, and that the account now standing in the name of, Agent, be transferred to an account in the name of

No. 207

Resolution of directors extending power of attorney.

RESOLVED, That the power of attorney heretofore granted to Mr. to represent the corporation in (*insert name of foreign country*), executed under date of, 19..., be and the same hereby is extended from the .. day of, 19..., and continued in full force and effect to and including the .. day of, 19...

No. 208

Directors' resolution authorizing officer to purchase materials.

RESOLVED, That, until further order of the Board of Directors, be and he hereby is authorized to purchase, for and in behalf of this Company, spelter, copper, and lead, in such amounts, and at such prices, and from such person or persons, firms or corporations, as he in his discretion may determine.

SIGNATURES ON CHECKS AND DOCUMENTS

No. 209

Directors' resolution authorizing officers to sign checks and documents.

RESOLVED, That the following officers are authorized to sign and execute all legal documents, contracts, and checks on the Company's depositaries—to wit, any President or Vice President with any Assistant Secretary or Assistant Treasurer—but in no case shall any one officer sign in the capacity of two officers.

No. 210

Resolution authorizing specific individual to sign checks, bills of lading, and other documents.

RESOLVED, That be and he is hereby authorized to sign and endorse checks, drafts, and orders for the payment of money upon the active accounts of the Company in the Bank in conjunction with any other authorized signatory, and he is hereby authorized to sign bills of lading, receipts for money paid to the Company, and other documents necessary and incidental to the routine conduct of the Company's business.

No. 211

Directors' resolution eliminating countersignature during absence of officer.

WHEREAS, under Article, Section of the By-laws of this Corporation, all checks, notes, and other evidences of obligation of this Corporation are required to be signed by its President and countersigned by its Treasurer, and

WHEREAS,, the Treasurer of this Corporation, will be absent from the City of for several weeks beginning the .. day of, 19.., be it

RESOLVED, That from the .. day of, 19.., and until

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otherwise provided by resolution of the Board of Directors, the countersignature of the Treasurer on all checks, notes, and other evidences of obligation of this Corporation be and it hereby is dispensed with, and all such checks, notes, and other evidences of obligations shall be signed only by the President, and need not be countersigned.

RESOLVED FURTHER, That the Secretary of this Corporation be and he hereby is directed to transmit forthwith to the Bank, depository of the funds of this Corporation, a certified copy of the foregoing resolution.

No. 212

Directors' resolution reinstating countersignature upon return of officer.

WHEREAS, a resolution was adopted by this Board of Directors the .. day of .., 19.., dispensing with the countersignature of .., Treasurer of this Corporation, on all checks, notes, and other evidences of obligation of this Corporation, from the .. day of .., 19.., because of his protracted absence from the City of .., and

WHEREAS, the said has now returned to the City of .., be it

RESOLVED, That the said resolution of the Board, adopted the .. day of .., 19.., be and it hereby is rescinded and set aside, and, beginning with the .. day of .., 19.., all checks, notes, and other evidences of obligation shall require the countersignature of the Treasurer of this Corporation in addition to the signature of the President.

RESOLVED FURTHER, That the Secretary of this Corporation be and he hereby is directed to transmit forthwith to the Bank, depository of the funds of this Corporation, a certified copy of the foregoing resolution.

No. 213

Resolution of directors authorizing officers to sign and seal certificates of stock manually, pending preparation of permanent certificates.

RESOLVED, That prior to the preparation of permanent certificates for common stock bearing the facsimile signatures of the President and the Secretary of the Corporation and the facsimile seal of the Corporation, the proper officers of the Corporation are hereby authorized to sign and seal certificates for common stock of the Corporation manually.

No. 214

Directors' resolution authorizing officers to sign warehouse bonds.

RESOLVED, That the President, Vice President, Secretary, Treasurer, or Assistant Treasurer, be and each of them hereby is authorized and empowered to sign the name of this Company as principal to any and all bonds required by the United States Government for the bonding of any and all of the floors or warehouses owned or controlled by this Company.

No. 215

Directors' resolution authorizing persons to execute bonds of surety company.

RESOLVED, That "A," or "B," or "C," or "D," or "E" (*insert as many as are desired*), attorneys in fact for this Company in the State of, be and they hereby are, and each of them is, authorized and empowered to execute and deliver and to attach the seal of the Company to any and all bonds and undertakings for or in behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and in executing or guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or required by law, including co-suretyship and reinsurance agreements, and all other bonds, undertakings, or guaranties of whatsoever nature not specifically covered by the foregoing authority; such bonds, undertakings, and agreements, however, to be attested in every instance by one other of the persons above named, as occasion may require, provided that, if such bonds, undertakings, and agreements are not executed by either "A," or "B," or "C," then, in such event, said bonds, undertakings, and agreements shall be attested by either the said "A," or "B," or "C"; and the aforesaid attorneys in fact are, and each of them is, hereby authorized and empowered to certify a copy of this resolution under the seal of this Company.

BANK ACCOUNTS AND SAFE DEPOSIT BOXES

No. 216

Directors' resolution authorizing opening of bank accounts.

RESOLVED, That the Treasurer of this Corporation, with the approval of the President, be and he hereby is authorized to open such bank accounts in the name and in behalf of this Corporation as he may deem necessary, payments from said bank accounts to be made upon and according to the check of this Corporation, signed by the Treasurer and countersigned by the President.

No. 217

Directors' resolution authorizing opening of bank account in specific bank.

RESOLVED, That the funds of this Corporation be deposited in the Bank, subject to checks made in the corporate name and signed by its President and Treasurer, who are hereby authorized to make, collect, discount, negotiate, indorse, assign, and deposit in the corporate name all checks, drafts, notes, and other negotiable paper; and all such checks, drafts, notes, and other negotiable paper, payable to or by this Corporation, signed as aforesaid (including checks drawn to cash or bearer, or to the individual order of the officer signing said checks), shall be honored and paid by said bank, and charged to the Corporation's account.

No. 218

Resolution of directors authorizing deposit of funds in a certain bank.

BE IT RESOLVED, That any and all checks, drafts, notes, bills of exchange, and orders for the payment of money payable to or belonging to this Corporation may be indorsed by any of its officers, employees, or agents, and deposited with the Trust Company of for the credit and use of, and that said indorsements may be made in writing or by a stamp, and without designation of the person so indorsing.

AND BE IT FURTHER RESOLVED, That any officer, employee, or agent authorized to act for this Corporation as aforesaid, shall be and he hereby is further authorized to waive presentment, demand, protest, and/or notice of dishonor or protest with respect to any negotiable paper involved in any of said transactions.

AND BE IT FURTHER RESOLVED, That the Secretary or any other officer of this Corporation is hereby authorized to certify to said Bank a copy of these resolutions, and said Bank is hereby authorized to rely upon such certificate until formally advised by a like certificate of any changes therein, and is authorized to rely on any such additional certificates.

No. 219

Directors' resolution authorizing opening of special account for payroll and petty cash.

RESOLVED, That the President of this Corporation be and he hereby is authorized to open a Special Account with the Bank & Trust Company for payrolls and petty cash payments, and that

checks on said account may be signed in behalf of the Corporation by the President, Vice President, or Treasurer, without countersignature.

No. 220

Resolution authorizing deposit of cash on call.

RESOLVED, That the officers of the Company be and they hereby are authorized to deposit up to \$..... of the Company's cash in the Bank, on days' call, at an interest rate of not less than% per annum.

No. 221

Resolution authorizing creation of manager's fund.

RESOLVED, That the officers of this Corporation be and they hereby are authorized, in their discretion, and until further order of the Board of Directors of this Corporation, to set aside a fund, not to exceed at any one time (\$....) Dollars, in any depository of their selection in the City of, State of, to be known as "manager's fund," and that the fund so set aside shall be subject to checks, drafts, or orders when signed in the name of the Corporation by or

No. 222

Directors' resolution authorizing branch bank accounts.

RESOLVED, That the Treasurer of this Corporation, with the approval of the President, may from time to time open a bank account in the name of this Corporation, in a bank or trust company located at or near any branch office established by this Corporation outside of the State of, to establish a local account necessary and convenient for the carrying on of the business of said branch office.

RESOLVED FURTHER, That until otherwise provided by resolution of this Board, such local banks or trust companies be and they hereby are authorized to make payments from the funds of this Corporation on deposit with them, upon and according to the check of this Corporation, signed by the local branch manager and countersigned by the local branch cashier, or signed by the President and countersigned by the Treasurer of this Corporation.

RESOLVED FURTHER, That the Treasurer, with the approval of the President, be and he hereby is authorized to deposit in such bank accounts, in the name of this Corporation, such amounts as may be necessary for the needs of any such branch office.

No. 223**Directors' resolution transferring bank account.**

RESOLVED, That the account of this Corporation now carried with the Bank be discontinued and closed, and that the Treasurer of this Corporation be and he hereby is authorized and directed to take all steps necessary to withdraw all the funds of this Corporation in the said account.

RESOLVED FURTHER, That the Treasurer of this Corporation be and he hereby is authorized and directed to open a new account in the name of this Corporation with the Banking Company, transferring to the said new account all the funds withdrawn from the account with the Bank; and that the funds in said account may be drawn against, in behalf of the Corporation, by checks bearing the signature of the President and the Treasurer.

No. 224**Resolution of directors authorizing renting of safe deposit box.**

RESOLVED, That the President be and he hereby is authorized and directed to rent a safe deposit box of suitable size, in the name of the Corporation, in the vaults of (*insert name of bank or trust company*), and that the Executive Committee, in its discretion, may deposit therein any securities, books, records, and other property of the Corporation.

RESOLVED FURTHER, That, subject to the rules and regulations of said (*insert name of bank or trust company*), any one or more of the following-named persons,,, or, shall have access to such safe deposit box standing in the name of this Corporation in the vaults of said (*insert name of bank or trust company*).

No. 225**Directors' resolution for rental of safe deposit box and the deposit therein of documents relating to secret process.**

RESOLVED, That this Corporation rent a safe deposit box in the vaults of the Safe Deposit Vaults, Inc., and that, President of this Corporation, and Mr., be and they hereby are directed to deposit in the said safe deposit box so rented all the documentary evidence, history, and instructions relating to the secret process.

RESOLVED FURTHER, That, President of this Corporation, together with Mr., or either of them,

accompanied by a voting trustee of this Corporation, shall have access to and control of said safe deposit box and the contents thereof.

RESOLVED FURTHER, That, President of this Corporation, and Mr., or either of them, accompanied by a voting trustee, be authorized to enter into such contract or agreement with the said Safe Deposit Vaults, Inc., as may be necessary to carry this resolution into effect.

No. 226

Resolution of executive committee (or directors) authorizing deposit of company's securities with custodian.

RESOLVED, That all securities owned by this Company shall be deposited with the Trust Company as custodian, and that they be withdrawn only on the order of the Executive Committee or Board of Directors, such order to be evidenced to the Trust Company by certified copies of the resolution authorizing the withdrawal.

No. 227

Resolution of directors authorizing custodian to place stock purchased or held for the corporation in the name of agents.

RESOLVED, That stock or other registered securities for the account of the Corporation may be placed in the names of either or, and that the custodian, the Trust Company of, is authorized to place stock or other registered securities purchased or held for the account of the corporation in said names; and to place such securities in the Trust Company's custody for the Corporation, after having procured indorsement of such securities by the said nominees thereof.

No. 228

Excerpt of minutes of directors ratifying contract with custodian of securities and authorizing any two officers to withdraw securities.

Upon motion duly made, seconded, and unanimously carried, a contract between this corporation and the Trust Company of, dated, 19.., providing for the deposit of securities owned by this corporation with said trust company was ratified, and a copy of this contract follows the waiver of notice of this meeting.

Upon motion duly made, seconded, and unanimously carried, it was
RESOLVED, That any two of the following officers, the President, the

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Vice President, the Secretary, and the Treasurer of the Corporation, are authorized to withdraw any or all securities deposited with the Trust Company of in accordance with agreement between the Corporation and the Trust Company of

No. 229

Resolution authorizing persons to have access to safe deposit box.

RESOLVED, That any two of the following named persons,, or, one accompanying the other, be and they are hereby authorized to have access to the Company's safe deposit box located in the vault of the Bank.

RESOLUTIONS RELATING TO CONTRACTS

No. 230

Directors' resolution authorizing officers to execute a contract.

RESOLVED, That the proposed form of contract submitted by the Company for the erection by it of a garage on property owned by this corporation at (Street), (City), (State), in accordance with plans and specifications prepared by, be and it hereby is accepted, and that, President, and, Vice President, be and they hereby are authorized to execute, in the name and in behalf of this corporation, a contract substantially in the form submitted to this meeting.

No. 231

Directors' resolution authorizing president to enter into a contract upon terms fixed by president.

RESOLVED, That the President of this Corporation be and he hereby is authorized and empowered to enter into a contract for (set forth the nature of the contract) with the Company, in the name and in behalf of this Corporation, upon such terms and conditions as may be agreed upon between him and said Company.

No. 232

Directors' resolution concerning authority for making estimates for proposed contracts.

RESOLVED, That estimates of the cost of all work on which propositions by this Corporation may be submitted shall be prepared by the

President or the Secretary, or by some person specifically appointed by either of them, and, when completed, shall be entered by the Secretary in a book kept expressly for that purpose, and no proposition shall be submitted by this Corporation until such estimate shall have been prepared and checked by or submitted to the President or the Secretary.

RESOLVED FURTHER, That all orders for material shall be given in writing, by the President and the Secretary, or by either one of them acting with the consent of the other, and that no order shall be valid except when signed by the President or the Secretary. Copies of all orders for material shall be preserved in a book kept expressly for that purpose.

RESOLVED FURTHER, That all contracts for the performance of work shall be valid and binding on the Corporation only when signed by the President or the Vice President, and by the Treasurer or the Secretary.

No. 233

Directors' resolution proposing to terminate contract.

WHEREAS, the Construction Corporation, by resolution of its Board of Directors, made a proposition to this Company for the construction of the telephone lines and systems of this Company in, for which this Company has received a concession from the government of, which proposition this Company duly accepted by resolution of its Board of Directors passed on , 19.., and which thereby became and is a contract between this Company and said Construction Corporation, and

WHEREAS, the said Construction Corporation has completed a large portion of the construction work which it was obligated to do under its contract, and has received a portion of the total consideration for such work provided for in said contract, and

WHEREAS, it is now considered more economical for this Company, and to the mutual advantage and best interests of the Construction Corporation and this Company, that said contract be terminated, and that this Company take over at once all telephone material and supplies belonging to said Construction Corporation, and that this Company undertake the further work of construction under its own management and control,

NOW, THEREFORE, BE IT RESOLVED, That this Company make to the said Construction Corporation the following proposition:

(Here follows the proposition.)

No. 234

Excerpt of directors' minutes showing report of termination of contract and approval thereof.

The President reported that the contract between this Corporation and Corporation, dated, 19..., had been terminated by mutual agreement.

Upon motion duly made, seconded, and unanimously carried, it was

RESOLVED, That the termination of the aforesaid contract be and the same hereby is approved and ratified.

No. 235

Directors' resolution accepting assignment of contract and authorizing payment in capital stock and a note.

RESOLVED, That this Company accept the offer of "A" to assign, transfer, and set over the contract and the claim of the said "A" against "B," doing business as "B" & Co., described in the agreement presented at this meeting, a copy of which said agreement is in words and figures as follows—to wit:

(Here insert copy of agreement.)

and that the Board of Directors does hereby adjudge and declare that the said contract and the said claim of the said "A" against the said "B," doing business as "B" & Co., is of the fair value of (\$.....) Dollars, and that the same is necessary for the business of this Company.

FURTHER RESOLVED, That the President and the Treasurer be and they hereby are authorized and directed to execute said agreement in behalf of the Company and issue certificates of the fully paid capital stock of this Company to the aggregate amount of (\$.....) Dollars to "A," as provided in said agreement; and to execute the promissory note of this Company for the sum of (\$.....) Dollars, payable to the order of the said, (....) months after, 19..., with interest at per cent (....%) per annum, as provided by said agreement.

No. 236

Directors' resolution authorizing officer to enter into agreement with Commissioner of Internal Revenue for determination of income and profits taxes.

WHEREAS, this Company has requested the Commissioner of Internal Revenue to enter into an agreement relative to the final determination of its income and profits taxes, and it is necessary as a condition to

making such an agreement that the President be duly authorized to execute same,

NOW, THEREFORE, BE IT RESOLVED, That the President of this Company be and he hereby is authorized to enter into an agreement with the Commissioner of Internal Revenue, in accordance with the provisions of law relating thereto, with respect to any income and profits taxes paid by this Company.

No. 237

Directors' resolution authorizing officers to negotiate for the erection of a garage, without power to bind.

RESOLVED, That, President, and, Vice President, of this Corporation be and they hereby are authorized and empowered to negotiate with the Company for the purpose of making a contract for the erection of a garage on property owned by this Corporation at (Street), (City), (State), in accordance with plans and specifications on file in the office of the Corporation, submitted by on the .. day of, 19.., and to report to the Board of Directors the price at which and the terms under which the Company will undertake the aforesaid construction, and the date of completion. Said and shall not have power to execute any contract with the Company until a proposed form of contract has been submitted by the Company to the Board of Directors and has been approved by at least (....) members of the Board, and until authority to execute such contract with the Company has been expressly given to said and

No. 238

Resolution of directors authorizing the purchase of land and building.

WHEREAS, this corporation has entered upon a policy of expansion and requires additional land for that purpose, and

WHEREAS,, owner of the land and building immediately adjoining the property of this corporation at Street, City of, State of, has offered to sell his land and the building thereon to this corporation for the sum of Dollars (\$.....), upon the terms hereinafter set forth, and

WHEREAS, the Board of Directors deems it advisable that the cor-

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poration acquire said land and building from for the price aforementioned,

THEREFORE, BE IT RESOLVED, That this corporation purchase from the aforesaid land and building more specifically described as follows:

(Here insert description.)

RESOLVED FURTHER, That the President and Secretary of this corporation are hereby authorized to enter into an agreement on behalf of this corporation with said to purchase the above described property for the sum of Dollars (\$.....), upon the following terms:..... Dollars (\$.....) to be paid upon the execution of the contract of sale, Dollars (\$.....) to be paid upon the closing of title and the delivery of a good and sufficient warranty deed conveying a good and marketable title to the premises free from all encumbrances, except a first mortgage in the sum of Dollars (\$....) now a lien upon the premises and held by the Trust Co., the balance to be paid by the execution of a purchase money mortgage in the sum of Dollars (\$.....) payable in semiannual installments of Dollars (\$.....), with interest at per cent (...%).

RESOLVED FURTHER, That the President and Secretary of this corporation be and they hereby are authorized to execute all instruments and make all payments necessary to carry the foregoing resolution into effect, and to accept all documents, duly executed, which are or may be necessary for the transfer and conveyance of the aforesaid land and building to this corporation.

No. 239

Resolution of directors authorizing contract with advertising agency; compliance with Federal and State laws required.

RESOLVED, That, Vice President of this Corporation, be and he hereby is authorized to execute a contract with Advertising Agency, employing them for the period of one year beginning, 19.., to handle all the advertising of this Corporation relating to drug products; and

RESOLVED FURTHER, That such contract shall specify that all advertisements prepared thereunder shall be in accordance with the requirements of all applicable Federal and State laws.

No. 240

Directors' resolution adopting agreement for acquisition of assets entered into before organization.

RESOLVED, That the agreement heretofore made in behalf of this Cor-

poration by & Co. with the Board of Directors and the stockholders of "A" Corporation (a corporation organized under the laws of the State of), to the effect that this Corporation, when organized, should acquire all the property and assets of said "A" Corporation, in exchange for (....) fully paid and nonassessable shares of the preferred stock of this Corporation of the par value of (\$.....) Dollars each, and for (....) fully paid and nonassessable shares of the common stock of this Corporation without par value, be and it hereby is approved and adopted for this Corporation.

RESOLVED FURTHER, That the property and assets of "A" Corporation to be sold and transferred to this Corporation as aforesaid are, in the judgment of the Board of Directors of this Corporation, of the full and fair value of (\$.....) Dollars over and above the liabilities of said "A" Corporation.

RESOLVED FURTHER, That the proper officers of this Corporation be and they hereby are authorized and directed to issue and deliver to or upon the order of the said "A" Corporation, against a proper conveyance and delivery to this Corporation of all the assets and property of said "A" Corporation, certificates representing (....) fully paid and nonassessable shares of the preferred stock of this Corporation of the par value of (\$.....) Dollars each, and (.....) fully paid and nonassessable shares of the common stock of this Corporation without nominal or par value.

No. 241

Resolution of directors adopting contract of promoters for services in organization of corporation.

RESOLVED, That the contract of the promoters of this corporation with, Esq., of, to organize this corporation under the laws of the State of, and to that end to prepare and file all certificates, reports, and other instruments required by law and to do everything necessary to obtain a charter from the State of for this corporation, in consideration of the payment of Dollars (\$.....) to said, Esq., for such services, be and the same hereby is adopted as the contract of this corporation.

No. 242

Stockholders' resolution permitting corporation to enter into contracts in which directors are interested.

RESOLVED, That no contract between this Corporation and any other corporation shall be affected by the fact that directors of this Corpo-

ration are interested in, or are directors or officers of, such other corporation, if, at the meeting of the Board of Directors or of the Executive Committee, making, authorizing, or affirming such contract or transaction, there shall be present a quorum of directors, or of the Executive Committee, as the case may be, not so interested; and any director, nevertheless, may be a party to or may be interested in any contract or transaction of this Corporation, provided that at least a majority of the directors of the Corporation are not so interested, and that such contract or transaction shall be approved or ratified by the affirmative vote of at least a majority of the directors not so interested.

[*Note.* This is often provided for in the charter.]

No. 243

Excerpt of minutes showing resolution of directors authorizing purchase to be made from a member of the board.

RESOLVED, That this corporation purchase from B all of his right, title, and interest in and to the coal lease between A, of the first part, and the said B, of the second part, dated the .. day of, 19.., covering certain property in the Township of, in the County of, in the State of, and give in payment therefor the sum of Dollars (\$.....) upon receipt of all documents, properly executed, necessary to transfer all right, title, and interest in said lease to this corporation.

RESOLVED FURTHER, That this authority be and it hereby is given notwithstanding the fact that said B is a member of the Board of Directors of this corporation.

All the members of the Board of Directors voted in favor of the above resolution, except Mr. B, who did not vote upon the resolution.

RESOLUTIONS RELATING TO EMPLOYEES

No. 244

Directors' resolution authorizing execution of employment agreement.

RESOLVED, That the employment agreement with, dated, 19.., submitted to this meeting, be and the same hereby is authorized and approved, and

RESOLVED FURTHER, That the Vice President and the Secretary of this Corporation be and they hereby are authorized and directed to execute the employment agreement with in substantially the form submitted to this meeting, and

RESOLVED FURTHER, That a copy of the said employment agreement be inserted in the minute book following the minutes of this meeting.

No. 245

Directors' resolution authorizing termination of employment contract upon notice to employee.

WHEREAS, this Corporation entered into an agreement dated
. . . , 19. . , with , whereby it employed the said
. as for a period of (. . . .)
years, and

WHEREAS, under the terms of the said contract, it was provided that the said agreement could be terminated by either party at any time by giving (. . . .) weeks' notice to the other party, and

WHEREAS, this Board of Directors believes that the best interests of this Corporation require a termination of the said contract, it is

RESOLVED, That this Corporation elects to terminate the said contract as of , 19. . .

RESOLVED FURTHER, That the proper officers of this Corporation be and they hereby are authorized and directed forthwith to serve upon the said a notice of termination of the aforesaid contract as therein provided.

No. 246

Directors' resolution authorizing termination of employment contract pursuant to agreement of termination.

WHEREAS, an agreement was entered into between this Corporation and on , 19. . , under the terms of which the said was employed by this Corporation as , for a period of (. . . .) years from the said date, and

WHEREAS, the said has expressed his desire and willingness to terminate the said contract forthwith, and

WHEREAS, it is deemed advisable in behalf of this Corporation to terminate the said contract, it is

RESOLVED, That the said agreement of employment be terminated and canceled, and

RESOLVED FURTHER, That the proper officers of this Corporation be and they hereby are authorized and directed to enter into an agreement with the said terminating the aforesaid contract of employment, and releasing each of the parties thereto from any and all claims and demands against the other arising out of or under the aforesaid contract.

No. 247

Resolution of directors authorizing contract with a labor union.

WHEREAS, it appears that the Union represents a majority of the employees of this Corporation, be it

RESOLVED, That the President of this Corporation be, and he hereby is, directed to enter into a contract with Union covering the wages, hours, and working conditions of the employees of this Corporation; and that such contract, and the execution thereof, shall be in accordance with all applicable Federal and State laws.

No. 248

Resolution of directors authorizing the payment of expenses of an employees' relief association.

WHEREAS, the Relief Association is composed of employees late of the Company, who will until further notice be continued in the service of the Company,

AND WHEREAS, the operation of the said association has been to the mutual advantage of the Company and of the said employees, and therefore, in the opinion of this Board, the association as now constituted should be continued,

NOW, THEREFORE, RESOLVED, That the Company will assume all expenses of clerk hire, office room, and all charges for stationery, etc., required in the conduct and management of the Relief Association, leaving the fund liable only to legitimate demands to be made upon it, and will facilitate in every way, without charge therefor, the investment and handling of the fund from time to time, for the benefit of the Relief Association, and will contribute to said fund to the amount of five per cent, of all sums paid by the employees, such contributions to be made by the Company from time to time in accordance with the regulations of said Relief Association.

RESOLVED, That the President be authorized to make such payments from time to time as may be necessary to carry into effect the foregoing resolution.

No. 249

Resolution of stockholders approving retirement plan.

RESOLVED, That it is advisable and to the best interests of Corporation that a Retirement Plan be adopted and made effective; and

RESOLVED FURTHER, That the Retirement Plan considered at this:

meeting, which was approved and adopted by the Board of Directors of Corporation at its meeting held on
 ..., 19.., and recommended for adoption to the Stockholders (a copy thereof having been sent to each stockholder of record at the close of business on, 19.., with the Notice of a Special Meeting of Stockholders, to be held on, 19.., to consider such Plan) be and it hereby is in all respects duly approved, adopted and directed to be made effective, subject to its terms, as of, 19..; and that the adoption thereof by the Board of Directors is ratified, approved, and confirmed; and

RESOLVED FURTHER, That the Board of Directors and the officers of Corporation and the Retirement Committee be and they hereby are authorized and directed to do any and all things to make the Retirement Plan effective as of, 19.., and to take any and all action to carry out said Plan, including the execution of any and all papers and documents that may seem proper, advisable, or convenient.

RESOLUTIONS—CLAIMS, SUITS, AND SETTLEMENTS

No. 250

Directors' resolution retaining general counsel.

RESOLVED, That, of the City of, State of, be retained as General Counsel for this Corporation for a period of, and that the proper officers of this Corporation be and they hereby are authorized and directed to execute a written retainer of the said for the said period, at an annual compensation of (\$.....) Dollars, the said amount to cover all compensation for all services to be rendered by said for the said period.

[*Note.* The following may be added to the above resolution: "except compensation for litigation, for which counsel is to bill the corporation at its usual rates." If the directors desire to leave the compensation arrangements entirely to the officers, the resolution would stop at the word "period" in the sixth line. Or, the following clause may be added after the word "Dollars" in the sixth line: "It is understood that all services rendered by counsel shall be billed to the Corporation at its usual rates, and if the total amount so billed is in excess of the amount of the retainer, the Corporation will pay the excess at the end of the aforesaid period."]

No. 251

Directors' resolution ratifying substitution of attorneys.

RESOLVED, That the action of the President in substituting
 in place of as attorney for this

Corporation in the action pending in the Court, entitled "..... v.," and in paying to the said the sum of (\$.....) Dollars in full settlement of all services rendered by him to this Corporation, be and the same hereby is ratified, confirmed, and approved.

No. 252

Directors' resolution repudiating acts of attorney.

RESOLVED, That the action of in (*insert act repudiated*) be and it hereby is repudiated as being contrary to the best interests of this Corporation, and as having been taken without authority.

RESOLVED FURTHER, That the President of this Corporation be and he hereby is authorized to engage as attorney for this Corporation, to take all legal steps necessary to rescind and withdraw the said action so taken, and to substitute the said as attorney for this Corporation in the place and stead of the said

No. 253

Directors' resolution authorizing counsel to defend claim against corporation.

WHEREAS, a claim has been presented by against this Corporation for (*insert nature of claim*), and

WHEREAS, it appears that the said claim is without foundation and unjustified,

RESOLVED, That, attorneys of this Corporation, be and they hereby are authorized to resist and defend said claim in behalf of this Corporation, and to take any and all steps which they may deem advisable in furtherance thereof, under the advice and direction of the President of this Corporation.

No. 254

Directors' resolution authorizing employment of special counsel to prosecute claim against director.

WHEREAS, the Board of Directors of this Company is of the belief and opinion that Messrs. and, directors of this Company, have fraudulently benefited themselves at the expense of this Company and are indebted to the Company in various amounts, and

WHEREAS, the general counsel for the Company,,

is also counsel for Messrs. and ...,
and, in the opinion of the Board, should not be requested to represent
the Company in any proceedings had against Messrs.
and ...,

NOW, THEREFORE, BE IT RESOLVED, That the President of the Com-
pany be and he hereby is authorized and directed to employ special
counsel with whom to consult and advise in the matter of any claim
or claims had by the Company against Messrs. and
..., or any other person, firm, or corporation growing
out of the organization, management, and operation of the Company;
and that said special counsel be authorized and directed, in behalf of
the Company, to proceed against Messrs. and
..., and any such person, firm, or corporation, by such legal
proceedings as in his opinion are deemed advisable, for the purpose or
purposes of procuring for the Company a full and complete accounting
and the return to this Company of any and all money or other property
due the Company by Messrs. and ...,
or any other person, firm, or corporation, and for the prosecution of
such suit or proceeding to its conclusion.

No. 255

Extract from minutes of directors' meeting declining stockholders' request that corporation bring suit.

The President, Mr. "A," in behalf of the Committee appointed at the
last meeting for the purpose of submitting to competent, disinterested
counsel the matter of the demand of "B" that suit be instituted in the
name of this Corporation against & Company, re-
ported that said Committee had, on, 19.., engaged
the law firm of, of the City of,
State of, to render such opinion, having submitted to
said firm all papers and correspondence relating thereto, as well as
the minute book of the Corporation. He further reported that the
Committee had received from said firm its opinion in writing, which
the Committee recommended should be received as its report, and
should be adopted by this Board of Directors. The opinion thereupon
was read, and upon motion of Mr. "C," seconded by Mr. "D," it was
ordered that the opinion be spread upon the minutes and be accepted
as the report of said Committee. Said opinion is as follows:

(Here insert copy of opinion.)

After discussion of said report by Mr. "E," and by Mr. "F" of the
firm of, who was present at the meeting by in-
vitation, it was moved by Mr. "E" that a Committee be appointed to
confer with Mr. "B" and his attorneys in an effort to avoid the liti-

gation threatened by them, and that no further action in the matter be taken by this Board until after such effort shall have been made by such Committee.

Upon such motion, Messrs. "E," "G," and "H" voted "aye," and Messrs. "A," "C," "D," "I," and "J" voted "no." The motion thereupon was declared lost.

It was then moved by Mr. "C" that the recommendation of said special Committee be adopted; that this Board decline to institute the suit against & Company for the reasons given in said opinion of counsel; and that this action of the Board be reported to the meeting of the stockholders to be held this date. Said motion was declared duly adopted upon the affirmative vote of Messrs. "A," "C," "D," "I," and "J." Messrs. "E" and "H" voted in the negative, and Messrs. "K" and "G" did not vote.

No. 256

Directors' resolution ratifying settlement of breach of contract claim.

RESOLVED, That the settlement of the claim of this Company against the Corporation, arising through the alleged breach by the said corporation of its contract with this Company dated the .. day of .., 19.., by the allowance to this Company by the said corporation of the sum of (\$.....) Dollars, be and it hereby is accepted, ratified, and approved, and that the officers of this Company be and they hereby are empowered to make settlement on such basis, and to take such steps and to execute such papers in behalf of this Company as may be necessary to carry this resolution into effect.

No. 257

Resolution of directors approving action of attorneys in settling controversy.

RESOLVED, That the action of, attorney for this Corporation, in settling the controversy between the Company and this Corporation by a cancellation of the present contract and the execution of a new contract between this Corporation and the Company, on exactly the same basis as the present contract, except that the term is for (.....) years, commencing with the year 19.., be and the same hereby is ratified, approved, and confirmed.

RESOLVED FURTHER, That the President be and he hereby is authorized to enter into a new contract with the Company in accordance with the foregoing resolution.

No. 258

Directors' resolution settling personal injury claim.

WHEREAS,, of the City of, State of, has presented to this Corporation a claim against it for personal injuries alleged to have been sustained by him on, 19.., through the negligence of an agent of this Corporation in the operation of one of the Corporation's trucks, and

WHEREAS,, attorneys for this Corporation, recommend the acceptance of an offer to settle the said claim for the sum of (\$.....) Dollars, it is

RESOLVED, That the said offer of settlement be and it hereby is accepted, and the Treasurer be and he hereby is authorized and directed to pay to the said the sum of (\$.....) Dollars, upon his signing and delivering to the Treasurer a release of all claims which he now has or may have against this Corporation, in form approved by the said attorneys of this Corporation.

No. 259

Directors' resolution approving attorney's bill for services.

RESOLVED, That the bill rendered this Corporation by on the .. day of, 19.., as attorney for this Corporation during the year ending, 19.., be and it hereby is accepted and approved, and the Treasurer is hereby authorized and directed to make payment of the said bill forthwith and to obtain a proper receipt therefor.

No. 260

Directors' resolution authorizing payment of special compensation to general counsel.

WHEREAS, subsequent to the death of Mr. "A" on, 19.., and up to, 19.., Mr. "B," General Counsel for the Company, gave valuable services to the Company in directing its affairs until such time as the Company could be reorganized, for which services no compensation was heretofore fixed,

NOW, THEREFORE, BE IT RESOLVED, That for his services rendered in directing and managing the Company from the period, 19.., to, 19.., the compensation of Mr. "B" be and it hereby is fixed at the sum of (\$.....) Dollars, in addition to any amounts paid him as General Counsel for the Company during such period.

No. 261

Directors' resolution authorizing issuance of treasury stock in payment for services rendered in settling litigation.

RESOLVED, That Company issue to, of the City of, State of, (....) shares of the stock of said Company held in its treasury, which shares of stock shall constitute full payment for the services rendered by said in effecting a settlement of the litigation between the said Company and its stockholders.

No. 262

Stockholders' resolution authorizing officers to pay cost of suit brought against directors personally.

WHEREAS, an action against the directors of this Corporation personally was instituted in the Court, on the .. day of, 19.., by and others, for (*insert nature of suit*),

RESOLVED, That the said directors be and they hereby are authorized to defray the expense of defending said action out of the funds of this Corporation.

No. 263

Resolution authorizing indemnification of directors, officers, and employees against expense in suits involving official acts.

RESOLVED, That Corporation indemnify its Directors, Officers, and Employees against any and all expense, including attorneys' fees, or liability for such expense sustained by them or any of them in connection with any suit or suits which may be brought against such Directors, Officers, or Employees, involving or pertaining to any of their official acts or duties and in which suit or suits no personal liability is finally established or which may be compromised.

No. 264

Resolution of stockholders instructing directors and officers to bring suit in name of corporation upon request of stockholder.

WHEREAS, on or about, 19..,, a stockholder of Corporation, made a demand upon the Board of Directors of such Corporation that it cause an action or actions to be instituted by the said Corporation against & Company, and the members thereof, seeking (*insert nature of action*), and

WHEREAS, said stockholder has explained in detail to the Board of Directors of Corporation the basis for such an action, and has furnished thereto a form of petition by Corporation against & Company, and the members thereof, setting forth said cause of action in detail, and

WHEREAS, the agent and proxy of has explained to this meeting the grounds upon which said action should be instituted and the facts upon which it would be based, and it is the sense of the stockholders that such an action should be forthwith instituted by Corporation and vigorously prosecuted,

NOW, THEREFORE, BE IT RESOLVED, That the directors and officers of Corporation are hereby instructed to cause an action or actions to be forthwith instituted in the proper jurisdiction by Corporation against & Company, and the members thereof, of the character specified in said demand and set forth in said petition, and to cause said actions to be prosecuted vigorously to judgment.

RATIFICATION OR RESCISSION OF ACTION

No. 265

Directors' resolution ratifying all acts of officers during the year.

Mr., President of the Corporation, then made an oral report, at length, concerning all the acts performed by him as such officer during the year ending 19... A similar report concerning their respective activities was then made by Mr., Vice-President, Mr., Secretary, and Mr., Treasurer of the Corporation.

On motion duly made and seconded, it was

RESOLVED, That all acts of the officers of this Corporation in the general conduct of the business during the year ending 19.., be and they hereby are approved, ratified, and adopted.

No. 266

Directors' resolution ratifying specific act of an officer.

RESOLVED, That the contract entered into by, as President of this Corporation, in the name and in behalf of the Corporation, on the .. day of, 19.., with the Company, for the (set forth nature of contract), be and the same hereby is adopted, confirmed, and ratified.

No. 267

Directors' resolution rescinding acts and resolutions of executive committee.

RESOLVED, That all acts and resolutions passed by Messrs. and as an Executive Committee, as shown by the minutes of the meetings of the said Committee dated , 19.. and , 19.., and submitted to this meeting, be and they hereby are rescinded, and the attempted confirmation of the same by the Board of Directors at the regular meeting of the Board held on the .. day of .., 19.., be and it hereby is also rescinded.

RESOLVED FURTHER, That the Secretary notify Mr. of the rescission of the contract purported to be made with him at the meeting of the Executive Committee held on the .. day of .., 19...

No. 268

Directors' resolution rescinding previous resolution.

RESOLVED, That the following resolution, adopted by the Board of Directors of this Corporation at a meeting held on the .. day of .., 19.., be and the same hereby is rescinded, annulled, and set aside:

(Here insert previous resolution in full.)

RESOLVED FURTHER, That any and all authority given to by and under the aforesaid resolution be and the same hereby is revoked and canceled.

No. 269

Directors' resolution disavowing contract entered into by officer.

RESOLVED, That the agreement made on , 19.., between, as President of this Corporation, and, of the City of, State of, in which the said agreed, in the name and in behalf of this Corporation, to convey by general warranty deed to said or to any person, persons, or corporations designated by the latter, title to the property known as (*insert description of property*), on or before the .. day of .., 19.., for the sum of (\$.....) Dollars, be and the same hereby is disavowed.

FURTHER RESOLVED, That any action taken or to be taken by the said in behalf of this Corporation in connection with the property aforesaid be and it hereby is disavowed and disapproved, unless such action was or is taken in compliance with instructions of, attorneys for this Corporation.

FURTHER RESOLVED, That the Secretary of this Corporation be and he hereby is authorized and directed to send a copy of this resolution to said forthwith.

No. 270

Stockholders' resolution ratifying acts of directors since last annual stockholders' meeting.

RESOLVED, That each and all of the resolutions, acts, and proceedings of the Board of Directors of the Corporation heretofore adopted and taken at the several meetings of the Board held since the last stockholders' meeting of this Corporation, as shown by its records in the minute book of this Corporation, and each and all of the acts of the officers of this Corporation in carrying out and promoting the purposes, objects, and interests of this Corporation since the last stockholders' meeting thereof, be and the same are approved, ratified, and hereby made the acts and deeds of this Corporation.

[Note. It would be proper for the Secretary to add in the minutes accompanying this resolution a statement as follows: "As this resolution was proposed, the Secretary brought to the table a minute book containing pages to, the same being the records of directors' meetings from, 19.., to, 19.., the book, for a period of, having previously been on a table at the of the room in which this meeting was held, where it was open to inspection, as required by the by-laws, after announcement had been made by the President that the stockholders were invited to make the inspection."]

No. 271

Stockholders' resolution revoking authority previously given.

RESOLVED, That the authority given to and by the following resolution passed by the stockholders at a special meeting held on the .. day of, 19.. —to wit:

(Here insert resolution.)

be and the same hereby is revoked, and the resolution aforementioned is hereby canceled, annulled, and set aside.

[Note. For directors' resolution rescinding previous resolution, see form No. 268.]

MISCELLANEOUS MANAGEMENT RESOLUTIONS

No. 272

Directors' resolution authorizing insurance on life of officer for benefit of corporation.

RESOLVED, That, in order to compensate this Corporation for financial losses which it may suffer in the event of the death of,

312 RESOLUTIONS CONCERNING MANAGEMENT

Chairman of the Board of Directors of this Corporation, the said be and he hereby is authorized and requested to apply to the Insurance Company for a straight life insurance policy upon his life, in the principal sum of (\$.....) Dollars, irrevocably naming this Corporation as beneficiary of said policy.

RESOLVED FURTHER, That all premiums on the said policy shall be paid by this Corporation as they become due and payable, and that all dividends, accumulations, and other benefits and rights accruing from the said policy shall belong and be payable to this Corporation, including the right, when so authorized by resolution of the Board of Directors, to surrender the said policy and receive the cash surrender or other value thereof.

[*Note.* A corporation may insure the life of a corporate officer for its own benefit and pay the premiums. *Harris v. H. C. Talton Wholesale Grocery Co.*, (1929) 11 La. App. 331, 123 So. 480. See also Venters, "Right of Corporation to Insure Life of Officer," 35 *Law Notes* 46.]

No. 273

Directors' resolution authorizing officer to procure insurance on officer's life for benefit of his wife.

RESOLVED, That the officers of this Corporation be and they hereby are duly authorized to procure insurance in the amount of (\$.....) Dollars on the life of, President of this Corporation. The policy or policies procured shall designate....., wife of said, beneficiary of such insurance, and shall deny to the insured any and all legal incidents of ownership in the policies, as, for example, a power to change the beneficiary, to surrender or cancel the policies, to assign them, to revoke an assignment of them, to pledge them for loans, or otherwise to dispose of them and their proceeds for his own benefit. All legal incidents of ownership in such policy or policies shall reside in the named beneficiary. The Corporation is hereby authorized to pay the premiums on said insurance policy or policies, and to charge all amounts so paid as ordinary and necessary business expenses on the books of the Corporation.

No. 274

Directors' resolution authorizing release of insurance on life of officer.

WHEREAS, the Insurance Company has insured the life of, President of this Corporation, under Policy No., in the principal sum of (\$.....) Dollars, and

WHEREAS, this Corporation is named as beneficiary under the said policy, with the right to receive all benefits accruing from said policy and to surrender the said policy and receive the cash or other value thereof, be it

RESOLVED, That the Vice President and the Treasurer of this Corporation be and they hereby are authorized to assign or release the interest of this Corporation in said policy designated above to the said Insurance Company, for any cash, loan, paid-up, or other value which the said Insurance Company may grant therefor.

No. 275

Directors' resolution authorizing the sale of a policy upon the life of an officer to the insured.

RESOLVED, That in consideration of the payment to the Corporation of the cash surrender value of Policy No., issued by the Insurance Company, in the principal sum of (\$.....) Dollars, on, 19.., upon the life of President of the Corporation, in which the Corporation is named as beneficiary, the Corporation is hereby authorized to sell, assign, and transfer all its interest in and to said life insurance policy to, the insured, and

RESOLVED FURTHER, That the proper officers be and they hereby are authorized to execute such assignments or other documents as may be necessary to effect said transfer of ownership of said policy to, upon receipt by the Corporation of the consideration aforementioned.

No. 276

Directors' resolution authorizing qualification for business in another state.

WHEREAS, this Corporation is desirous of doing business in the State of, and

WHEREAS, under the laws of the State of, no business may be transacted in such state until this Corporation has fully complied with all legal requirements for qualification by foreign corporations, be it

RESOLVED, That the proper officers of this Corporation be and they hereby are authorized and directed to do any and all acts, and to make, file, and record any and all documents required by law to qualify this Corporation to do business in the State of

No. 277

Directors' resolution establishing office for business in foreign country.

WHEREAS, this Corporation has previously expressed its desire to transact business in the City of, and has allocated to and set aside for that purpose the sum of (\$.....) Dollars, be it

RESOLVED, That the President of this Corporation be and he hereby is authorized and directed to perform any and all acts and to do any and all things necessary for the establishment of an office of this Corporation in the City of, and to execute and file any and all certificates and other instruments necessary or expedient to authorize the Corporation to transact business in the City of

No. 278

Resolution of directors reimbursing promoter for expenses incurred in promoting company.

RESOLVED, That the Treasurer of this Corporation be and he hereby is authorized and directed to pay to the sum of (\$.....) Dollars, representing all the moneys advanced and expenses incurred by in promoting, organizing, and incorporating this Corporation.

No. 279

Resolution of directors (or stockholders) extending sympathy upon death of associate.

WHEREAS, the directors of the Corporation desire to record their deep sorrow at the death on, 19.., of their esteemed associate, who since, 19.., had served as director of this Corporation, be it

RESOLVED, That the Board of Directors of this Corporation hereby gives formal expression of its grievous loss in the death of, and does hereby note in its records the passing from this life of a man who was esteemed by his associates, loved by his friends, and respected by all.

RESOLVED FURTHER, That a copy of this resolution be tendered to his family as a humble expression of the Board's heartfelt sympathy in its bereavement.

No. 280

Directors' resolution reducing surety bonds on officers signing checks.

RESOLVED, That the surety bonds held by this Corporation on officers authorized to sign checks be reduced in each instance to the sum of (\$.....) Dollars.

No. 281

Directors' resolution making appropriation for radio advertising.

RESOLVED, That the sum of (\$.....) Dollars be allocated to and set aside for advertising the products of this Corporation over the radio, for a period of, beginning with the .. day of, 19.., the said appropriation to be additional to all other appropriations heretofore made for advertising the products of this Corporation during the said period.

No. 282

Directors' resolution authorizing president to address explanatory letter accompanying notice of special meeting of stockholders.

RESOLVED, That, President of the Company, address a letter to the stockholders, to accompany the notice of stockholders' meeting to be held on, 19.., setting forth the reasons underlying the calling of the special meeting of the stockholders.

No. 283

Resolution of stockholders accepting a proposition.

RESOLVED, first, that the proposition of the Company to this company, this day presented to the stockholders, be, and the same is, hereby accepted; second, that the President and Secretary of the company be and they are hereby authorized and directed to execute all papers and to do all things necessary to carry out said proposition on the part of this company, including the issuance of the bonds of this company through the Company.

No. 284

Resolution of directors authorizing subscription to government bonds.

RESOLVED, That the officers of this corporation be and hereby are authorized to subscribe, on behalf of this corporation, for Government Bonds, known as the (*insert full description of the issue*), to the amount of (\$.....) Dollars.

CHAPTER 11

COMPENSATION OF DIRECTORS, OFFICERS, AND EMPLOYEES

Right of Directors and Officers to Compensation

Who is entitled to compensation. The right of the ordinary agent or employee of the corporation to compensation is governed by this well-known rule: where there is employment, the law will imply a contract to pay the fair and reasonable value of the services rendered, in the absence of an express agreement that the services are to be gratuitous. Thus, an employee who performs his work faithfully and in accordance with the terms of his employment is entitled to the reasonable worth of his services. This is true even in the absence of an express contract with the corporation, and whether or not there has been a prior authorization by the corporation for compensation.¹ The same rule does not apply to the employment of a director or an officer, as such. Compensation of directors and officers is governed by the rules given in the following paragraphs. These rules have been well established by numerous decisions.

Right of directors to compensation for services within scope of their duties. Directors have no right to compensation for services rendered *within the scope of their duties as directors*,² unless payment is authorized in one of the following ways: (1) by charter; (2) by by-laws;³ (3) by express contract between the directors and the corporation;⁴ (4) by resolution of the stockholders; or (5) by resolution of the directors before the

¹ National Loan & Investment Co. v. Rockland Co., (1899) 94 F. 335; Heldmyer v. Cleaver, (1918) 30 Del. 135, 104 A. 635; Brown v. Crown Gold Milling Co., (1907) 150 Cal. 376, 89 P. 86; Norelli v. Mutual Savings Fund Harmonia, (1938) 121 N. J. Law 60, 1 A. (2d) 440.

² Pindell v. Conlon Corp., (1940) 303 Ill. App. 232, 24 N. E. (2d) 882; Herman v. Gutman, (1935) 244 N. Y. App. Div. 694, 280 N. Y. Supp. 410; Fox v. Arctic Placer Min. & Mil. Co., (1920) 229 N. Y. 124, 128 N. E. 154.

³ Finch et al. v. Warrior Cement Corp. et al., (1928) 16 Del. Ch. 44, 141 A. 54; Bates Street Shirt Co. v. Waite, (1931) 130 Me. 352, 156 A. 293.

⁴ Baltimore & Jamaica Trading Co. v. Dinning, (1922) 141 Md. 318, 118 A. 801.

services are rendered, where the directors have authority to fix their own compensation.⁵

It is presumed that the office of director is filled by one whose interest in the welfare of the corporation is a motive for executing his duties gratuitously; it is immaterial that the services were performed with the expectation of compensation or with an understanding among the directors themselves.⁶ This rule applies whether the services are rendered by the directors in their capacity as officers or as members of committees.⁷ The principle underlying the rule requiring directors to perform their services as such gratuitously is that the directors are trustees for the stockholders and the corporation and that the law does not imply a promise to pay a trustee for his services.⁸ However, the mere fact that a person is a director and officer does not prevent his employment, under proper circumstances, at a salary.⁹ (See the following paragraph.)

Directors are not entitled to compensation for attending meetings unless payment is expressly authorized.¹⁰

Right of directors to compensation for services beyond scope of duties. Where directors or officers perform services *beyond the scope of their regular duties*, they may be entitled to compensation, depending upon the law prevailing in the particular jurisdiction. In some states the courts adhere to the strict rule that, in the absence of an express contract, neither a director nor an officer may recover compensation for his services, regardless of the extraordinary nature or value of such services.¹¹

In other states, however, the courts have followed a more liberal rule and have held that under certain circumstances the

⁵ Joy v. Ditto, Inc., (1934) 356 Ill. 348, 190 N. E. 671.

⁶ Green v. Felton, (1908) 42 Ind. App. 675, 84 N. E. 166; Lofland v. Cahall, (1922) 13 Del. Ch. 384, 118 A. 1; Alexander v. Equitable Life Assurance Soc. of U. S., (1922) 233 N. Y. 300, 135 N. E. 509, rev'g 196 N. Y. App. Div. 963, 188 N. Y. Supp. 908; First Nat. Bank v. Daugherty, (1926) 122 Okla. 47, 250 P. 796; Alabama Lime & Stone Co. v. Adams, (1929) 218 Ala. 647, 119 So. 853.

⁷ Taussig v. St. Louis & Kirkwood Ry. Co., (1901) 166 Mo. 28, 65 S. W. 969.

⁸ Enders v. Northwestern Tr. Co., (1928) 125 Ore. 673, 268 P. 49; Nashville Brecko Block & Tile Co. v. Hopton, (1946) (Tenn. App.), 196 S. W. (2d) 1010, cert. denied, 10/5/46.

⁹ Mortensen v. Ballard, (1945) 209 Ark. 1, 188 S. W. (2d) 749; Karns v. Industrial Com. of Arizona, (1938) 50 Ariz. 466, 76 P. (2d) 104.

¹⁰ Norway-Pleasant Telephone Co. v. Tuntland, (1942) 68 S. D. 441, 3 N. W. (2d) 882.

¹¹ Althouse v. Cobaugh Colliery Co., (1910) 227 Pa. 580, 76 A. 316; Dixmoor Golf Club, Inc. v. Evans et al., (1927) 325 Ill. 612, 156 N. E. 785; Kirk Oil Co. v. Bristow, (1932) 154 Okla. 188, 7 P. (2d) 682; Moon Motor Car Co. v. Moon, (1932) 58 F. (2d) 90.

law will imply a contract to pay for services rendered outside the ordinary duties of a director or officer, even if there was no prior express agreement for payment.¹² This rule does not apply, however, unless the services are clearly outside the ordinary duties of the director, are performed at the instance of the corporation,¹³ and are rendered under circumstances tending to show an understanding that payment was to be made therefor.¹⁴ A claim for such services will always be scanned critically by the courts.¹⁵

In determining whether certain circumstances merit an implication that the services were to be paid for, consideration is given to the nature of the corporation and the business it performs, the character and extent of the services rendered, and the value thereof.¹⁶

Right of officers to compensation. Practically the same rules that govern the compensation of directors apply in the case of officers who manage and control the property of the corporation, whether or not they are also directors. Many of the cases which have dealt with the right of corporate officers to receive compensation for their services have applied the rules without making a distinction between officers and directors.¹⁷ Thus, it has been

¹² *Johnson v. Tri-union Oil & Gas Co.*, (1939) 278 Ky. 633, 129 S. W. (2d) 111; *Wright v. McLaury*, (1936) 81 F. (2d) 96; *Trust No. 5522 and Trust No. 5644, etc. v. Com'r of Int. Rev.*, (1936) 83 F. (2d) 801; *Joy v. Ditto, Inc.*, (1934) 356 Ill. 348, 190 N. E. 671; *Finch et al. v. Warrior Cement Corp. et al.*, (1928) 16 Del. Ch. 44, 141 A. 54; *Enders v. Northwestern Tr. Co.*, (1928) 125 Ore. 673, 268 P. 49; *Kinsella v. Marquette Finance Corp.*, (1929) (Mo. App.) 16 S. W. (2d) 619; *Alexander v. Equitable Life Assurance Soc. of U. S.*, (1922) 233 N. Y. 300, 135 N. E. 509; *Navco Hardwood Co. v. Bass*, (1925) 214 Ala. 553, 108 So. 452.

¹³ *Nashville Brecko Block & Tile Co. v. Hopton*, (1946) (Tenn. App.), 196 S. W. (2d) 1010, cert. denied, 10/5/46; *Morris v. North Evanston Manor Bldg. Corp.*, (1943) 319 Ill. App. 298, 49 N. E. (2d) 646.

¹⁴ *Sauberli v. Sledd*, (1936) 143 Kan. 350, 55 P. (2d) 415; *Security Savings & Trust Co. v. Coos Bay Lumber & C. Co.*, (1935) 219 Wis. 647, 263 N. W. 187; *Gettinger v. Heaney*, (1930) 220 Ala. 613, 127 So. 195; *Lofland v. Cahall*, (1922) 13 Del. Ch. 384, 118 A. 1; *Alexander v. Equitable Life Assurance Soc. of U. S.*, (1922) 233 N. Y. 300, 135 N. E. 509; *Baltimore & Jamaica Trading Co. v. Dinning*, (1922) 141 Md. 318, 118 A. 801; *N. C. Agr. Credit Corp. v. Boushall*, (1927) 193 N. C. 605, 137 S. E. 721; *In re A. F. Brown Packing Corp.*, (1927) 22 F. (2d) 419.

¹⁵ *Talbot v. Nevada Fire Ins. Co.*, (1930) 52 Nev. 145, 283 P. 404, rehearing denied, 286 P. 1118.

¹⁶ *Clifford v. Walker*, (1929) 180 Ark. 592, 22 S. W. (2d) 36; *Jones v. Foster*, (1934) 70 F. (2d) 200.

¹⁷ *Alexander v. Equitable Life Assurance Soc. of U. S.*, (1922) 233 N. Y. 300, 135 N. E. 509; *Baltimore & Jamaica Trading Co. v. Dinning*, (1922) 141 Md. 318, 118 A. 801; *Navco Hardwood Co. v. Bass*, (1925) 214 Ala. 553, 108 So. 452; *In re A. F. Brown Packing Corp.*, (1927) 22 F. (2d) 419; *James v. Alderton Dock*

held that officers are not entitled to compensation for services rendered in an official capacity or as incidental to their offices, unless there is a by-law or charter provision, a prior express agreement, or authorization by the board of directors.¹⁸

Compensation of officers under implied contract. Although the services of an officer impose no obligation on the corporation to pay for them in the absence of contract,¹⁹ if the services are accepted under circumstances which raise a presumption that the corporation will pay for the services, a contract will be implied.²⁰ A formal vote of the board of directors is not necessary to raise such a presumption.²¹ For example, a director was secretary and general manager, and a resolution allotted a salary to him in that capacity. He later became president and general manager, but no resolution allotted a salary to that office. He was entitled to the reasonable value of his services.²²

If a salary is paid to an officer for several years, the law implies a promise to pay it for the next year—in the absence of any understanding to the contrary.²³ On the other hand, a vice president who acts in the absence of the president in accordance with a by-law provision, is not entitled to the president's salary unless there is also an express provision that he will draw the president's salary.²⁴

It is within the power of the board of directors to require, through by-law provision, that a formal vote be taken before compensation shall be paid for services, regardless of how extraordinary those services may be.²⁵ See page 320 for illustrations of services for which compensation is payable to officers; page

Yards, Ltd., (1928) 225 N. Y. App. Div. 675, 231 N. Y. Supp. 215; *Enders v. Northwestern Tr. Co.*, (1928) 125 Ore. 673, 268 P. 49.

¹⁸ *N. C. Agr. Credit Corp. v. Boushall*, (1927) 193 N. C. 605, 137 S. E. 721; *Winfield Mortgage & Tr. Co. v. Robinson*, (1913) 89 Kan. 842, 132 P. 979; *Gettinger v. Heaney*, (1930) 220 Ala. 613, 127 So. 195; *McCulloch v. Perry*, (1931) 150 Okla. 203, 1 P. (2d) 170; *Ferrenbach v. Edward Fehlig & Co., Inc.*, (1935) (Mo. App.) 80 S. W. (2d) 705; *Felsenheld v. Bloch Bros. Tobacco Co.*, (1937) 119 W. Va. 167, 192 S. E. 545; *Upright v. Brown*, (1938) 98 F. (2d) 802.

¹⁹ *Shaw v. Harding*, (1940) 306 Mass. 441, 28 N. E. (2d) 469.

²⁰ *Kinsella v. Marquette Finance Corp.*, (1929) (Mo. App.) 16 S. W. (2d) 619; *Clifford v. Walker*, (1929) 180 Ark. 592, 22 S. W. (2d) 36; *Calkins v. Wire Hardware Co. et al.*, (1929) 267 Mass. 52, 165 N. E. 889.

²¹ *Calkins v. Wire Hardware Co. et al.*, (1929) 267 Mass. 52, 165 N. E. 889.

²² *Caminetti Ins. Com. v. Prudence Mut. Life Ins. Ass'n*, (1944) 62 Cal. App. (2d) 945, 146 P. (2d) 15.

²³ *Gillespie Land & Irrigation Co. v. Jones*, (1945) 63 Ariz. 535, 164 P. (2d) 456.

²⁴ *Brown v. Galveston Wharf Co.*, (1899) 92 Tex. 520, 50 S. W. 126.

²⁵ *Enders v. Northwestern Tr. Co.*, (1928) 125 Ore. 673, 268 P. 49.

321 for illustrations of services for which compensation is not payable.

Application of rule permitting compensation for extraordinary services. In jurisdictions where officers and directors are entitled to compensation for services rendered outside the scope of their ordinary duties on an implied contract, it has been held to be a question of fact rather than of law as to what circumstances justify the application of the rule.²⁶ All the attendant circumstances regarding the nature of the corporate business and the extent and value of the services rendered will be considered in determining whether there was a mutual understanding that payment was to be made for the services.²⁷ The rule permitting compensation for extraordinary services is based on the proposition that the law will not permit a corporation to benefit by services rendered by an officer or director, which do not pertain to his duties as such officer or director, without compensating him for the reasonable value of his services, solely because officers and directors are forbidden to receive a salary in the absence of an agreement or provision allowing compensation.²⁸

Illustrations of extraordinary services that justify compensation. In the following instances directors and officers were entitled to compensation for extraordinary services on an implied contract:

A director who was vice-president and manager of a corporation received the reasonable value of his services although there was no prior authorization for such payment.²⁹ A secretary who acted as general manager was also held to be entitled to compensation;³⁰ likewise, in the case of an officer or director who devoted practically all of his time to corporate affairs in the

²⁶ *Red Bud Realty Co. v. South et al.*, (1910) 96 Ark. 281, 131 S. W. 340; *Joy v. Ditto, Inc.*, (1934) 356 Ill. 348, 190 N. E. 671; *Engler v. Ipswich Printing Co.*, (1934) 63 S. D. 1, 256 N. W. 132; *Security Sav. & Trust Co. v. Coos Bay Lumber & Coal Co.*, (1935) 219 Wis. 647, 263 N. W. 187. See also *Bowen v. Trust Co.*, (1948) 166 F. (2d) 264 (salaried officer claimed additional compensation for extra services).

²⁷ *Red Bud Realty Co. v. South et al.*, (1910) 96 Ark. 281, 131 S. W. 340.

²⁸ *Rowland v. Demming Exploration Co.*, (1927) 45 Idaho 99, 260 P. 1032; *Hunter v. Conrad*, (1928) 132 N. Y. Misc. 579, 230 N. Y. Supp. 202.

²⁹ *Bassett v. Fairchild*, (1901) 132 Cal. 637, 64 P. 1082; *Hewson v. Charles P. Gillen & Co., Inc., et al.*, (1928) (N. J. Eq.) 142 A. 250; *Pence v. West Side Hospital*, (1932) 265 Ill. App. 560.

³⁰ *Illinois State Bank v. Queen City Quarry Co.*, (1916) 203 Ill. App. 176; *Lammerding v. Lammerding Lumber & Supply Co.*, (1931) 107 N. J. Eq. 551, 153 A. 380.

capacity of manager or superintendent.³¹ Similarly, where a director was employed as watchman and caretaker,³² or where he acted as land commissioner,³³ or rendered services as an attorney for the corporation,³⁴ or as a consulting engineer,³⁵ or where he audited the corporate books and acted as an arbitrator,³⁶ or operated and looked after the busses of the corporation,³⁷ it was held that he was entitled to reasonable compensation for his work. A president or other officer performing extraordinary services for the corporation may recover under the same circumstances.³⁸

Illustrations of services that do not justify compensation. In the following instances compensation was not due for special services, in the absence of a contract:

A director was not entitled to compensation for getting a manufacturing contract for the corporation when his agreement called for getting a purchaser.³⁹ A director could not collect compensation for making a settlement for damages, favorable to his corporation.⁴⁰

Time of fixing compensation. If an officer is entitled to compensation either by statutory or by-law provision or by a mutual understanding between the parties, it is not necessary that the amount of such compensation be fixed before the service is rendered, since the officer may recover the reasonable worth of his services.⁴¹ It has been held that a by-law providing that the compensation of officers shall be fixed before their election, was directory and not mandatory, and that the act of the board in fixing the amount of an officer's salary after his election was

³¹ *Navco Hardwood Co. v. Bass*, (1925) 214 Ala. 553, 108 So. 452; *Nashville Brecko Block & Tile Co. v. Hopton*, (1946) (Tenn. App.), 196 S. W. (2d) 1010.

³² *Hudson et ux v. Pac. Truck & Tractor Co.*, (1929) 151 Wash. 46, 274 P. 789.

³³ *Rogers v. Hastings, etc. Ry. Co.*, (1875) 22 Minn. 25.

³⁴ *Tausig v. St. Louis & Kirkwood Ry. Co.*, (1901) 166 Mo. 28, 65 S. W. 969.

³⁵ *Bogart v. N. Y. & L. I. R. Co.*, (1907) 118 N. Y. App. Div. 50, 102 N. Y. Supp. 1093.

³⁶ *Paine v. Kentucky Refining Co.*, (1914) 159 Ky. 270, 167 S. W. 375.

³⁷ *Massoth et al v. Central Bus Corp.*, (1926) 104 Conn. 683, 134 A. 236.

³⁸ *Red Bud Realty Co. v. South et al.*, (1910) 96 Ark. 281, 131 S. W. 340. See *Gumaer v. Cripple Creek Tunnel Transportation & Mining Co.*, (1907) 40 Colo. 1, 90 P. 81; *Barrows v. J. N. Fauver Co., Inc.*, (1937) 280 Mich. 553, 274 N. W. 323; *Clark v. Marjorie Michael, Inc.*, (1939) 34 Cal. App. (2d) 775, 90 P. (2d) 866.

³⁹ *Pindell v. Conlon Corp.*, (1940) 303 Ill. App. 232, 24 N. E. (2d) 882.

⁴⁰ *Norway-Pleasant Telephone Co. v. Tuntland*, (1942) 68 S. D. 441, 3 N. W. (2d) 882.

⁴¹ *Stewart v. St. Louis, Ft. S. & W. R. Co.*, (1887) 41 F. 736; *Bogart v. New York & L. I. R. Co.*, (1907) 118 N. Y. App. Div. 50, 102 N. Y. Supp. 1093; *Jezeski v. Northeast Inv. Co.*, (1925) 163 Minn. 165, 203 N. W. 978.

valid.⁴² The fact that an officer's salary was not fixed until a month after his election does not deprive him of his right to his salary for the full time, in the absence of a claim that the salary was excessive.⁴³

See page 316 as to right to compensation for services rendered without a by-law or charter provision, a prior agreement, or directors' authorization therefor.

Continuation of compensation. When a salary is attached to an office, there is a presumption that it continues as long as any duties remain to be performed.⁴⁴ Thus, where an officer, entitled by resolution to a certain annual salary, was re-elected, but no mention was made of his salary, it was held that he was to receive the same salary.⁴⁵ The presumption that re-election without a new compensatory agreement is a renewal of the original contract is not affected by the fact that the duties of the officer were lessened.⁴⁶ If a by-law provision requires that the directors shall agree annually upon the amount of salary that each officer and director shall receive, the directors are powerless to fix salaries for more than a year.⁴⁷

Officers receiving a salary and bonus under contract are not entitled to compensation after the contract expires, although they continue in their offices in defiance of the corporation's legal action in discharging them.⁴⁸ After a director who is an officer is voted out of the office, he has no claim to the salary that went with the office.⁴⁹

A board of directors may pay an officer during temporary illness, just as they do other employees. This is a matter of policy and the honest judgment of the board of directors.⁵⁰

Right to compensation for past services. Directors and officers are not entitled to back pay for services rendered voluntarily.⁵¹ Payment for past services must be based upon an

⁴² *Francis v. Brigham-Hopkins Co. et al.*, (1908) 108 Md. 233, 70 A. 95.

⁴³ *Robson v. Fenniman Co.*, (1912) 83 N. J. Law 453, 85 A. 356.

⁴⁴ *Mobile, J. & K. C. R. Co. v. Owen*, (1899) 121 Ala. 505, 25 So. 612.

⁴⁵ *Eicks v. Wittemann Co.*, (1913) 157 N. Y. App. Div. 412, 142 N. Y. Supp. 190; *Fisher v. Massillon Iron & Steel Co.*, (1918) 209 Ill. App. 616; *Perry v. Noonan Furniture Co.*, (1908) 8 Cal. App. 35, 95 P. 1128. See also *Gillespie Land & Irrigation Co. v. Jones*, (1945), 63 Ariz. 535, 164 P. (2d) 456.

⁴⁶ *Metropolitan Rubber Co. v. Place*, (1906) 147 F. 90.

⁴⁷ *Hurricane Gold Min. Co. v. Bright*, (1912) 193 F. 46.

⁴⁸ *Saltz Bros., Inc. v. Saltz*, (1941) 122 F. (2d) 79.

⁴⁹ *Murray v. Requardt*, (1942) 180 Md. 245, 23 A. (2d) 697.

⁵⁰ *Solimine v. Hollander*, (1940) 128 N. J. Eq. 228, 16 A. (2d) 203.

⁵¹ *National Loan & Investment Co. v. Rockland Co.*, (1899) 94 F. 335.

agreement, express or implied.⁵² It was held that there was no agreement upon which to base pay for past services where a claimant had offered to work voluntarily until the corporation was on a paying basis, and had failed to charge a salary to himself, although he had charge of the corporation's books.⁵³

The rule that a director is not entitled to compensation without an agreement in advance also applies to the compensation of directors for attending meetings of the board and of the stockholders.⁵⁴

Forfeiture of compensation. An officer forfeits his right to compensation if he is guilty of fraud, dishonesty, misconduct, or gross negligence in the performance of his duties.⁵⁵ Even if he has a contract for salary, he may forfeit his right to it by active opposition to the corporation. Thus, the president of a corporation who attempted to drive it out of business and set up a directly competing business for his son was not entitled to receive his salary, on the theory that he had violated his fiduciary duty.⁵⁶

The rule that an officer who violates his fiduciary duty forfeits his right to compensation is not inflexible. For example, a corporation grew and prospered while similar businesses were losing heavily and failing. The corporation's success was due to the diligence and ability of the officers. When these officers breached their fiduciary duty to the corporation, they were not made to forfeit their right to compensation.⁵⁷

Compensation of ministerial officers who are not directors. Ministerial officers may include such officers as secretary, assistant secretary, manager, superintendent, cashier, treasurer, and others. Whether or not an office is a ministerial one depends

⁵² *Stafford's Estate v. Progressive Nat'l Farm Loan Ass'n*, (1945) 207 La. 1097, 22 So. (2d) 662; *Holmes v. Republic Steel Corp.*, (1946) (Ohio Ct. C. P.) 69 N. E. (2d) 396; *Landstreet v. Meyer*, (1947) 201 Miss. 826, 29 So. (2d) 653. See also *Felsenheld v. Bloch Bros. Tobacco Co.*, (1937) 119 W. Va. 167, 192 S. E. 545; *Talbot v. Nevada Fire Ins. Co.*, (1930) 52 Nev. 145, 283 P. 404, 286 P. 1118.

⁵³ *Clifford v. Walker*, (1929) 180 Ark. 592, 22 S. W. (2d) 36.

⁵⁴ *Norway-Pleasant Telephone Co. v. Tuntland*, (1942) 68 S. D. 441, 3 N. W. (2d) 882.

⁵⁵ *Richardson v. Blue Grass Mining Co.*, (1939) 29 F. Supp. 658; *Lydia E. Pinkham Medicine Co. v. Gove*, (1937) 298 Mass. 53, 9 N. E. (2d) 573; *Toy v. Lapeer Farmers Mut. Fire Ins. Ass'n*, (1941) 297 Mich. 188, 297 N. W. 230, citing *Fletcher, Cyc. of Corp.*, Vol. 5, §2145.

⁵⁶ *Slosberg v. Callahan Oil Co.*, (1939) 125 Conn. 651, 7 A. (2d) 853, citing *Wadsworth v. Adams*, (1891) 138 U. S. 380, 11 S. Ct. 303.

⁵⁷ *Richardson v. Blue Grass Mining Co.*, *supra* (Note 55).

entirely upon the nature and scope of the duties incidental to the office.

Ministerial officers who are neither directors nor stockholders are entitled to reasonable compensation for their services unless a mutual intention that they were to serve gratuitously is shown.⁵⁸ This rule is based upon the theory that since a ministerial officer has no discretionary control over the management of corporate property and affairs, he does not stand in the same fiduciary relation to the corporation as does a director, and his right to compensation is governed by the rules which apply to the ordinary employees of the corporation.⁵⁹ (See page 316.)

Where a secretary was also secretary of another corporation, but it was not shown that his duties conflicted or involved the doing of any acts prejudicial to the corporation, it was held that the secretary could recover reasonable compensation for the services performed.⁶⁰

Compensation of ministerial officers who are stockholders. The fact that a ministerial officer is a stockholder in the corporation does not necessarily preclude his right to compensation for services rendered at the instance of the corporation. The law will imply a contract to pay the reasonable value of the services unless the circumstances go against such an implication.⁶¹ The officer's right to compensation is not affected by the fact that he may have gotten the employment because he was a stockholder.⁶²

Authority to Fix Compensation of Directors and Officers

Source of authority to fix compensation. Compensation of directors and officers is a subject rarely regulated by the corporation laws of the states. In the few jurisdictions where some

⁵⁸ See *Smith v. Long Island R.*, (1886) 102 N. Y. 190, 6 N. E. 397; *King v. Grass Valley Gold Mines Co.*, (1928) 205 Cal. 698, 272 P. 290 (this case does not indicate whether or not the officer was also a director); *Colpe v. Jubilee Min. Co.*, (1905) 2 Cal. App. 393, 84 P. 324; *Sirbeck v. Sunbeam Divide Mining Co.*, (1926) 50 Nev. 46, 249 P. 865.

⁵⁹ *Mobile, J. & K. C. R. Co. v. Owen*, (1899) 121 Ala. 505, 25 So. 612.

⁶⁰ *Ibid.*

⁶¹ *Goodin v. Dixie-Portland Cement Co.*, (1916) 79 W. Va. 83, 90 S. E. 544; *Pease, Kolbert & Co. v. Bates*, (1927) 85 Cal. App. 786, 260 P. 399. But in *Gaul v. Keil & Arthe Co.*, (1910) 199 N. Y. 472, 92 N. E. 1069, and *Mather v. Eureka Mower Co.*, (1890) 118 N. Y. 629, 23 N. E. 993, it was held that when a stockholder, not a director, assumes the duties of an office and performs them without some agreement or provision for compensation, the presumption, in view of his relation and interest, may arise that he performed the official services gratuitously.

⁶² *Huntington Fuel Co. et al. v. McIlwaine*, (1907) 41 Ind. App. 328, 82 N. E. 1001.

statutory provision is found, the law merely states (1) that the corporation shall have power to prescribe compensation of directors and officers; (2) that the directors shall have power to fix the salaries of officers; or (3) that the by-laws may provide for the compensation of directors and officers.

A corporation has the right to enter into an express contract to pay a salary or other compensation to its directors or officers for services performed within or without the scope of their duties. Payment must be fixed without fraud and by the proper authority.⁶³ The method of fixing the compensation of directors and officers is usually covered in a by-law. This by-law can make practically any provision so long as it does not conflict with the charter of the corporation.

By-law provisions authorizing compensation. Some of the most common by-law provisions on the subject of compensation are as follows: (1) The directors shall receive no compensation for their services as directors, but this provision shall not preclude a director from serving the corporation in another capacity and receiving compensation for his services. (2) The salaries of officers shall be fixed by resolution of the board of directors. (3) The directors shall be entitled to a fixed fee and expenses for attendance at each meeting and to no other compensation for their services as directors. (4) The salaries of the directors and officers shall be recommended by a committee subject to approval by the board of directors.

A by-law provision which provided that no salary should be allowed to any officer, director, agent, or employee without the consent of holders of three-fourths of the stock was held to be inconsistent with the statutory provision vesting care and management of the corporate property in the directors, and hence void.⁶⁴

Compliance with fixed authority to authorize compensation. A charter or by-law provision delegating authority to vote compensation or regulating the amount thereof must be strictly complied with. Payment to directors and officers for services must be authorized by those to whom the authority to fix compensation has been delegated by statute, or by the charter or by-

⁶³ *Green v. Felton*, (1908) 42 Ind. App. 675, 84 N. E. 166; *Finch et al. v. Warrior Cement Corp. et al.*, (1928) 16 Del. Ch. 44, 141 A. 54.

⁶⁴ *Security Savings & Trust Co. v. Coos Bay Lumber & Coal Co.*, (1935) 219 Wis. 647, 263 N. W. 187.

laws of the corporation.⁶⁵ Thus, where the statute provides that salaries shall be fixed by the by-laws, a resolution of the board of directors fixing salaries is insufficient.⁶⁶

All persons dealing with the corporation are bound by the limitations and restrictions contained in the statute, charter, or by-laws.⁶⁷ For example, the by-laws provided that the board of directors should fix the salary of officers and agents of the corporation. The president promised additional compensation to a person in a position similar to that of an officer. As the additional compensation was not agreed to by the board, the corporation was not required to pay it.⁶⁸ Also, where absolute power to fix officers' salaries was vested in the board of directors, an officer's informal agreement with stockholders to take less than the salary fixed by the directors was invalid and not binding on the officer.⁶⁹

A corporation can waive a by-law delegating authority to fix compensation in the same way that it waives other by-laws. (See page 730.) Thus, where the corporation allowed its president to fix salaries and pay bonuses over a period of years, it waived a by-law requiring that the board of directors shall fix the salaries of its officers.⁷⁰

Authority of directors and officers to fix their own compensation. If no provision delegating authority to fix compensation can be found, the power to fix salaries of directors must emanate from the stockholders. Directors cannot legally vote themselves compensation of any kind unless they are specifically authorized to do so.⁷¹ However, in the absence of fraud or bad faith, the corporation cannot deny the validity of an action of its directors in voting salaries to themselves in their capacity as employees, when the directors are also the sole stockholders and officers of the corporation.⁷² Directors are not generally considered to be

⁶⁵ *Hayes v. Canada, Atlantic & Plant S. S. Co.*, (1910) 181 F. 289.

⁶⁶ *Ibid.*

⁶⁷ *Colpe v. Jubilee Min. Co.*, (1905) 2 Cal. App. 393, 84 P. 324.

⁶⁸ *Vredenburg v. International Trade Exhibition, Inc.*, (1928) 166 La. 390, 117 So. 437.

⁶⁹ *Superior Brewing Co. v. Curtis*, (1938) (Tex. Civ. App.) 116 S. W. (2d) 853.

⁷⁰ *Bay City Lumber Co. v. Anderson*, (1941) 8 Wash. (2d) 191, 111 P. (2d) 771.

⁷¹ *Tilton v. Gans*, (1915) 90 N. Y. Misc. 84, 152 N. Y. Supp. 981; *Schulte v. Ideal Food Products Co.*, (1929) 208 Iowa 767, 226 N. W. 174; *Jones v. Van Heusen Charles Co.*, (1930) 230 N. Y. App. Div. 694, 246 N. Y. Supp. 204; *Bates Street Shirt Co. v. Waite*, (1931) 130 Me. 352, 156 A. 293; *Redstone v. Redstone Lumber & Supply Co.*, (1931) 101 Fla. 226, 133 So. 882.

⁷² *Plotsky v. Plotsky Egg Co., Inc.*, (1934) 152 N. Y. Misc. 297, 273 N. Y. Supp. 214.

officers within the meaning of a by-law provision giving the board of directors power to vote compensation to officers and employees.⁷³

Corporate officers are under a similar disability to fix their own compensation.⁷⁴ Thus, it has been held that officers cannot agree among themselves that they shall each have a salary for a term of years and that the profits of the business shall be distributed in a certain way. Such an agreement is void as against public policy and is a violation of the duty owing to the stockholders.⁷⁵ Officers, however, do have a discretionary right to enter into agreements with their subordinate agents regarding their compensation, if proper consideration is given to the best interests of the corporation.⁷⁶

Authority of directors to fix officers' salaries. It was held in an early case that in the absence of any prohibitory statutory or by-law provision, directors may fix the salary of officers as an incident of their power to appoint such officers; if they are not permitted to do so, they may have difficulty in finding a person to fill the office.⁷⁷ Undoubtedly the board of directors may fix the salaries of ministerial officers who are not directors,⁷⁸ but excessive salaries of ministerial officers, voted by the directors, can be repudiated by the stockholders.⁷⁹ Where the directors have power to fix the salaries of officers, the court will not interfere with the discretion of the board, even if their action seems ill advised, in the absence of fraud.⁸⁰

In the absence of an express provision giving the board of directors power to fix the salaries of officers or prohibiting them from doing so, the board has the power to fix the salary of one

⁷³ *Schoening et al. v. Schwenk et al.*, (1901) 112 Iowa 733, 84 N. W. 916.

⁷⁴ *Stevenson v. Sicklesteel Lumber Co.*, (1922) 219 Mich. 18, 188 N. W. 449; *Chabot & Richard Co. v. Chabot*, (1912) 109 Me. 403, 84 A. 892. See also *Bloom v. Nathan Vehon*, (1930) 341 Ill. 200, 173 N. E. 270; *Bennett v. Klipto Loose Leaf Co.*, (1926) 201 Iowa 236, 207 N. W. 228; *Taylor v. Citizens' Oil Co.*, (1918) 182 Ky. 350, 206 S. W. 644.

⁷⁵ *Abbott v. Harbeson Textile Co. et al.*, (1914) 162 N. Y. App. Div. 405, 147 N. Y. Supp. 1031; *Pence v. West Side Hospital*, (1932) 265 Ill. App. 560; *Rogers v. Hill*, (1932) 53 F. (2d) 395.

⁷⁶ *American Nat. Assur. Co. of St. Louis, Mo. v. Ricketts*, (1929) 230 Ky. 398, 19 S. W. (2d) 1071.

⁷⁷ *Waite v. Windham County Min. Co.*, (1865) 37 Vt. 608. See also *Harris v. Harris*, (1930) 137 N. Y. Misc. 73, 241 N. Y. Supp. 474.

⁷⁸ *Tilton v. Gans*, (1915) 90 N. Y. Misc. 84, 152 N. Y. Supp. 981; *Godley v. Crandell & Godley Co.*, (1914) 212 N. Y. 121, 105 N. E. 818.

⁷⁹ *Monterey Water Co. v. Voorhees*, (1935) 45 Ariz. 338, 43 P. (2d) 196.

⁸⁰ *Nahikian v. Mattingly*, (1933) 265 Mich. 128, 251 N. W. 421.

of its members who occupies one of the corporate offices and performs services which are beyond the scope of his duties as a director. For instance, it can fix the salary of a director who is the general manager of the corporation.⁸¹ However, such agreements are subject to careful scrutiny by the courts because of the interest of the director, and will be set aside if they are fraudulent or if the salary is grossly excessive.⁸²

Amount of compensation. The amount of compensation which a director or officer may claim is fixed in one of the following ways: (1) by the corporate by-laws; (2) by resolution of the stockholders; (3) by resolution of the board of directors; (4) by a contract between the corporation and the director or officer, executed by the proper authority; or (5) by implication arising from circumstances indicating an understanding that payment was to be made for the services. The third method is applicable to the salaries of directors only when they have authority to fix their own salaries. The fifth method does not apply to directors' salaries for their services as directors, because directors cannot decide among themselves what their salaries shall be.

The board of directors may not grant a salary higher than that permitted in the by-laws,⁸³ and an officer who accepts such a salary must account to the stockholders for the excess.⁸⁴

Factors in determining reasonableness of compensation. Corporate directors, in fixing their own salaries, must have some regard for the financial condition of the corporation,⁸⁵ and the amounts so fixed must be reasonable and not excessive.⁸⁶ To be

⁸¹ *Ransome Concrete Machinery Co. v. Moody*, (1922) 282 F. 29. But see *Redstone v. Redstone Lumber & Supply Co.*, (1931) 101 Fla. 226, 133 So. 882, which held that directors cannot fix their own compensation for services to be rendered as officers, unless expressly authorized by charter or by the stockholders. In *Sterling Loan & Investment Co. v. Litel*, (1924) 75 Colo. 34, 223 P. 753, it was held that since the board of directors had not been given express authority by the stockholders, they could not vote salaries of officers. However, the salaries voted in this case were for the purpose of absorbing the assets of the company.

It has been held that the executive committee may fix the president's salary. *Wallace v. International Trade Exhibition, Inc.*, (1930) 170 La. 55, 127 So. 362.

⁸² *Sotter v. Coatesville Boiler Works*, (1917) 257 Pa. 411, 101 A. 744; *Wellington Bull & Co. v. Morris*, (1928) 132 N. Y. Misc. 509, 230 N. Y. Supp. 122; *Barrett v. Smith*, (1932) 185 Minn. 596, 242 N. W. 392; *Worley v. Dunkle*, (1948) (N. J. Eq.) 62 A. (2d) 699.

⁸³ *Hingston v. Montgomery*, (1906) 121 Mo. App. 451, 97 S. W. 202.

⁸⁴ *Hall v. Woods*, (1927) 325 Ill. 114, 156 N. E. 258.

⁸⁵ *Backus v. Finkelstein et al.*, (1924) 23 F. (2d) 531.

⁸⁶ *Jezeski v. Northeast Inv. Co.*, (1925) 163 Minn. 165, 203 N. W. 978; *Presidio-Mining Co. v. Overton*, (1919) 261 F. 933.

reasonable, the compensation must be in proportion to the executive's ability, his services, and the time which he devoted to such services.⁸⁷ In addition, cognizance must be taken of such factors as the difficulties involved, responsibilities assumed, success achieved, corporate earnings, profits, and prosperity, increase in volume or quality of business or both, and all relevant facts and circumstances.⁸⁸ The compensation should not unduly diminish dividends properly payable to stockholders.⁸⁹ Where salaries have remained on the same level for many years, they are presumptively reasonable.⁹⁰ Compensation paid to officers by other businesses connected with the corporation should be considered in fixing salaries.⁹¹

Examination of compensation by courts. The reasonableness of a salary voted by the directors to one of their members may be examined in a court of equity for the benefit of the corporation, and if the salary is found to be excessive, wasteful, or illegal, it may be recovered.⁹² The courts, however, do not interfere with the activities of either directors or stockholders in fixing compensation unless there is an injustice amounting to fraud or clear abuse of power.⁹³ The dissenting stockholders who seek redress on the ground that compensation is excessive must show bad faith or other breach of trust by the directors in fixing compensation.⁹⁴

See also the discussion of payment of bonuses, on page 338.

Increases in salaries, voted by directors. Directors may not vote increases of salaries to themselves for services already performed under a stipulated salary.⁹⁵ Extra compensation may

⁸⁷ *Wineburgh v. Seeman Bros., Inc.*, (1940) 21 N. Y. Supp. (2d) 180; *Keough v. St. Paul Milk Co.*, (1939) 205 Minn. 96, 285 N. W. 809.

⁸⁸ *Koplar v. Warner Bros. Pictures*, (1937) 19 F. Supp. 173.

⁸⁹ *Gallin v. National City Bank*, (1934) 152 N. Y. Misc. 679, 273 N. Y. Supp. 87; *Keough v. St. Paul Milk Co.*, *supra* (Note 87).

⁹⁰ *Wineburgh v. Seeman Bros., Inc.*, (1940) 21 N. Y. Supp. (2d) 180.

⁹¹ *Richardson v. Blue Grass Mining Co.*, (1939) 29 F. Supp. 658.

⁹² *Calkins v. Wire Hardware Co.*, (1929) 267 Mass. 52, 165 N. E. 889; *McQuillen v. National Cash Register Co.*, (1939) 27 F. Supp. 639, *aff'd* (1940) 112 F. (2d) 877, *cert. denied*, (1940) 311 U. S. 695, 61 S. Ct. 140, 316; *Von Herberg v. Von Herberg*, (1940) 6 Wash. (2d) 100, 106 P. (2d) 737; *Albers v. Villa Moret*, (1941) 46 Cal. App. (2d) 54, 115 P. (2d) 238, *citing* *Rogers v. Hill*, (1933) 289 U. S. 582, 53 S. Ct. 731; *Worley v. Dunkle*, (1948) (N. J. Eq.) 62 A. (2d) 699.

⁹³ *Shannon v. Early Foundry Co.*, (1929) 296 Pa. 141, 145 A. 708; *Nahikian v. Mattingly*, (1933) 265 Mich. 128, 251 N. W. 421; *Schmitt v. Eagle Roller Mill Co.*, (1937) 199 Minn. 382, 272 N. W. 277; *Perrott v. U. S. Banking Corp.*, (1944) 53 F. Supp. 953.

⁹⁴ *Gallin v. National City Bank*, (1934) 152 N. Y. Misc. 679, 273 N. Y. Supp. 87.

⁹⁵ *Godley v. Crandall & Godley Co.*, (1914) 212 N. Y. 121, 105 N. E. 818.

be authorized by the directors for work done by officers beyond the scope of their duties,⁹⁶ unless the statute, charter, or by-laws require that the stockholders fix all compensation paid to officers.⁹⁷

Increases in salary are subject to the general rules governing the power of directors to vote compensation to themselves. If the passage of a resolution granting an increase in salary is dependent upon or effected by the vote of an interested director, it is *prima facie* voidable at the election of a stockholder.⁹⁸ However, a director-officer's act in increasing his own salary was held valid under the following circumstances: there was no fraud and no attempt to appropriate the corporate funds unlawfully under the pretense of salary; the salary was not excessive; the objecting stockholders knew of the increase at the time and did not object.⁹⁹ In this case, the board of directors, consisting of the director-officer, his wife, and his son, had ratified the increase of salary in a blanket ratification of all the acts of the officers.

Increase in salaries, voted by stockholders. A stockholders' resolution providing for extra compensation for managing directors is not voidable at the election of a minority stockholder merely because it was passed by the votes of the stockholder-directors benefited thereby. Such a resolution will be set aside only if it is found to be disadvantageous to the minority stockholders.¹⁰⁰ Nor will a stockholders' resolution that authorizes payment to the president of additional salary for additional services be set aside, if the additional services are worth the amount specified. The legality of such a resolution is not affected by the fact that the president owns practically all of the stock.¹⁰¹

Necessity of formal action to fix compensation. A formal contract to give compensation need not be made, even though a resolution has been passed authorizing the board of directors to enter into such agreement. In other words, the failure of the corporation to draw the contract will not interfere with the right of the persons interested to collect the compensation due them.¹⁰²

⁹⁶ *Ibid.*

⁹⁷ See *Ontjes v. MacNider*, (1942) 232 Iowa 562, 5 N. W. (2d) 860.

⁹⁸ *Davis v. Pearce et al.*, (1928) 30 F. (2d) 85.

⁹⁹ *Cook et al. v. Cook et al.*, (1930) 270 Mass. 534, 170 N. E. 455. See also *Lowman v. Harvey R. Pierce Co.*, (1923) 276 Pa. 382, 120 A. 404.

¹⁰⁰ *Booth v. Beattie*, (1922) 95 N. J. Eq. 776, 118 A. 257.

¹⁰¹ *Wiseman v. Musgrave*, (1944) 309 Mich. 523, 16 N. W. (2d) 60.

¹⁰² *Sotter v. Coatesville Boiler Works*, (1917) 257 Pa. 411, 101 A. 744. See also

It is not absolutely necessary that the directors exercise their power to fix compensation of officers at a formal meeting or by a formal vote, or that a record be shown of the directors' exercise of their power, if the person to be paid can show that there was a mutual understanding between him and all the directors.¹⁰³ Thus, if an officer is called before the board of directors, or a duly authorized committee, and promised a stated increase in salary as inducement to continue in the service of the corporation, he is entitled to the increase if he assents to the proposition and acts upon it. The agreement does not have to be reduced to writing or included in a formal resolution.¹⁰⁴

As a general rule, however, where the board is given the power to determine salaries, it must act as a board, and an agreement regarding compensation, made between an officer and one or two of the directors, is not binding on the corporation.¹⁰⁵

A resolution to pay an officer a salary has been held to be a contract, subject, however, to review by the courts as to amount.¹⁰⁶

Resolutions fixing compensation. While it is not always absolutely essential, from a legal standpoint, that a resolution be passed fixing the compensation of directors and officers,¹⁰⁷ the corporation that would avoid misunderstandings, disputes, and lawsuits would do well to fix the compensation of directors and officers by resolution and to keep a careful record of the action taken. The utmost care should be exercised in drawing the resolutions. The cases that have come before the courts for construction as to the meaning of resolutions authorizing compensation show the necessity for clear and unambiguous language.

Rules for framing compensation resolutions. A study of the decisions shows that the rules given below should be followed by those who are called upon to frame compensation resolutions.

1. Name the person to whom compensation is to be paid.

Jezeski v. Northeast Inv. Co., (1925) *supra* (Note 86); *In re Gouverneur Pub. Co.*, (1909) 168 F. 113.

¹⁰³ *Chabot & Richard Co. v. Chabot*, (1912) 109 Me. 403, 84 A. 892. See also *Cook v. Cook*, (1930) 270 Mass. 534, 170 N. E. 455.

¹⁰⁴ *Young v. U. S. Mortgage & Trust Co.*, (1915) 214 N. Y. 279, 108 N. E. 418.

¹⁰⁵ *Shannon v. Early Foundry Co.*, (1929) 296 Pa. 141, 145 A. 708; *Dubbs v. Kramer*, (1931) 302 Pa. 455, 153 A. 733.

¹⁰⁶ *McMahon v. Burdette*, (1930) 106 N. J. Eq. 79, 150 A. 12.

¹⁰⁷ *In re Gouverneur Pub. Co.*, (1909) 168 F. 113; *Besch v. Western Carriage Mfg. Co.*, (1889) 36 Mo. App. 333.

2. Indicate the service for which the compensation is to be paid.¹⁰⁸

3. State the period of the service to be covered by the compensation.¹⁰⁹

4. Show when payment is to be made.

5. Indicate clearly the amount to be paid. (See page 416 for a discussion of payment of services with stock of the corporation.)

6. State exactly the formula for determining any amount to be paid in addition to a specific salary. A resolution that gave the chairman of the board a specified salary "plus such additional amounts, if any," as the board might decide, was held to constitute an implied contract for payment of reasonable compensation in addition to the stated salary.¹¹⁰

7. State clearly the basis upon which payment is to be made.

8. If payment is to be made on a percentage basis, define clearly the basis upon which the percentage is to be calculated.

9. If payment of salaries is to be made contingent upon the profits of the corporation, define clearly what is meant by profit.¹¹¹

10. If salaries are to be paid in any event, do not limit the resolution by saying that "salaries shall be paid out of earnings," since it has been held that such a clause refers to "net earnings," and consequently, where there are no net earnings, salaries cannot be paid.¹¹²

11. Guard against unnecessary implications in the wording of the resolution. A resolution reading "that the salaries of the officers of the company be and the same hereby are fixed at the rates allowed the past year, namely, etc.," was held to be an

¹⁰⁸ *Tietsort v. Irwin*, (1925) 9 F. (2d) 65. A resolution will not be invalid because it does not define the duties for which extra compensation was paid. *Booth v. Beattie*, (1922) 95 N. J. Eq. 776, 118 A. 257, 123 A. 925. See *Huebner v. Advance Refrigerator Co.*, (1929) 200 Wis. 233, 227 N. W. 868.

¹⁰⁹ The phrase "for ensuing year" means that salary is to be provided for that year only, and an officer holding over after the expiration of his term cannot collect the same compensation for the next year. *Huebner v. Advance Refrigerator Co.*, (1929) 200 Wis. 233, 227 N. W. 868. But see page 322 as to continuation of compensation.

¹¹⁰ *Holmes v. Republic Steel Corp.*, (1948) (Ohio Ct. App.) 84 N. E. (2d) 508, *aff'g in part, rev'g in part*, 69 N. E. (2d) 396.

¹¹¹ See *Witt v. McNeil & Bro. Co.*, (1929) 296 Pa. 386, 146 A. 27, in which the meaning of "dividend profits" is construed.

¹¹² *Harlan-Kellioka Coal Co. v. Kelly*, (1924) 203 Ky. 260, 262 S. W. 259.

admission by the board of directors that a salary was fixed for the preceding year.¹¹³

12. Consider each resolution concerning compensation to be a contract of employment, and give it the same care and thought that you would give such a contract.¹¹⁴

13. In recording the vote on the resolution, state that the interested director did not vote.¹¹⁵

Right of interested directors and officers to vote on compensation. The general principle that prohibits a director from voting upon a matter in which he has a personal interest is enforced with great vigor against directors voting upon the question of their own salaries. It is well settled that, when a salary or compensation is voted to a director, the vote is illegal if it is carried only by including the vote of the director who is to receive the pay or salary, or if the vote is induced by the influence of the interested director.¹¹⁶ The same rule would apply if the salary were being voted by the directors for themselves as officers. The resolution must be passed without the vote of anyone pecuniarily interested in the resolution.¹¹⁷

Effect of vote by interested directors and officers. Voting by directors and officers on resolutions fixing their own salaries does not necessarily take from them their right to compensation. Even if a contract under which a director or officer draws a salary for special services is illegal because he voted for it, he might be allowed to keep the salary on the theory that he is entitled to the reasonable value of his services.¹¹⁸ When yearly salaries are fixed by the stockholders, any subsequent action by the board is unnecessary; the fact that a director votes in favor of his own salary is then immaterial.¹¹⁹

A resolution will not be invalid if an interested director votes on the question of his own salary and a sufficient number of directors besides himself vote in favor of the resolution,¹²⁰ or if

¹¹³ *Smith v. Woodville Consolidated Silver Min. Co.*, (1885) 66 Cal. 398, 5 P. 688.

¹¹⁴ See *Maune v. Unity Press*, (1911) 143 N. Y. App. Div. 94, 127 N. Y. Supp. 1002.

¹¹⁵ *Ontjes v. MacNider*, (1942) 232 Iowa 562, 5 N. W. (2d) 860.

¹¹⁶ *Miller & Pardee v. Pardee*, (1926) 242 Ill. App. 233; *Bennett v. Klipto Loose Leaf Co.*, (1926) 201 Iowa 236, 207 N. W. 228; *Connors v. Swords Co.*, (1934) 276 Ill. App. 318; *State v. Miller*, (1939) 62 Ohio App. 43, 23 N. E. (2d) 321.

¹¹⁷ *Wonderful Group Min. Co. v. Rand*, (1920) 111 Wash. 557, 191 P. 631; *Angelus Securities Corporation v. Ball*, (1937) 20 Cal. App. (2d) 423, 67 P. (2d) 152.

¹¹⁸ *Kenton v. Wood*, (1940) 56 Ariz. 325, 107 P. (2d) 380.

¹¹⁹ *Kimball v. Kimball Bros.*, (1944) 143 Ohio St. 500, 56 N. E. (2d) 60.

¹²⁰ *Anderson v. Calaveras Central Min. Corp.*, (1936) 13 Cal. App. (2d) 338, 57

the interested director is merely present at the meeting and does not vote on the resolution.¹²¹

In some jurisdictions a resolution fixing compensation, carried by the vote of the interested director, is not void but merely voidable. For example, it has been held that the resolution is voidable only if it is fraudulent or the salary is excessive, but the burden is on the director to show that the salary is just.¹²² A resolution that is illegal because an interested director voted on it can be ratified. See page 147, footnote 117.

A by-law adopted by the directors, authorizing payment of attendance fees to directors, was valid, although directors who voted in favor of the by-law subsequently benefited from it.¹²³

Counting an interested director to make a quorum. As a general rule, interested directors cannot be counted in determining whether a quorum is present to pass upon the question of their own salaries.¹²⁴ However, a resolution was considered valid where it was passed by a majority of the board of directors and a majority of the quorum, the interested director not voting on the resolution, but his presence being counted to make up the quorum.¹²⁵

Voting of salaries of officers by officer-directors. The rule that interested directors cannot vote on the question of the payment of salaries to themselves may mean that the salaries of the directors or officers must be fixed by the stockholders even in cases where the power to fix salaries has been given to the board of directors.

Let us take a typical situation where the directors are authorized by the by-laws to appoint the officers of the corporation and to fix their salaries, and see how the rule that interested directors cannot vote on the question of their own salaries affects the situation. Suppose there are five directors. At a regular meeting they have appointed from their own number the following offi-

P. (2d) 560. See also *Bassett v. Fairchild*, (1901) 132 Cal. 637, 64 P. 1082; *Standard Furniture Co. v. Hobel Butler Co.*, (1931) 161 Wash. 109, 296 P. 153; *Barrett v. Smith*, (1932) 185 Minn. 596, 42 N. W. 392.

¹²¹ *Hax v. R. T. Davis Mill Co.*, (1890) 39 Mo. App. 453; *Mathews v. Fort Valley Cotton Mills*, (1934) 179 Ga. 580, 176 S. E. 505.

¹²² *Francis v. Brigham-Hopkins Co.*, (1908) 108 Md. 233, 70 A. 95.

¹²³ *Carter v. Louisville R. Co.*, (1931) 238 Ky. 42, 36 S. W. (2d) 836.

¹²⁴ See page 145, Chapter 3. See also *Bassett v. Fairchild*, (1901) *supra* (Note 120); *Fields v. Victor Building & Loan Co.*, (1918) 73 Okla. 207, 175 P. 529; *Angelus Securities Corporation v. Ball*, (1937) 20 Cal. App. 423, 67 P. (2d) 152.

¹²⁵ *Gumaer v. Cripple Creek Tunnel, Transportation & Mining Co.*, (1907) 40 Colo. 1, 90 P. 81.

cers: a president, a vice-president, and a secretary-treasurer. They now wish to fix the salaries of these three officers. Under the by-laws a majority vote of the board of directors is necessary to pass any resolution. Thus, it is necessary for three disinterested members of the board to vote for the passage of the resolution fixing the compensation. Obviously, one resolution fixing the salary of the three officers cannot be introduced, for, if all the interested directors do not vote, only two directors are left to vote on the resolution, and that number would not be sufficient to pass upon the resolution.¹²⁶ However, an opposite view has been taken of this method of voting, on the theory that there are sufficient disinterested votes to carry each part of the resolution.¹²⁷

The next thought that occurs to the directors is to introduce a separate resolution fixing the salary of each officer. The director whose salary as officer was being considered would not vote upon the resolution and there would still be a sufficient number of directors left to obtain the votes of three disinterested directors. This procedure has been held valid in some cases,¹²⁸ particularly when the salary voted was not excessive or fraudulent.¹²⁹ It has been held invalid in other cases,¹³⁰ principally on the theory that introducing several resolutions is equivalent to breaking the resolution into parts, and all the directors are interested in the common object of getting a salary for each of them.¹³¹ Another objection to this method of voting salaries is that a chief stockholder can induce his codirectors, who are dummies and under his control, to vote a large salary to him as an officer.¹³²

What absolutely certain method remains, then, for the directors to follow in fixing their compensation as officers where the directors fill all or most of the offices? The answer is that the stockholders should fix the salaries of the director-officers at a meeting, or the action of the directors should be ratified by the stockholders.

¹²⁶ *Beha v. Martin*, (1914) 161 Ky. 838, 171 S. W. 393.

¹²⁷ *Funsten v. Funsten Com. Co.*, (1896) 67 Mo. App. 559. See also *Barrett v. Smith*, (1932) 185 Minn. 596, 242 N. W. 392.

¹²⁸ *Funsten v. Funsten Com. Co.*, (1896) *supra* (Note 127).

¹²⁹ *McNab v. McNab & Harlin Mfg. Co.*, (1892) 133 N. Y. 687, 31 N. E. 627, *aff'g* 68 Hun 18, 16 N. Y. Supp. 448. See also *Dauids v. Dauids*, (1909) 135 N. Y. App. Div. 206, 120 N. Y. Supp. 350.

¹³⁰ *Mallory v. Mallory Wheeler Co.*, (1891) 61 Conn. 131, 23 A. 708.

¹³¹ *Wonderful Group Mining Co. v. Rand*, (1920) 111 Wash. 557, 191 P. 631; *Angelus Securities Corporation v. Ball*, (1937) 20 Cal. App. 423, 67 P. (2d) 152.

¹³² *Holcomb v. Forsyth*, (1927) 216 Ala. 486, 113 So. 516.

Ratification of compensation of directors and officers. If the directors have exceeded their authority in fixing compensation for themselves or the officers, their acts may or may not be validated, depending upon the facts in each case and the circumstances under which such actions were taken.¹³³ If the directors have acted honestly and have fixed a reasonable compensation, their acts will be considered voidable,¹³⁴ that is, subject to ratification by the stockholders.¹³⁵ If, however, in voting themselves salaries the directors have perpetrated a fraud upon the stockholders, their acts will be considered absolutely void. Void acts cannot be ratified by the stockholders who are also the directors.¹³⁶ Ratification of unauthorized payments to directors and officers is subject to the rules that govern ratification.¹³⁷ On a motion at a stockholders' meeting to ratify the acts of the directors, interested directors who are stockholders have the right to vote.¹³⁸

A resolution that is illegal because the vote of an interested director was essential to the adoption can subsequently be ratified by complying with the statutory method of validating such a resolution.¹³⁹ In some cases the resolution must be ratified by a competent board of directors;¹⁴⁰ in others, by the stockholders; or it can be authorized in advance by them.¹⁴¹

Ratification of excessive salaries fixed by directors. Salaries fixed by the board of directors, even if subsequently ratified by the stockholders, must not be excessive. Otherwise a majority stockholder could ratify an illegal vote of the board, and the effect would be the same as though there were no ratification.¹⁴²

¹³³ *Chamberlain v. Chamberlain, Care & Boyce, Inc.*, (1925) 124 N. Y. Misc. 48, 209 N. Y. Supp. 258; *Collins v. Hite*, (1930) 109 W. Va. 79, 153 S. E. 240; *Bates Street Shirt Co. v. Waite*, (1931) 130 Me. 352, 156 A. 293.

¹³⁴ *Sotter v. Coatesville Boiler Works*, (1917) 257 Pa. 411, 101 A. 744; *Booth v. Beattie*, (1922) 95 N. J. Eq. 776, 118 A. 257; *Godley v. Crandall & Godley Co.*, (1914) 212 N. Y. 121, 105 N. E. 818. See also *Mathews v. Fort Valley Cotton Mills*, (1934) 179 Ga. 580, 176 S. E. 505.

¹³⁵ *Ibid.*

¹³⁶ *McKey v. Swenson*, (1925) 232 Mich. 505, 205 N. W. 583.

¹³⁷ See page 251. See also *Shickel & Berryville Land & Imp. Co.*, (1901) 99 Va. 88, 37 S. E. 813.

¹³⁸ *Russell v. Patterson Co.*, (1911) 232 Pa. 113, 81 A. 136; *Sotter v. Coatesville Boiler Works*, (1917) 257 Pa. 411, 101 A. 744; *Shickel v. Berryville Land & Imp. Co.*, *supra* (Note 137).

¹³⁹ *Pece v. Tama Trading Co.*, (1937) 22 Cal. App. (2d) 219, 70 P. (2d) 652.

¹⁴⁰ *Wickersham v. Crittenden*, (1895) 110 Cal. 332, 42 P. 893; *Tefft v. Schaefer*, (1925) 136 Wash. 302, 239 P. 837, 1119.

¹⁴¹ *Massoth v. Central Bus Corp.*, (1926) 104 Conn. 683, 134 A. 236.

¹⁴² *McKey v. Swenson*, (1925) 232 Mich. 505, 205 N. W. 583.

For this reason, the courts will review the acts of directors in fixing compensation, at the instance of a minority stockholder.¹⁴³ It has been held that ratification by all stockholders is required to legalize the act of a director in paying salaries in excess of authorized amounts.¹⁴⁴

Salaries of corporate officers, fixed by resolution at the time such officers were in control of the corporation, are open to investigation, whether or not the resolution providing for them was void.¹⁴⁵ If it is found that the salaries were exorbitant, the court will permit a recovery of the excess that has been paid, or will grant any other relief which the circumstances require.¹⁴⁶ Officers have been held liable for all salaries received by them when no justification was offered for the salaries, and the reasonable worth of the services was not shown.¹⁴⁷

Authorization of employee benefit plans. Many corporations have been adopting employee benefit plans that provide for retirement benefits, profit-sharing, or other deferred remuneration. Two principal reasons account for this trend: (1) a large part of the cost is deductible as a business expense in arriving at the corporation's net taxable income; (2) it is good business policy, because it reduces labor turnover, increases employee efficiency, and attracts a better class of employees. Any plan adopted by a corporation must conform, of course, to the requirements of the state corporation law. Unless prohibited by statute, charter, or by-law, the board of directors has authority, as one of its implied powers, to establish an employee benefit plan.¹⁴⁸

Even though neither statute, charter, nor by-law requires stockholder approval of a benefit plan, the usual practice is to obtain such backing. Stockholder approval is advisable, certainly, if the number of directors participating in the benefits of

¹⁴³ *Tilton v. Gans*, (1915) 90 N. Y. Misc. 84, 152 N. Y. Supp. 981; *Collins v. Hite*, (1930) 109 W. Va. 79, 153 S. E. 240; *Godley v. Crandall & Godley Co.*, (1914) 212 N. Y. 121, 105 N. E. 818; *Lillard v. Oil, Paint & Drug Co.*, (1903) 70 N. J. Eq. 197, 56 A. 254.

¹⁴⁴ *Collins v. Hite*, (1930) 109 W. Va. 79, 153 S. E. 240.

¹⁴⁵ *Backus v. Finkelstein et al.*, (1924) 23 F. (2d) 531.

¹⁴⁶ *Sotter v. Coatesville Boiler Works*, (1917) 257 Pa. 411, 101 A. 744; *Beha v. Martin*, (1914) 161 Ky. 838, 171 S. W. 393; *Hall et al. v. Woods et al.*, (1927) 325 Ill. 114, 156 N. E. 258; *Albers v. Villa Moret*, (1941) 46 Cal. App. (2d) 54, 115 P. (2d) 238.

¹⁴⁷ *McKey v. Swenson*, (1925) 232 Mich. 505, 205 N. W. 583.

¹⁴⁸ *Nemser v. Aviation Corp.*, (1942) 47 F. Supp. 515; *Holmes v. Republic Steel Corp.*, (1946) (Ohio Ct. C. P.) 69 N. E. (2d) 396, aff'd in part, rev'd in part, (1948) 84 N. E. (2d) 508.

the plan does not leave a disinterested quorum of directors available to adopt the plan. The large and permanent expenditure involved in the average plan suggests the desirability of obtaining approval of the stockholders, since this procedure would relieve the directors of at least moral responsibility should the plan prove less satisfactory than was anticipated. Finally, if an employee benefit plan is adopted or ratified by the majority stockholders, after a full and frank explanation, it is usually binding on the minority.¹⁴⁹ However, the minority may sue to set the plan aside, and the question of its reasonableness and fairness is then left to the jury.^{149a}

The plan must be administered in strict accordance with its terms. Thus, where a bonus plan provided for the payment of a bonus to "officers and employees," non-officer directors and counsel could not be included. The authorization of specified officers to distribute the bonus in such proportions as they saw fit did not authorize them to include persons ineligible to receive the bonus under the plan.¹⁵⁰

The rule that a corporation is without power to pay compensation for past services does not apply to the payment of a lump sum to an insurance company for employees who are near the retirement age when a pension plan is established.¹⁵¹

Payment of bonuses to employees, not under a plan. The payment of bonuses after services have been rendered, to persons whose salaries have been fixed, has been recognized by the courts as a common practice among large corporations, followed for the purpose of encouraging employees to work diligently, become less wasteful, remain with the company, and grow more skillful.¹⁵² Some courts, however, have regarded the paying of bonuses to employees as a reward or as additional compensation for past services, in the absence of express agreement therefor, as unusual and not legal except when authorized by a formal

¹⁴⁹ *Diamond v. Davis*, (1945) 62 N. Y. Supp. (2d) 181.

^{149a} *Fogelson v. American Woolen Co., Inc.*, (1948) 170 F. (2d) 660, rev'g (1948) 79 F. Supp. 291, on the ground that the case should not have been dismissed summarily on motion.

¹⁵⁰ *Mann v. Luke*, (1943) 44 N. Y. Supp. (2d) 202.

¹⁵¹ *Osborne v. United Gas Imp. Co.*, (1944) 51 Pa. D. & C. 383, aff'd, (1946) 354 Pa. 57, 46 A. (2d) 208.

¹⁵² *Putnam v. Juvenile Shoe Co.*, (1925) 307 Mo. 74, 269 S. W. 593; *Neff v. Gas & Electric Shop et al.*, (1929) 232 Ky. 66, 22 S. W. (2d) 265. See, however, *Shear Co. v. Harrington*, (1924) (Tex. Civ. App.) 266 S. W. 554, in which the court refused to enforce a promise to pay a gratuity to an employee.

vote of the directors, acting as a board.¹⁵³ Other courts have gone so far as to hold that directors cannot give bonuses to employees for past services without a formal authorization from the stockholders.¹⁵⁴ The sums paid must always be reasonable in amount, as related to the employee's services and salary.¹⁵⁵

Payment of bonuses to directors and officers, not under a plan. Under the general rule prohibiting directors from fixing their own compensation, directors and officers who work under a fixed salary cannot, without authority, vote bonuses to themselves.¹⁵⁶ A corporation cannot make bonus payments to officers unless the bonus is a matter of contractual obligation,¹⁵⁷ especially over the protest of any stockholders.¹⁵⁸ It has been held, however, that it is neither illegal nor against public policy to contract for or pay a bonus, provided (1) that the services are valuable and are rendered with an understanding that they are to be so rewarded; or (2) that they are rendered under circumstances which raise a presumption of the intention to pay.¹⁵⁹ A by-law adopted by stockholders, providing for payment of a percentage of net profits to officers as extra compensation in the nature of a bonus, has also been upheld. The court stated, however, that, against the protest of a stockholder, the by-law could not be used to justify payments so large as to amount to spoliation and waste of corporate property.¹⁶⁰ Incentive compen-

¹⁵³ *A. J. Anderson Co. v. Kinsolving*, (1924) (Tex. Civ. App.) 262 S. W. 150.

¹⁵⁴ *Richardson v. Blue Grass Mining Co.*, (1939) 29 F. Supp. 658; *Parrott v. Noel*, (1925) 8 F. (2d) 368.

¹⁵⁵ *Neff v. Gas & Electric Shop*, supra (Note 152).

¹⁵⁶ *Stevenson v. Sicklesteel Lumber Co.*, (1922) 219 Mich. 18, 188 N. W. 449; *A. J. Anderson Co. v. Kinsolving*, (1924) (Tex. Civ. App.) 262 S. W. 150; *Schall v. Althaus*, (1924) 208 N. Y. App. Div. 103, 203 N. Y. Supp. 36; *Thauer v. Gaebler*, (1930) 202 Wis. 296, 232 N. W. 561.

¹⁵⁷ *Boyum v. Johnson*, (1942) 127 F. (2d) 491; *Holmes v. Republic Steel Corp.*, (1946) (Ohio Ct. C. P.) 69 N. E. (2d) 396, aff'd in part, rev'd in part, (1948) 84 N. E. (2d) 508.

¹⁵⁸ *In re Fergus Falls Woolen Mills Co.*, (1941) 41 F. Supp. 355.

¹⁵⁹ *Church v. Harnit et al.*, (1929) 35 F. (2d) 499. In this case the board of directors consisted of five members, four of whom were the corporate officers. The bonuses were paid to the officers pursuant to an agreement among the directors. It was held that the agreement was not nullified by the fact that the directors agreed among themselves what the amounts of the bonuses would be, since no fraud or lack of good faith on the part of the directors was shown, and since it further appeared that the bonuses were fair and reasonable. See also *Wineburgh v. Seeman Bros., Inc.*, (1940) 21 N. Y. Supp. (2d) 180; *In re Wood's Estate*, (1941) 299 Mich. 635, 1 N. W. (2d) 19.

¹⁶⁰ *Rogers v. Hill*, (1933) 289 U. S. 582, 53 S. Ct. 731, rev'g 60 F. (2d) 109. It was stated that the court could determine whether or not, and to what extent, such payments constituted a waste. See also "The American Tobacco Co. Bonus

sation in the form of an option to purchase stock of the corporation at a fixed price has been held legal.^{160a} If the bonuses are not reasonable in amount, they may be considered a misappropriation of funds, even if provided for with proper formalities.¹⁶¹

A bonus is not necessarily valid because it is authorized by the board of directors. The circumstances under which it was given are subject to scrutiny by the courts to determine whether the purpose for which it was given is legal.¹⁶² Thus, it is illegal for directors to donate to themselves property of the corporation in the guise of additional compensation, and a bonus voted by the directors to themselves that amounts to no more than a gift of the corporate property is without consideration and void.¹⁶³

The action of directors in voting bonuses to themselves, or additional compensation in the form of increased salaries, may be ratified at a stockholders' meeting. The stockholders, including the interested directors, have full power to ratify the action of the directors if no fraud is involved.¹⁶⁴

Plans, Legal Control of Executive Remuneration," 46 *Harvard Law Review* 828 (1933), "Profit-Sharing for Executives and Employees—American Tobacco Co., a Case in Point," 42 *Yale Law Journal* 419 (1933); "Legal Problems of Corporate Executive Bonus Plans," 41 *Yale Law Journal* 109 (1931).

^{160a} Wyles v. Campbell, (1948) 77 F. Supp. (2d) 343.

¹⁶¹ Shera v. Carbon Steel Co., (1917) 245 F. 589.

¹⁶² Putnam v. Juvenile Shoe Co., (1925) 307 Mo. 74, 269 S. W. 593; Rinn v. Asbestos Mfg. Co., (1938) 101 F. (2d) 344.

¹⁶³ Schall v. Althaus, (1924) 208 N. Y. App. Div. 103, 203 N. Y. Supp. 36; Auer v. Wm. Meyer Co., (1944) 322 Ill. App. 244, 54 N. E. (2d) 394.

¹⁶⁴ Sotter v. Coatesville Boiler Works, (1917) 257 Pa. 411, 101 A. 744; Russell v. Patterson Co., (1911) 232 Pa. 113, 81 A. 136; Schmidt v. Paper Box Co., (1936) 185 *Pittsburgh Legal Journal* 541.

CHAPTER 12

FORMS OF RESOLUTIONS CONCERNING COMPENSATION OF DIRECTORS, OFFICERS, AND EMPLOYEES

No. 285

Directors' resolution fixing salary of director.

RESOLVED, That, pursuant to Article, Section of the By-laws of this Corporation, the salary of, as a director of this Corporation, be and it hereby is fixed at the sum of (\$.....) Dollars per year, to be paid to the said during his incumbency in said office, and until otherwise provided by resolution of the Board of Directors, in monthly installments of (\$.....) Dollars each, on the last day of each and every month.

No. 286

Resolution of directors fixing salary of vice president and general manager.

WHEREAS, was duly elected by this Board of Directors on the .. day of, 19.., to the office of Vice President and General Manager of this company, and the salary to be paid to said as compensation for services rendered in the capacity of Vice President and General Manager of this company was not fixed,

THEREFORE, BE IT RESOLVED, That the salary of as Vice President and General Manager of this company be and the same is hereby fixed at Dollars (\$.....) per month from 19.., to 19.., to be paid on the .. day of each and every month.

No. 287

Resolution of directors authorizing compensation of members of executive committee, based upon net profit.

RESOLVED, That the Executive Committee, composed of five members, shall receive as compensation ten per cent (10%) per annum of

the net profits of the Corporation, and that said ten per cent (10%) shall be paid to the five members of the said Executive Committee in equal amounts, that is, one-fifth ($\frac{1}{5}$) of ten per cent (10%) per annum of the net profits to each member of said Committee, and that the amount paid to each member of said Committee shall not exceed ten thousand dollars (\$10,000) per annum. For the purpose of fixing such compensation it is hereby understood that net profits shall be the amount available for dividends on the common stock and for surplus and reserves, that is, net income after deductions have been made for interest on the indebtedness, expenses, all accrued taxes, and preferred dividends.

No. 288

Directors' resolution fixing attendance fees of nonsalaried directors.

RESOLVED, That beginning with the next regular meeting of the Board of Directors, to be held on the .. day of, 19.., the fee of nonsalaried members of the Board for attending any regular or special meeting of said Board shall be the sum of (\$.....) Dollars per meeting.

No. 289

Directors' resolution allotting lump sum as fee for attending directors' meetings.

RESOLVED, That at each and every meeting of the Board of Directors of this Corporation, whether general or special, the aggregate sum of (\$.....) Dollars shall be paid as attendance fees to the Board of Directors, the said sum to be divided equally among those directors who are present at the roll call and are still present at the adjournment of the meeting, or have been properly excused during the meeting.

No. 290

Directors' resolution fixing attendance fees for directors and members of executive committee.

RESOLVED, That a fee of (\$.....) Dollars be paid to each member of the Board of Directors for attendance at meetings of directors, adjourned meetings on the same day counting as one meeting only, and adjourned meetings to a subsequent date counting as two meetings. Members of the Board of Directors, however, residing out of town, shall be paid (\$.....) Dollars each for attendance at such meetings; and be it further

RESOLVED, That a fee of (\$.....) Dollars be paid to each member of the Executive Committee for attendance at meetings of the

Executive Committee, adjourned meetings on the same day counting as one meeting only, and adjourned meetings to a subsequent day counting as two meetings.

No. 291

Directors' resolution fixing officers' salaries at stated sums.

RESOLVED, That commencing with the .. day of, 19..., and until changed by resolution of the Board of Directors of the Corporation, the salaries of the officers of this Corporation, payable in monthly installments on the last day of each month, shall be as follows:

President	\$.....
Vice President	\$.....
Secretary	\$.....
Treasurer	\$.....

No. 292

Directors' resolution fixing officers' salaries at fixed amount monthly, plus proportion of net profits at end of year; deduction for inactivity.

WHEREAS, the earnings of the Corporation are due largely to the engineering knowledge and training of and , President and Secretary, respectively, and it is necessary to fix their compensation for services during the time each shall be actively engaged in the business of the Corporation during the year 19..,

NOW, THEREFORE, BE IT RESOLVED, That the salaries of , President, and , Secretary for the year 19.., be and they hereby are fixed at the sum of (\$.....) Dollars per month to each of them, payable to each at the end of each and every month, and that at the end of the year, each of them shall receive as salary the further sum of an amount equal to one third of the net profits of the Corporation, it being understood that the term "net profits" means earnings made in the operation of the business of the Corporation after: (1) all expenses incident to the operation of the business have been paid; (2) five (5%) per cent on the capital employed has been set aside; and (3) depreciation of ten (10%) per cent on fixtures, equipment, and small tools, and six (6%) per cent depreciation on buildings, have been set aside; provided, however, that if either of said officers shall not be active in the affairs of the Corporation for any period exceeding one week at any one time, a proportionate deduction shall be made from such salary.

No. 293

Directors' resolution authorizing payment of percentage of net profits as compensation to officer for special service during year.

RESOLVED, That as special compensation for the services rendered by, President of this Corporation, in effecting the consummation of numerous contracts for the sale of the products of this Corporation during the year 19.., the said shall receive (....%) per cent of the net profits of this Corporation during the year 19.., as shown by the books of the Corporation, but not to exceed the sum of (\$.....) Dollars, the said special compensation to be paid to at the end of the year 19...

RESOLVED FURTHER, That for the purpose of fixing such compensation, net profits shall comprise the amount available for dividends on the common stock and for surplus and reserves—that is, net income after deductions have been made for interest on the indebtedness, expenses, all accrued taxes, and preferred dividends.

[Note. The definition of "net profits" is a matter that requires careful consideration from persons skilled in accounting practice. See also forms Nos. 294, 295, 314.]

No. 294

Directors' resolution authorizing participation of officers in net earnings of corporation.

RESOLVED, That in addition to their present salaries, the officers of the corporation, comprising, and, holding, respectively, the offices of,, and, shall participate from year to year in the net earnings, as shown by the books at the close of each business year, to the extent of (....%) per cent of the net gain after the regular (....%) per cent dividend to the stockholders has been set aside, to be equally divided among them. The remaining (....%) per cent of the net gain shall be proportioned to "wear and tear of plant and machinery," and to a surplus or undivided profit account, as may be determined by the Board of Directors.

[Note. See note to form No. 293.]

No. 295

Resolution of directors authorizing payment of percentage of net earnings to chief executives in proportions recommended by president.

RESOLVED, That the Treasurer shall be and he hereby is authorized to make payments to the President and certain other officers and em-

ployees of the Company of additional compensation for services rendered during the year 19... The total so to be paid shall be ten (10%) per cent of net earnings in excess of (\$....) Dollars.

For the above purpose, net earnings for the year shall mean the consolidated net earnings of the Company and all its subsidiaries, after provision has been made for depreciation and all other reserves, and after all interest charges and all taxes, except United States corporation income taxes and British income taxes, have been deducted, but before any deduction for sinking fund requirements have been made.

The amount so computed shall be divided among such officers and employees of the Company and in such proportions as the President may recommend, subject to the approval of a committee of three (3) directors appointed by the President from those directors not actively engaged in the business.

[Note. See note to form No. 293.]

No. 296

Directors' resolution authorizing payment of bonus to officers.

WHEREAS, a Committee was appointed by this Board of Directors on the .. day of .., 19.., to make recommendations with regard to the payment of bonuses to the various officers of this Corporation for the year ending .., 19..; and

WHEREAS, the said Committee has presented to this meeting its memorandum of recommendations for bonuses to officers, as follows:

To.....	President, \$.....
.....	Vice Pres., \$.....
.....	Secretary, \$.....
.....	Treasurer, \$.....

RESOLVED, That the said recommendations be and they hereby are approved and adopted, and that the Treasurer of this Corporation be and he hereby is authorized and directed to make payments to the respective officers, in accordance with the recommendations hereinabove set forth.

No. 297

Directors' resolution authorizing payment of honorarium to officer.

WHEREAS, .., .. (*insert title of office*) of this Corporation, has rendered valuable services for and in behalf of this Corporation apart from his usual duties as such officer and in connection with the .. (*insert matter in which services were rendered*), be it

RESOLVED, That an honorarium of (\$.....) Dollars be

voted to the said in recognition and appreciation of the said additional services so rendered by him, and the Treasurer of this Corporation is hereby authorized and directed to pay the said sum to the said forthwith.

No. 298

Directors' resolution authorizing payment for past services of officer and fixing future salary.

WHEREAS, was duly elected by this Board of Directors on the .. day of .., 19.., to the office of (*insert title of office*); and

WHEREAS, the salary to be paid to said as such was not fixed by this Board, and no compensation has been paid to the said to date for his services to this Corporation as such, and

WHEREAS, Article, Section, of the By-laws of this Corporation authorizes the Board of Directors to fix the compensation of officers of the Corporation for their services as such officers, be it

RESOLVED, That this Corporation pay to the said the sum of (\$.....) Dollars, as reasonable compensation and in full payment for services rendered by him to the Corporation up to and including the .. day of .., 19.., and that commencing with the .. day of .., 19.., the salary of the said as such of this Corporation be and it hereby is fixed at the sum of (\$.....) Dollars per year, payable monthly on the .. day of each and every month.

Mr., although present, took no part in the vote upon this resolution.

No. 299

Directors' resolution giving officer treasury stock as compensation for services rendered.

RESOLVED, That the Board of Directors, recognizing the valuable services rendered by as Secretary and Factory Manager of, and as purchaser for, the Corporation for the past (....) years, does hereby grant to the said the same compensation as the President of the said Corporation received during the said (....) years.

RESOLVED FURTHER, That the amount so granted to the said shall be the difference between the amount received by

..... as compensation for his services for the period between, 19.. and, 19.., and the amount received by, President of this Corporation, during the said period for his services as such officer, and that, in lieu of payment thereof in cash, the officers of the Corporation be and they hereby are authorized to issue to the balance of the unsold treasury stock—to wit (....) shares of the common stock of the said Corporation—in full settlement of the compensation due him for services rendered as aforesaid.

[Note. See McGillicuddy v. Los Verjels Land & Water Co., (1931) 213 Cal. 145, 2 P. (2d) 19, in which it was held that, where an agreement to pay treasury stock as compensation could not be carried out, the officer was entitled to be paid the reasonable value of his services.]

No. 300

Directors' resolution authorizing issuance of stock to officers as extra compensation for services.

RESOLVED, That as extra compensation for their services to, 19.. there shall be issued to the following officers of the company the number of shares of common stock of this company set opposite their respective names—to wit:

<i>Name of Officer</i>	<i>Title of Office</i>	<i>Number of Shares</i>
.....
.....
.....

No. 301

Stockholders' resolution reserving stock for allotment to officers and keymen.

RESOLVED, That (....) shares of the common stock of this Corporation, of the par value of (\$.....) Dollars each, be reserved for the purpose of allotment by the Board of Directors to such officers and keymen of the Corporation as it may determine, and that such reserved stock be allotted to and purchased by those designated by the Board of Directors at (\$.....) Dollars per share, to and including, 19..; (\$.....) Dollars per share from, 19.., to and including, 19.., at which time the reservation of said shares, for the purpose of allotment as herein provided, shall terminate.

No. 302

Directors' resolution changing officers' salaries.

RESOLVED, That the salary of the President of the

Corporation be increased (*or decreased*) from the sum of (\$.....) Dollars per year to the sum of (\$.....) Dollars per year, and that the salary of the Vice President of the Corporation be increased (*or decreased*) from the sum of (\$.....) Dollars per year to the sum of (\$.....) Dollars per year.

No. 303

Directors' resolution eliminating officers' salaries.

RESOLVED, That, beginning with the .. day of, 19.., the salaries of the President, Vice President, Secretary, and Treasurer of this Corporation, fixed by resolution of the Board of Directors adopted on the .. day of, 19.., shall cease, and that, until otherwise provided by resolution of the Board of Directors, the said officers shall render their services to the Corporation as such officers without compensation.

No. 304

Directors' resolution discontinuing officer's expense allowance.

RESOLVED, That the expense allowance of (\$.....) Dollars per year, voted by resolution of this Board of Directors on the .. day of, 19.., to, (*insert title of office*) of this Corporation, be and it hereby is withdrawn, canceled, and discontinued as of the .. day of, 19...

[*Note.* A corporation may discriminate among its employees in allowing expense accounts, in the absence of any agreement to the contrary. *Renauld v. Marine Specialty & Mill Supply Co.*, (1931) 172 La. 835, 135 So. 374.]

No. 305

Directors' resolution appointing committee to recommend salaries for executive officers.

RESOLVED, That, and be and they hereby are appointed a committee to recommend to this Board of Directors the amount of salaries to be paid to the executive officers of this Company, the said Committee to take into account any preliminary or tentative arrangements that may have been made prior to the incorporation of the Company.

No. 306

Directors' resolution ratifying officer's compensation.

WHEREAS, was duly elected by this Board of Directors on the .. day of, 19.., to the office of Vice President of this Corporation; and

WHEREAS, the salary to be paid to said as such Vice President was not fixed by this Board; and

WHEREAS, at the direction of the President of this Corporation, the said has been paid a salary at the rate of (\$.....) Dollars per month for his services as such Vice President, and said compensation appears to be reasonable for the services rendered, be it

RESOLVED, That the salary of the said as Vice President of this Corporation be and it hereby is fixed at the said sum of (\$.....) Dollars per month, payable on the last day of each and every month, and that the payments heretofore made to the said, under the direction of the President as aforesaid, be and the same hereby are ratified, confirmed, and approved.

No. 307

Stockholders' resolution fixing salaries of directors.

RESOLVED, That beginning with the .. day of, 19..., and until otherwise provided by resolution of the stockholders of this Corporation, each and every person who shall have been duly elected to and shall hold the office of director of this Corporation, shall be entitled to receive as compensation for his services as such director, the sum of (\$.....) Dollars per year, to be paid in monthly installments of (\$.....) Dollars on the last day of each and every month.

No. 308

Stockholders' resolution fixing extra compensation of director.

WHEREAS, at the request of this Corporation, has rendered valuable services to the Corporation outside of the scope of his duties as a director of the Corporation, in making a complete audit of the books of the Corporation for the year ending, 19..., be it

RESOLVED, That this Corporation pay to the said, as compensation for the services so rendered by him, the sum of (\$.....) Dollars.

RESOLVED FURTHER, That the Treasurer be and he hereby is authorized and directed forthwith to make payment to the said, as hereinabove provided, and to take a receipt therefor.

No. 309

Stockholders' resolution ratifying act of board of directors in voting salary to a director.

RESOLVED, That the action of the Board of Directors in voting to

..... a salary of (\$.....) Dollars per annum, to be paid to the said in monthly installments of (\$.....) Dollars during his term of office, in accordance with the resolution of the Board of Directors adopted at the meeting of , 19.., be and the same hereby is ratified and approved.

No. 310

Stockholders' resolution ratifying increase in salaries of directors.

RESOLVED, That the increase in the salaries of directors of this Corporation, voted by the Board of Directors at a meeting of the Board held on the .. day of .., 19.., be and the same hereby is ratified and approved.

No. 311

Stockholders' resolution allowing directors traveling and other expenses to attend board meetings.

RESOLVED, That the members of the Board of Directors of this Corporation be allowed their actual traveling expenses to and from the City of .., State of .., and the sum of (\$.....) Dollars per day for their expenses while in the said City of to attend meetings of the Board of Directors.

No. 312

Stockholders' resolution ratifying increase in salary of officer.

WHEREAS, heretofore and prior to the .. day of .., 19.., .., President of this Corporation, received the sum of (\$.....) Dollars per month as compensation for his services as such officer, and

WHEREAS, on the said .. day of .., 19.., the salary of said .., as President of this Corporation, was increased to the sum of (\$.....) Dollars per month, and since that date the Treasurer of this Corporation has paid to the said the sum of (\$.....) Dollars each and every month as compensation for his services as President of this Corporation, be it

RESOLVED, That the aforesaid increase in the salary of , as President of this Corporation, and the payments made to him by the Treasurer as aforesaid, be and they hereby are ratified, confirmed, and approved, and

RESOLVED FURTHER, That the Treasurer of this Corporation be and he hereby is authorized to continue to pay to such

increased salary of (\$.....) Dollars per month, as compensation for his services as President of this Corporation.

No. 313

Stockholders' resolution ratifying payment of additional compensation to managers.

RESOLVED, That the action of the Board of Directors in paying to, and, as managers of this company, a share of the profits of the business at the end of each year from, 19.. to, 19.., inclusive, in accordance with the resolution of the Board of Directors, adopted at the meeting of, 19.., which reads as follows:

(Here insert directors' resolution.)

be and the same hereby is ratified and approved, and that the method employed by the Board in arriving at the amount of net profits at the end of each year is hereby approved.

No. 314

Resolution of executive committee recommending special compensation to officer based on net profits.

RESOLVED, That the Executive Committee recommend to the Board of Directors that the Committee be authorized to award to the President, as compensation for his services during the year ending, 19.., and in addition to his regular salary for that year, a participation in the net profits of the Company to the extent of per cent (....%) of such profits as shown on the books of the Company.

[Note. For other resolutions providing for compensation based on net profits, see forms Nos. 293, 294, 295.]

No. 315

Resolution of directors authorizing officer's compensation for securing lease, and providing conditional payment.

WHEREAS, at the request of this corporation, has expended large sums of money and has rendered valuable services to this corporation outside the lines of his employment, in negotiating and securing for this corporation that certain lease from the Company to this corporation dated, 19.., and set forth in these minutes on pages, and, and will render further valuable services to this corporation by securing to this corporation a continuation of said lease, thereby securing large profits to this corporation,

BE IT THEREFORE RESOLVED, That this corporation do pay said , as compensation for said services heretofore rendered and hereafter to be rendered, the sum of forty-five thousand (\$45,000) dollars in the manner following, to wit: eleven thousand (\$11,000) dollars forthwith, the further sum of ten thousand (\$10,000) dollars ninety days from this date, the further sum of twelve thousand (\$12,000) dollars five months from this date, and the further sum of twelve thousand (\$12,000) dollars six months from date: Provided that, if the earnings of this corporation shall not be sufficient to make said deferred payments at the respective times above provided, then said deferred payments shall be made to said as fast as the earnings of this company will permit. The President and Secretary are hereby authorized and directed to make the payments herein provided and to take receipts therefor as made.

[*Note.* See *Presidio Mining Co. et al. v. Overton et al.*, (1919) 261 F. 993, in which this resolution appears.]

No. 316

Directors' resolution authorizing reimbursement to officer for money advanced.

RESOLVED, That the Treasurer of this Corporation be and he hereby is authorized and directed to pay forthwith to , President (*or insert other officer*) of the Corporation, the sum of (\$....) Dollars, in full reimbursement for moneys advanced and expenses incurred and paid for by the said in connection with (*insert subject matter of advancement*).

[*Note.* Where an officer advances funds for the corporation, official authorization by the directors is required for reimbursement. *Fischer v. Streeter Milling Co.*, (1931) 60 N. D. 362, 234 N. W. 392. Unless the corporation expressly or impliedly requested the officer to make the advances or ratified them by acquiescence, the officer has no right to reimbursement. See *In re Gouverneur Pub. Co.*, (1909) 168 F. 113. Contracts of indebtedness arising out of advances to the corporation by an officer of the corporation are not illegal. The courts will, however, closely scrutinize the transaction. *H. E. Briggs & Co. v. Harper Clay Products Co.*, (1928) 150 Wash. 235, 272 P. 962.

A resolution acknowledging indebtedness to the president of the corporation has been held invalid where the presence of the president had to be counted to constitute a quorum. *Oceano Beach Resort Co. v. Clark*, (1930) 106 Cal. App. 582, 289 P. 950.]

No. 317

Directors' resolution authorizing president to pay additional compensation to employees.

RESOLVED, That the President be and he hereby is authorized to make payments to all employees of this Company in an amount that seems

to him to be equitable as additional compensation for services rendered during the period, 19.., to, 19.., the total amount to be expended by him in carrying this out not to exceed per cent (....%) of the Company's payroll for the period above mentioned.

No. 318

Directors' resolution awarding bonuses recommended by executive committee.

There was presented to the meeting a memorandum of recommendations regarding additional compensations to be paid to the various officers and employees for the year 19.., amounting to approximately (\$.....) Dollars, and salary increases to the amount of approximately (\$.....) Dollars for the year 19.., and after a consideration of the matter, upon motion duly made and seconded, it was

RESOLVED, That the recommendations be and the same hereby are approved and adopted, and the Treasurer be and he hereby is authorized to make payments accordingly.

No. 319

Directors' resolution authorizing appropriation for distribution to officers and employees.

RESOLVED, That an appropriation equal in amount to (\$.....) Dollars per share on the outstanding stock of the Company be set aside out of the assets for distribution to certain officers and employees of the Company, and that the Executive Committee be authorized to make such distribution as it may deem wise and proper.

No. 320

Directors' resolution distributing bonus previously appropriated.

WHEREAS, at a special meeting of the Board of Directors of, Inc., held at the office of the company on the .. day of, 19.., at o'clock .. M., a resolution to set aside the sum of (\$.....) Dollars for extra compensation for the calendar year ending, 19.., for distribution among the employees at the discretion of the Board of Directors, was unanimously passed,

NOW, THEREFORE, BE IT RESOLVED, That the above-mentioned sum of (\$.....) Dollars be distributed as follows:

\$..... to
\$..... to

and to the other employees in the service of this company in the City of, on the .. day of, 19..., (....%) per cent of their respective salaries at that time, provided that, on the aforementioned date, they shall have been in the service of this company for at least one year.

RESOLVED FURTHER, That the Treasurer be and he hereby is authorized to pay such extra compensation in four (4) installments, as follows: April 1, July 1, October 1, and December 1, 19..., to each of the employees entitled to compensation under this resolution, provided such employee is in the service of this company on the date payment becomes due, unless otherwise specified by the Board of Directors.

No. 321

Directors' resolution authorizing payment of Christmas bonus to employees.

RESOLVED, That the Treasurer be and he hereby is authorized and directed to pay to each officer and employee of this Corporation who has been in its employ for a period of six (6) months or more, a sum equal to per cent (....%) of his or her annual salary, and to each employee who has been in the employ of the Corporation for a period of less than six (6) months, the sum of (\$.....) Dollars, as additional compensation, the total sum thus expended to be charged by the Treasurer to the salary account.

CHAPTER 13

SUBSCRIPTIONS TO CAPITAL STOCK

Subscription to stock distinguished from purchase and sale of stock. A subscription to stock is an agreement under the terms of which the subscriber agrees to take and pay for a fixed number of shares of the stock of a corporation which is organized or is about to be organized. A contract for the purchase and sale of stock, on the other hand, is an agreement by the corporation or other seller to sell a certain number of shares for a fixed consideration and by the purchaser to take the stock and pay the consideration fixed.¹ An agreement to purchase stock "when issued" is not a subscription to stock to be issued, but a contract to purchase.² A stock purchase and sale agreement is a valid and binding contract. It is generally treated by the courts like any other contract for the purchase and sale of goods.³

A contract for the sale or purchase of stock is not required to be in writing under the statute of frauds.⁴ It has been held that there is no difference between a subscription and a contract for the purchase of stock, so far as the statute of frauds is concerned.⁵

Before a corporation has been organized, its stock may be acquired only by subscription; after incorporation, it may be acquired either by subscription or by purchase from the corporation or from individual owners. Whether a particular transaction constitutes a subscription or a purchase and sale generally

¹ *Stern v. Mayer*, (1926) 166 Minn. 346, 207 N. W. 737; *Crichfield-Loeffler, Inc. v. Taverna*, (1926) (N. J. Law), 132 A. 494.

² *Lucas v. Bank of Montclair*, (1933) 110 N. J. Law 394, 166 A. 311.

³ See *Schmitz v. 75th and Exchange Drug Co., Inc.*, (1940) 303 Ill. App. 192, 24 N. E. (2d) 889; *General Commercial Securities Corporation v. Call*, (1932) 105 Fla. 595, 141 So. 879; *Friedman v. Bachman*, (1932) 234 N. Y. App. Div. 267, 254 N. Y. Supp. 689; *Allen Schiffman & Co. v. Burnson*, (1929) (N. J. Law) 148 A. 153; *A. L. Jameson & Co. v. Redfield*, (1931) 118 Cal. App. 59, 4 P. (2d) 817; *Stevens & Thompson Paper Co. v. Brady*, (1930) 106 N. J. Eq. 410, 151 A. 92; *Fourth National Bank v. Webb*, (1930) 131 Kan. 167, 290 P. 1.

⁴ *Byrd v. Tidewater Power Co.*, (1934) 205 N. C. 589, 172 S. E. 183; *Luikart v. Heelan*, (1939) 136 Neb. 492, 286 N. W. 780.

⁵ *Farrell v. Simons*, (1937) 180 Okla. 600, 71 P. (2d) 688.

depends upon the terms of the contract and the intention of the parties.⁶

Difference in legal effect of subscription to stock and contract for purchase and sale of stock. The importance of the distinction between a subscription and a contract for purchase and sale lies in the difference in the legal effect of the two types of contracts. Under a subscription, the subscriber becomes entitled, upon acceptance of his subscription by the corporation, to all the rights and privileges and subject to all the liabilities of a stockholder; no offer or delivery of a certificate for the shares of stock is necessary to make him a stockholder.⁷ However, if the subscription agreement provides that the corporation will issue the stock if and when the subscription is paid for in full, no title to any of the stock can pass to the subscriber or to an assignee before full payment has been made.⁸ Under a contract of purchase and sale, the purchaser does not become a stockholder until the corporation has offered or tendered the certificate of stock to him.⁹

Employees who subscribe to stock under a deferred payment plan become stockholders immediately upon subscription.¹⁰

Subscriptions to stock before incorporation. Subscriptions to the capital stock of a proposed corporation are obtained before the corporation is organized, for the following reasons: (1) to

⁶ *Louisiana Oil Exploration Co., Inc. v. Raskob*, (1925) 32 Del. 564, 127 A. 713; *Boroseptic Chemical Co. v. Nelson*, (1928) 53 S. D. 546, 221 N. W. 264; *Bigelow v. Bicek*, (1939) 298 Ill. App. 73, 18 N. E. (2d) 398; *Burke v. Walker*, (1938) 124 N. J. Eq. 141, 200 A. 546. See also *Eden v. Miller*, (1930) 37 F. (2d) 8, wherein the United States Circuit Court of Appeals for the Second Circuit was divided, two to one, on the construction of a contract, the majority holding that the agreement was not a capital stock subscription contract, and the minority holding that it was. See also Frey, "Post-Incorporation Subscriptions," 77 *Univ. of Pa. Law Rev.* 750-783.

⁷ *Gill Printing Co. v. Goodman*, (1932) 224 Ala. 97, 139 So. 250; *Burke v. Walker*, (1938) 124 N. J. Eq. 141, 200 A. 546; *Stull v. Terry & Tench, Inc.*, (1948) 81 N. Y. Supp. (2d) 43.

⁸ *Patterson v. U. S. Bond & Mortgage Co.*, (1940) 240 Ala. 474, 199 So. 695.

⁹ The stock certificate is the authentic evidence of title to the stock, but it is not necessary to the existence of the stock. *Com. v. Nixon*, (1929) 94 Pa. Super. 333; *Sargent v. Whitfield & Co.*, (1929) 226 Ky. 754, 11 S. W. (2d) 926; *Mau v. Montana Pac. Oil Co.*, (1928) 16 Del. Ch. 114, 141 A. 828; *Crocker v. Crocker*, (1927) 84 Cal. App. 114, 257 P. 611; *Baker v. Bankers' Mortgage Co.*, (1927) 15 Del. Ch. 209, 135 A. 486; *Miller v. Silverman*, (1927) 221 N. Y. App. Div. 697, 224 N. Y. Supp. 609. See also *Burke v. Walker*, (1938) 124 N. J. Eq. 141, 200 A. 546; *West Texas Utilities Co. v. Ellis*, (1937) (Tex. Civ. App.) 102 S. W. (2d) 234, rev'd on other grounds, 126 S. W. (2d) 13.

¹⁰ *Hegerty v. American Commonwealths Power Corp.*, (1934) 20 Del. Ch. 231, 174 A. 273.

meet a statutory requirement that a certain amount of capital stock shall be subscribed before the corporation begins business; or (2) to assure the organizers of the corporation that the capital needed to finance the enterprise will be forthcoming. Such subscriptions are valid and enforceable by the corporation thereafter formed only if there is an agreement between two or more parties to form such a corporation, and if the corporation is formed by such parties or by someone authorized to act for them in that regard.¹¹

The date of signing the contract of subscription, whether before or after organization of the corporation, is immaterial.¹² If the corporation accepts the subscription and engages in the business for which it was created, the contract is completed.¹³ The corporation formed, however, must be the specific one that was contemplated at the time of the subscription.¹⁴

The subscription agreement must have all the essentials of an ordinary contract in order to be enforceable by the corporation. These are discussed on page 363.

Formalities in subscribing to stock. No formal agreement in writing or otherwise is necessary to constitute one a subscriber, unless the statute under which the corporation is to be organized, or the charter, calls for a certain form of agreement.¹⁵ However, if the agreement is in writing, parol evidence of oral agreements cannot be introduced to change the legal meaning of the written subscription contract.¹⁶ Even where the manner of subscribing is regulated by statute, substantial compliance with the law will

¹¹ *Sanders v. Barnaby*, (1915) 166 N. Y. App. Div. 274, 151 N. Y. Supp. 580. See also *Snodgrass v. E. A. Zander & Co.*, (1913) 106 Ark. 462, 154 S. W. 212; *Jermyn v. Searing*, (1919) 225 N. Y. 525, 122 N. E. 706; *Martin v. Cushwa*, (1920) 86 W. Va. 615, 104 S. E. 97; *Nowlin v. Memphis Packing Corp.*, (1923) 161 Ark. 294, 255 S. W. 1092; *Positype Corp. v. Flowers*, (1930) 36 F. (2d) 617; *U. S. Grant Hotel Co. v. Keheas*, (1929) 255 Ill. App. 101; *Perry Hotel Co. v. Courtney*, (1931) 102 Fla. 1041, 136 So. 691.

¹² *Hatcher-Powers Shoe Co. v. Hitchens*, (1929) 232 Ky. 87, 22 S. W. (2d) 444.

¹³ *Ibid.*

¹⁴ *Harlie R. Norris Co. v. Lovett*, (1932) 123 Cal. App. 640, 12 P. (2d) 141.

¹⁵ *Upton v. Tribilcock*, (1875) 91 U. S. 203, 1 Otto. 45; *Sanger v. Upton*, (1875) 91 U. S. 220, 1 Otto. 60; *In re Grand Rapids Furniture Agency*, (1913) 209 F. 483; *Dickinson Hospital Co. v. Kessinger*, (1929) 128 Kan. 576, 279 P. 7; *Wright v. Lewis*, (1932) 161 Md. 674, 158 A. 704; *Gibson v. Oswalt*, (1934) 269 Mich. 300, 257 N. W. 825; *Dingle v. Shaab*, (1941) 179 Md. 589, 20 A. (2d) 149.

¹⁶ *Elizabeth City Hotel Corp. v. Overman*, (1931) 201 N. C. 337, 160 S. E. 289. See also *Haebler v. Crawford*, (1931) 232 N. Y. App. Div. 122, 249 N. Y. Supp. 184, rev'd on other grounds in 258 N. Y. 130, 179 N. E. 319; *Denver Industrial Corp. v. Kesselring*, (1932) 90 Colo. 295, 8 P. (2d) 767.

be sufficient.¹⁷ Thus, although the statute provides for opening of subscription books, the use of subscription paper instead of books does not make a subscription void.¹⁸ Under a charter provision requiring subscription books, the subscription agreement must be in writing. Its existence cannot be established by parol evidence, unless a written contract was actually made.¹⁹

A binding contract can be made without actually signing a formal subscription paper or stock book, unless the statute or articles of association provide to the contrary.²⁰ The courts are governed by the intention of the parties; if the subscriber and the corporation clearly manifest their purpose to enter into a contract whereby the relationship of stockholder is to result, there will be a valid subscription.²¹ A signature to the articles of incorporation as required by statute, with the number of shares placed opposite the signature, may constitute a subscription sufficient to bind both the corporation and the subscriber.²² The subscription, however, must be for a definite number of shares²³ and the amount which the subscriber is to pay for the shares must also be ascertainable. In actions on subscription agreements made before incorporation, the courts will generally apply the law existing in the state in which the contract was made, in preference to the law of the state in which the corporation was organized.²⁴

Conditions precedent to liability of subscriber on preorganization subscription. An agreement to subscribe for shares in a corporation to be formed is an executory contract. One of the conditions of such a contract is the formation of the corporation contemplated by the parties. The subscriber will be released from his obligation under the subscription contract: (1) if there

¹⁷ See *Windsor Hotel Co. v. Schenk*, (1915) 76 W. Va. 1, 84 S. E. 911.

¹⁸ *Nebraska Chicory Co. v. Lednicky*, (1907) 79 Neb. 587, 113 N. W. 245.

¹⁹ *Vreeland v. N. J. Stone Co.*, (1878) 29 N. J. Eq. 188.

²⁰ *Butler University v. Scoonover*, (1887) 114 Ind. 381, 16 N. E. 642.

²¹ See *Nulton v. Clayton*, (1880) 54 Iowa 425, 6 N. W. 685, citing the following from *Rensselaer & W. Plank Road Co. v. Barton*, (1854) 16 N. Y. 457: "Whatever may be the form or language of a subscription to the stock of an incorporated company, any person who in any manner becomes a subscriber for, or engaged to take any portion of, the stock of such company, thereby assumes to pay according to the conditions of the charter."

²² *Dupee v. Chicago Horse Shoe Co.*, (1902) 117 F. 40; *Zander v. Schuneman*, (1927) 170 Minn. 353, 212 N. W. 587.

²³ *Wheeler v. Ocker & Ford Mfg. Co.*, (1910) 162 Mich. 204, 127 N. W. 332.

²⁴ *Community Hotel Corp. v. Gilbert*, (1930) 135 N. Y. Misc. 676, 241 N. Y. Supp. 352. See, however, *Guaranty Trust Co. v. Scoon*, (1927) 144 Wash. 33, 256 P. 74.

is a material change in the charter of the corporation without his consent;²⁵ or (2) if the corporation is not validly organized.²⁶ These conditions are discussed in the following paragraphs.

For the release of a subscriber upon his failure to make payment at the time of subscription, as required by the statute or charter, see page 371.

Change in proposed charter sufficient to release subscriber. In determining whether or not an alteration or change in the charter of the corporation is material and sufficient to release the subscriber,²⁷ the facts in each case must be considered. In general, so long as the provisions of the charter conform to the main objects or purposes of the corporation contemplated at the time the subscription contract was made, the subscriber is not released by the alteration.²⁸ But if the main objects or purposes of the corporation formed are different from those of the corporation proposed, then the subscriber will be released.²⁹ A mere enlargement of corporate powers that does not actually change the purpose for which the corporation was formed is not material, and will not release the subscriber.³⁰

If the amount of capital stock of the corporation formed is greater than the amount originally proposed, the change is

²⁵ The reason for the general rule is given in *Nugent v. The Supervisors of Putnam Co.*, (1873) 86 U. S. 83, as follows: "A subscription is always presumed to have been made in view of the main design of the corporation, and of the arrangements for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason it is held that such a change exonerates a subscriber from liability for his subscription; or, if the contract has been executed, justifies the stockholder in resorting to a court of equity to restrain the company from applying the funds of the original organization to another project not contemplated by it." The general rule has no applicability to the case cited.

²⁶ *Indianapolis Furnace, etc. Co. v. Herkimer*, (1874) 46 Ind. 142; *Capps v. Hastings Prospecting Co.*, (1894) 40 Neb. 470, 58 N. W. 956; *Dorris v. Sweeney*, (1875) 60 N. Y. 463; *Tonge v. Item Pub. Co.*, (1914) 244 Pa. 417, 91 A. 229.

²⁷ *National Bank of Union Point v. Amoss*, (1915) 144 Ga. 425, 87 S. E. 406; *Kingston v. Nichols*, (1923) 221 Mich. 677, 192 N. W. 768; *Ginter, Recr. v. Blain*, (1913) 2 Ohio App. 482; *Mann v. Mitchell*, (1923) (Tex. Com. App.) 255 S. W. 980.

²⁸ *Menominee Community Bldg. Co. v. Rueckert*, (1929) 245 Mich. 37, 222 N. W. 162. See also *Crawford v. Coleman Hotel Co.*, (1929) (Tex. Civ. App.) 16 S. W. (2d) 307; *Peoria Inv. Corporation v. Hoagland*, (1939) 300 Ill. App. 54, 20 N. E. (2d) 627.

²⁹ *Owensboro Seating & Cabinet Co. v. Miller*, (1908) 130 Ky. 310, 113 S. W. 423; *Bunn v. Farmers' Warehouse Co.*, (1916) 18 Ga. App. 567, 90 S. E. 78; *Macon Union Co-op. Ass'n v. Chance*, (1924) 31 Ga. App. 363, 122 S. E. 66.

³⁰ *Watters & Martin v. Homes Corp.*, (1923) 136 Va. 114, 116 S. E. 366.

material, and the subscriber is discharged.³¹ A change in the capital stock structure has been held to be material and to release the subscriber.³² A decrease in the amount of stock which could be legally issued and outstanding at any given time was held not to be such an alteration as would release the stockholder from liability on the subscription.³³

Release of subscriber when corporation is not validly organized. A subscriber to stock before organization may insist upon the organization of a regular and legal corporation.³⁴ The statutory requirements for the organization of a corporation must be met. Thus, failure to record the certificate of incorporation, where recording is a condition precedent to corporate existence, is defective incorporation, and sufficient to release the subscriber.³⁵ If the promoters fail to organize the corporation, they are personally liable to return to preincorporation subscribers money paid on their subscriptions.³⁶

Right of subscriber to withdraw preorganization subscription prior to acceptance by corporation. Subscriptions made before the formation of a corporation are usually of two kinds: (1) an individual acting alone and without the co-operation of others may offer to take stock in a corporation to be formed; or (2) a number of persons may agree to form a corporation and to subscribe to the capital stock.

If the subscription is of the first kind, the subscriber may rescind or revoke the subscription at any time before the corporation is formed and the subscription accepted. The reason for this is that it takes two parties to make a contract. Since the corporation is not yet formed, there is but one party. Until the

³¹ *Atlanta Steel Co. v. Maynahan*, (1912) 138 Ga. 668, 75 S. E. 980; *National Bank of Union Point v. Amoss*, (1915) 144 Ga. 425, 87 S. E. 406.

³² *Lane v. Coin Mach. Mfg. Co.*, (1918) 69 Pa. Super. 373; *Wallace v. Duel*, (1934) 18 Tenn. App. 483, 79 S. W. (2d) 595.

³³ *In re Gillham's Estate*, (1936) 286 Ill. App. 370, 3 N. E. (2d) 524, discussed in 25 *Georgetown Law Journal* 184 (1936). See also *Country Club Real Estate Improvement Co. v. Gillham's Estate*, (1938) 294 Ill. App. 184, 13 N. E. (2d) 631.

³⁴ In an action on a subscription agreement made prior to incorporation, the plaintiff generally must show the existence of a corporation de jure, and not merely de facto. *Community Hotel Corp. v. Gilbert*, (1930) 135 N. Y. Misc. 676, 241 N. Y. Supp. 352; *Wright Bros. v. Merchants' & Planters' Packet Co.*, (1913) 104 Miss. 507, 61 So. 550. See, however, A. H. Frey, "Modern Development in the Law of Preincorporation Subscriptions," 79 *University of Pa. Law Review* 1005 (1931).

³⁵ See *Tonge v. Item Pub. Co.*, supra (Note 26).

³⁶ *Smith v. Secor*, (1938) 225 Iowa 650, 281 N. W. 178.

corporation is organized and the subscription accepted, there is no agreement but a mere unaccepted offer.³⁷

If the subscription is of the second type, the agreement, in some jurisdictions, constitutes a contract among the subscribers themselves.³⁸ It likewise constitutes a continuing offer to the proposed corporation. Upon acceptance, the subscription becomes a contract between each subscriber, respectively, and the corporation.³⁹ In other jurisdictions, such a subscription is not regarded as a contract among the subscribers themselves. This view is based on the theory that since "all of the subscriptions are mere offers, the withdrawal of one offer will not affect the other."⁴⁰ Where the subscription is regarded as a contract among the subscribers, none of the parties can withdraw without the acquiescence of all the subscribers even before acceptance by the corporation.⁴¹ According to the weight of authority, until the corporation is organized, the subscription does not take effect as a contract with the corporation; as there is no contract, the party signing the subscription may withdraw.⁴²

Necessity of notice of withdrawal of preorganization subscription. Subscribers who desire to withdraw must give notice of their withdrawal. Such notice need not be in any particular form, nor need it be in writing or given at a meeting of the subscribers. If notice is given to the person who obtained the subscription or to the person who has charge of the subscription list, it is sufficient.⁴³

³⁷ *Collins v. Morgan Grain Co., Inc.*, (1926) 16 F. (2d) 253. See also *Wallace v. Duel*, (1934) 18 Tenn. App. 483, 79 S. W. (2d) 595; Lukens, "The Withdrawal and Acceptance of Preincorporation Subscriptions to Stock," 76 *University of Pa. Law Review* 423.

³⁸ *Collins v. Morgan Grain Co., Inc.*, (1926) 16 F. (2d) 253.

³⁹ *Ibid.* See also *Marysville Electric Light & Power Co. v. Johnson*, (1892) 93 Cal. 538, 29 P. 126; Rufe, "Pre-incorporation Subscription versus Present Subscription to Stock," 26 *Georgetown Law Jour.* 749 (1938).

⁴⁰ See *Macon Union Co-op. Ass'n v. Chance*, (1924) 31 Ga. App. 636, 126 S. E. 66 (citing *National Bank of Union Point v. Amoss*, (1915) 144 Ga. 425, 87 S. E. 406; *Allen & Co. v. Hastings Industrial Co.*, (1907) 2 Ga. App. 291, 58 S. E. 504).

⁴¹ *Cravens v. Eagle Cotton Mills Co.*, (1889) 120 Ind. 6, 21 N. E. 981. See also *Crawford v. Coleman Hotel Co.*, (1929) (Tex. Civ. App.) 16 S. W. (2d) 307.

⁴² *Hudson Real Estate Co. v. Tower*, (1892) 156 Mass. 82, 30 N. E. 465; *Bryant's Pond Steam Mill Co. v. Felt*, (1895) 87 Me. 234, 32 A. 888. See also *Glass Coating Co. v. Clark*, (1928) 118 Ohio St. 10, 160 N. E. 460; *O'Dell v. Appalachian Hotel Corp.*, (1929) 153 Va. 283, 149 S. E. 487; 27 *Michigan Law Review* 467 (1928); A. H. Frey, "Modern Development in the Law of Preincorporation Subscription," 79 *University of Pa. Law Review* 1005 (1931); "Release of Stock Subscriptions," 53 *Harvard Law Review* 313, at p. 321 (1939).

⁴³ *Planters & Merchants Independent Packing Co. v. Webb*, (1908) 156 Ala. 551,

Acceptance of preorganization subscription by corporation. The final act which gives complete validity to a subscription procured prior to corporate organization is the acceptance of the subscription by the corporation after its formation. Acceptance of the subscription after incorporation is necessary to make the subscriber a shareholder, and to fix his liability to pay for the stock.⁴⁴

No particular form of acceptance is required: it may be express or implied, oral or written, and may depend upon acts as well as words. Recognition of the subscriber as a stockholder is sufficient to imply acceptance.⁴⁵ However, the statute or the charter may require acceptance in a particular way.

When the corporation accepts the charter granted in conformity with the purpose and powers as described in the subscription agreement,⁴⁶ the subscription becomes binding, and the subscriber becomes a stockholder.⁴⁷

Subscriptions to stock after incorporation. Some courts have held that there is a distinction, so far as the status of the subscriber is concerned, between a subscription for stock in a corporation to be formed and a subscription for stock in an existing corporation.⁴⁸ In the former case, the subscriber becomes a stockholder when the corporation is organized; in the latter case, the subscription is considered a mere contract of purchase and sale between the subscriber and the corporation.⁴⁹ The general

46 So. 977; *Palais Du Costume v. Beach*, (1910) 144 Mo. App. 456, 127 S. W. 270; *Hudson Real Estate Co. v. Tower*, (1894) 161 Mass. 10, 36 N. E. 680.

44 *Thielsen v. Linde*, (1928) 127 Ore. 639, 271 P. 983; *Glass Coating Co. v. Clark*, (1928) 118 Ohio St. 10, 160 N. E. 460; *Cramer v. Burnham*, (1928) 107 Conn. 216, 140 A. 477; *Martin v. Cushwa*, (1920) 86 W. Va. 615, 104 S. E. 97; *Jackson v. Sabie*, (1917) 36 N. D. 49, 161 N. W. 722; *Natwick v. Terwilliger*, (1916) 24 Wyo. 253, 160 P. 338.

For a discussion of what constitutes acceptance by the corporation, see A. H. Frey, "Modern Development in the Law of Preincorporation Subscriptions," 79 *University of Pa. Law Review* 1005 (1931).

45 *Nebraska Chicory Co. v. Lednický*, (1907) 79 Neb. 587, 113 N. W. 245.

46 *Crawford v. Coleman Hotel Co.*, (1929) (Tex. Civ. App.), 16 S. W. (2d) 307; *Menominee Community Bldg. Co. v. Rueckert*, (1928) 245 Mich. 677, 222 N. W. 162; *Kingston v. Nichols*, (1923) 221 Mich. 677, 192 N. W. 768; *Watters & Martin, Inc. v. Homes Corp.*, (1923) 136 Va. 114, 116 S. E. 366; *National Bank of Union Point v. Amoss*, (1915) 144 Ga. 425, 87 S. E. 406.

47 *Baltimore City Pass. Ry. Co. v. Hambleton*, (1893) 77 Md. 341, 26 A. 279.

48 *Schwartz v. Manufacturers Casualty Ins. Co.*, (1939) 335 Pa. 130, 6 A. (2d) 299.

49 *Reagan v. Midland Packing Co. et al.*, (1924) 298 F. 500 (citing *Rhey v. Ebensburg and S. P. R. Co.*, (1856) 27 Pa. St. 261, *Bole v. Fulton*, (1912) 233 Pa. 609, 82 A. 947; *Baltimore City Pass. Ry. Co. v. Hambleton*, (1893) 77 Md. 341,

view, however, is that there is no distinction between a subscription to the stock of a corporation already organized and a subscription made prior to and for the purpose of organization.⁵⁰

So far as the subscription agreement is concerned, the general rule is that whereas a subscription before incorporation is governed by the law of the state in which the contract was made,⁵¹ a subscription agreement after incorporation is governed by the laws of the state in which the corporation was organized.⁵²

Validity and enforceability of a subscription. A corporation which has accepted subscriptions to its capital stock may enforce each subscription agreement, provided the agreement is a valid and enforceable contract⁵³ under the laws of the state of incorporation.⁵⁴ Pertinent provisions of the state constitution,⁵⁵ applicable statutory provisions,⁵⁶ and the charter of the corporation⁵⁷ become part of the stock subscription contract.

Elements essential for validity and enforceability of a subscription. To be valid and enforceable, a capital stock subscription must contain the following elements:

26 A. 279; *Guaranty Mtge. Co. v. Wilcox* (1923) 62 Utah 184, 218 P. 133; *Stern v. Mayer*, (1926) 166 Minn. 346, 207 N. W. 737; *Crichfield-Loeffler, Inc. v. Taverna*, (1926) 4 N. J. Misc. 310, 132 A. 494.

⁵⁰ "All those who join in the enterprise of accumulating the capital of the corporation, represented by subscriptions to the original issue of capital stock, should be regarded as subscribers, rather than as purchasers, whether the agreement is made before or after the articles are filed." *Reagan v. Midland Packing Co. et al.*, *supra* (Note 49). See also *Spear v. Crawford*, (1835) 15 Wend. (N. Y.) 20.

⁵¹ See page 358.

⁵² *May v. Roberts*, (1930) 133 Ore. 643, 286 P. 546; *McAlister v. Eclipse Oil Co.*, (1935) (Tex. Civ. App.) 79 S. W. (2d) 895. See also *Thomas v. Kalbfus*, (1918) 97 Ohio St. 232, 119 N. E. 412.

⁵³ Where the subscription to the capital stock of a corporation was unexecuted by payment and delivery of the certificate of stock, the court held that it was an executory contract. *Steele v. Singletary*, (1922) 120 S. C. 132, 110 S. E. 833. To the same effect, see *Kappers v. Cast Stone Construction Co.*, (1924) 184 Wis. 627, 200 N. W. 376. However, in *Jackson v. Sabie*, (1917) 36 N. D. 49, 161 N. W. 722, the court said: "In the absence of regulations to the contrary, the principles which govern the formation of an ordinary contract apply with full force to a contract of subscription to corporate stock." See *Farm Lands Development Co. v. Taft*, (1922) 194 Iowa 481, 186 N. W. 431, and *Thomas v. Scoutt*, (1927) 115 Neb. 848, 215 N. W. 140.

⁵⁴ *Collins v. Morgan Grain Co.*, (1927) 16 F. (2d) 253.

⁵⁵ *Guaranty Trust Co. v. Scoon*, (1927) 144 Wash. 33, 256 P. 74.

⁵⁶ *Thomas v. Kalbfus*, (1918) 97 Ohio St. 232, 119 N. E. 412.

⁵⁷ *Rensselaer & W. Plank Road Co. v. Barton*, (1857) 16 N. Y. 457; *Nulton v. Clayton*, (1880) 54 Iowa 425, 6 N. W. 685; *Port Edwards C. & N. Ry. Co. v. Arpin*, (1891) 80 Wis. 214, 49 N. W. 828; *Bryan v. St. Andrews Bay Community Hotel Corp.*, (1930) 99 Fla. 132, 126 So. 142; *Geiger v. American Seeding Mach. Co.*, (1931) 124 Ohio St. 222, 177 N. E. 594.

1. *Competency of parties.* The parties to the agreement must be competent. Any individual who is competent to enter into a contract may make a valid subscription to stock, unless the charter of the corporation offering the stock, or the statute under which the corporation is organized, expressly or impliedly contains some contrary provision.⁵⁸

A corporation has no power to subscribe for or to purchase and hold shares of stock in another corporation, unless it is clearly authorized to do so by statute or by the provisions of its charter. In many of the states, such a provision is found in the statute. The reason for the rule is that the stockholders are entitled to assume, in the absence of notice to the contrary in the charter or statute, that the directors will use the capital and assets in the business authorized by the charter and not share the capital with others.⁵⁹

2. *Consideration.* The subscription must be supported by a valid consideration. The promise of the subscriber to take the stock and pay for it, and the promise of the corporation to issue the stock upon payment, constitute a sufficient consideration.⁶⁰ It is not necessary that the corporation be named as promisee in the agreement to subscribe.⁶¹

3. *Offer and acceptance.* There must be an offer by the subscriber to take the shares and an acceptance of the subscription⁶² by the corporation. The subscriber is released from his obligation: (1) if the corporation has failed to accept the subscription; or (2) if the corporation has refused to accept payment offered by the subscriber, and the subscriber has availed himself of the refusal;⁶³ or (3) if the subscriber has revoked or rescinded his offer before acceptance by the company.⁶⁴

4. *Meeting of minds.* The minds of the parties must meet upon the subject matter of the agreement. A mutual mistake

⁵⁸ *Cattlemen's Trust Co. v. Turner*, (1916) (Tex. Civ. App.) 182 S. W. 438.

⁵⁹ *Kappers v. Cast Stone Const. Co.*, (1924) 184 Wis. 627, 200 N. W. 376; *City Coal & Ice Co. v. Union Trust Co. of Maryland*, (1924) 140 Va. 600, 125 S. E. 697.

⁶⁰ *Scranton Axle & Spring Co. v. Scranton Board of Trade*, (1921) 271 Pa. 6, 113 A. 838.

⁶¹ *Ocala Community Hotel Co. v. Holloway*, (1931) 103 Fla. 521, 137 So. 882; *Perry Hotel Co. v. Courtney*, (1931) 102 Fla. 1041, 136 So. 691.

⁶² *Schmitz v. 75th and Exchange Drug Co.*, (1940) 303 Ill. App. 192, 24 N. E. (2d) 889.

⁶³ *Potts v. Wallace*, (1892) 146 U. S. 689, 13 S. Ct. 196.

⁶⁴ See page 360.

about some material fact connected with the subscription may entitle the subscriber to rescind his subscription.⁶⁵

5. *Legality of contract.* The contract must not be illegal. The contract will be illegal, for example, if the purpose for which the corporation is formed is illegal; or the subscription may be illegal if the agreement violates some statute. Thus, a subscription was held invalid, where the subscription price was fixed at less than par in violation of a statute requiring the par value to be paid for all shares.⁶⁶

6. *Freedom from fraud.* The contract must be free from fraud. Subscriptions obtained by fraudulent misrepresentations, under duress, or through the use of undue influence, may be avoided by the subscriber.⁶⁷ (See page 399 as to liability under the Federal Securities Act of 1933 for fraud and misrepresentation in the sale of securities.)

Subscriptions obtained through fraud. The courts have not laid down any definite rules as to what does and what does not constitute fraud sufficient to invalidate a subscription to stock; each case must be determined by its own facts.⁶⁸ In general, however, it may be said that, in order to constitute actionable fraud, the following elements must be present: ⁶⁹

1. A false representation must be made as to a past or present material fact. A distinction is made between statements about the prospects of the enterprise and statements representing facts that do not exist. The former are matters of opinion merely and are not grounds for annulling the contract. The latter are material representations that are fraudulent and hence are grounds for annulment. For example, a statement made by a representative of a corporation that the company was actually engaged in manufacturing the product that it was organized to manu-

⁶⁵ Hill v. International Products Co., (1925) 129 N. Y. Misc. 25, 220 N. Y. Supp. 711; Moseley v. Red River Oil Mill, (1927) 6 La. App. 725.

⁶⁶ Tramp v. Marquesen, (1920) 188 Iowa 968, 176 N. W. 977; Rudolph-Christy Casket Co. v. Tancl, (1928) 244 Ill. App. 314; Crawford v. Twin City Oil Co., (1927) 216 Ala. 216, 113 So. 61; World Oil Co. v. Hicks, (1929) (Tex. Civ. App.) 19 S. W. (2d) 605; Castle v. Acme Ice Cream Co., (1929) 101 Cal. App. 94, 281 P. 396.

⁶⁷ Bohn v. Burton-Lingo Co., (1915) (Tex. Civ. App.) 175 S. W. 173.

⁶⁸ Rescission for fraud applies only to stock subscription contracts which are executed in whole or in part by the fraudulent party, and not to those which are merely executory. Gould v. Bester, (1928) 127 Ore. 308, 271 P. 988.

⁶⁹ Bohn v. Burton-Lingo Co., (1915) (Tex. Civ. App.) 175 S. W. 173. See also Kentucky Electric Development Co.'s Receiver v. Head, (1934) 252 Ky. 656, 68 S. W. (2d) 1; Berwick Hotel Co. v. Vaughan, (1930) 300 Pa. 389, 150 A. 613; Goodin v. Palace Store Co., (1931) 164 Wash. 625, 4 P. (2d) 493.

facture, when it was not so engaged, was a misrepresentation of a material fact. On the other hand, a statement that the stock would pay annually a dividend of nine per cent was merely a promise and not a misrepresentation of a material fact.⁷⁰

2. The false representation must be made by an authorized agent of the corporation to the subscriber.⁷¹ A notation printed in the margin of a subscription blank furnished by the corporation, to the effect that the company is not responsible for representations made by its agent, does not relieve the corporation from liability for false representations made by its agent.⁷²

3. The statement must be false.⁷³

4. The party making the statement must know that it is false,⁷⁴ or must have made it recklessly with no knowledge of its truth and as a positive assertion.⁷⁵

5. The misrepresentation must be intended to induce the subscriber to act upon it.⁷⁶

6. The acts of the subscriber must show that he relied upon the representations. The signature of the subscriber to the subscription agreement, in the absence of evidence to the contrary, is proof that he relied upon the representations and acted on the faith of them.⁷⁷ Not only must the subscriber rely on the representations, but he must be justified in relying on them.⁷⁸ He must also exercise a reasonable degree of care to avoid being misled.⁷⁹ He is not bound, however, to investigate the truth of the statements that induced him to subscribe to the stock.⁸⁰

⁷⁰ *Steele v. Singletary*, (1922) 120 S. C. 132, 110 S. E. 833. See also *Radley v. Phalen & Co., Inc.*, (1936) (Ill. App.), 2 N. E. (2d) 581; *Fuhrman v. American Nat. Building & Loan Ass'n*, (1932) 126 Cal. App. 202, 14 P. (2d) 601; *Depositors Bond Co. v. Christensen*, (1936) 185 Wash. 161, 53 P. (2d) 312.

⁷¹ *Seacoast Packing Co. v. Long*, (1921) 116 S. C. 406, 108 S. E. 159. See also *Fuhrman v. American Nat. Building & Loan Ass'n*, (1932) 126 Cal. App. 202, 14 P. (2d) 601.

⁷² *Edge v. Alertox, Inc.*, (1933) 47 Ga. App. 598, 171 S. E. 181.

⁷³ *Denis v. Nu-Way Puncture-Cure Co.*, (1919) 170 Wis. 333, 175 N. W. 95.

⁷⁴ *Peake v. Thomas*, (1927) 222 Ky. 405, 300 S. W. 885.

⁷⁵ *Kentucky Electric Development Co.'s Receiver v. Head*, (1934) 252 Ky. 656, 68 S. W. (2d) 1. See *West Texas Utilities Co. v. Ellis*, (1937) (Tex. Civ. App.) 102 S. W. (2d) 234. This case holds that it is immaterial whether the false representations were made in good faith or not.

⁷⁶ *Equity Co-op. Ass'n of Roy, Mont. v. Equity Co-op. Milling Co. of Mont.*, (1922) 63 Mont. 26, 206 P. 349.

⁷⁷ *American Alkali Co. v. Salom*, (1904) 131 F. 46.

⁷⁸ See *Chandler v. McKerral*, (1934) 68 F. (2d) 343; *Fuhrman v. American Nat. Building & Loan Ass'n*, (1932) 126 Cal. App. 202, 14 P. (2d) 601.

⁷⁹ *Hines v. Saart Bros. Co.*, (1931) 51 R. I. 436, 155 A. 533.

⁸⁰ *American Alkali Co. v. Salom*, *supra* (Note 77); *Griffin v. Burrus*, (1927) (Tex. Civ. App.) 292 S. W. 561.

7. The subscriber must have suffered injury.⁸¹

Remedies of subscriber in case of fraud. A contract procured by fraud is not void but it is voidable only at the option of the party defrauded. This means that it is valid until disaffirmed.⁸² In most states, several remedies are open to a subscriber induced by fraud to subscribe for stock of a corporation. (1) He may rescind the subscription by notification to the corporate authorities without taking legal proceedings.⁸³ (2) He may repudiate the subscription and bring an action in equity to have the subscription canceled, thus assuring himself of relief from all liability as a stockholder.⁸⁴ (3) If the corporation brings an action against the subscriber to enforce payment of the subscription price, or an assessment on the shares, the subscriber may defend the action brought against him, setting forth fraud as a defense.⁸⁵ (4) If he has paid any money to the corporation on the subscription, he may bring an action to recover what he has paid.⁸⁶ (5) He may affirm the contract and sue for damages.⁸⁷

See waiver of release from subscription obtained through fraud, on page 371.

When rescission must be made. Rescission of a subscription contract because of fraud must be made promptly upon discovery of the fraud.⁸⁸ Whether or not a subscriber has been guilty of undue delay depends on the facts in each case.⁸⁹ The subscriber's refusal to make payments on the subscription as soon as he learns of the fraud is equivalent to prompt rescission,

⁸¹ *Peake v. Thomas*, (1927) 222 Ky. 405, 300 S. W. 885.

⁸² *Upton v. Englehart*, (1874) 3 Dill. (U. S.) 496; *Akers v. Radford State Bank*, (1929) 153 Va. 1, 149 S. E. 528; *Hashem v. Mass. Sec. Corp.*, (1926) 255 Mass. 29, 150 N. E. 846; *Gress v. Knight*, (1910) 135 Ga. 60, 68 S. E. 834; *Roe v. Oradell Farms Dairy Co.*, (1915) 85 N. J. Eq. 146, 96 A. 65.

⁸³ *McGrath v. C. T. Sherer Co. et al.*, (1935) 291 Mass. 35, 195 N. E. 913; *Kentucky Electric Dev. Co.'s Receiver v. Head*, (1934) 252 Ky. 656, 68 S. W. (2d) 1; *Bohn v. Burton-Lingo Co.*, (1915) (Tex. Civ. App.) 175 S. W. 173.

⁸⁴ *Tyler v. Savage*, (1892) 143 U. S. 79, 125 S. Ct. 340.

⁸⁵ *American Alkali Co. v. Salom*, (1904) 131 F. 46; *Davis v. Gifford*, (1918) 182 N. Y. App. Div. 99, 169 N. Y. Supp. 492.

⁸⁶ *Davis v. Gifford*, *ibid.*; *Hunsicker v. Gilham*, (1927) 163 La. 651, 112 So. 518. See also *Orbison v. Lesh*, (1933) 205 Ind. 340, 184 N. E. 771. *Spiller v. Centrifugals, Inc.*, *N. Y. Law Journal*, June 28, 1940 (N. Y. Sup. Ct.).

⁸⁷ *Fulmele v. Los Angeles Inv. Co.*, (1921) 51 Cal. App. 417, 196 P. 923; *Davis v. Gifford*, *supra* (Note 85).

⁸⁸ *Wilson v. Empire Holding Corp.*, (1934) 145 Ore. 598, 28 P. (2d) 843; *Coyle v. Franklin State Bank*, (1934) 213 Wis. 601, 252 N. W. 361; *Fulmele v. Los Angeles Inv. Co.*, *supra* (Note 87); *Davis v. Gifford*, *supra* (Note 85); *Smith v. Schmitt*, (1924) 112 Ore. 687, 231 P. 176.

⁸⁹ *Depositors Bond Co. v. Christensen*, (1936) 185 Wash. 161, 53 P. (2d) 312.

although a bill for rescission is not filed until some time later.⁹⁰ Moreover, the subscriber must exercise due diligence in discovering the fraud.⁹¹

Remedies of subscriber after insolvency of the corporation. The remedies mentioned above may be invoked while the corporation is solvent. If the corporation becomes insolvent, and the rights of creditors are involved, the opportunity to rescind the subscription, even though it has been procured through fraud, may be denied.⁹² No definite rule applicable to every jurisdiction in this country can be stated regarding the effect of corporate insolvency upon the right of a subscriber to rescind his contract on the ground of fraud. However, in a leading case the court said:

"The decisions of the courts, we think, sustain the doctrine laid down in the textbooks, that a person who has to all external appearances become a stockholder cannot, as to creditors who may have trusted the company upon the faith of his membership, have his contract of subscription rescinded upon the ground of fraud, where he did not repudiate the contract, and take steps to have it rescinded, before the company stopped payments and became actually insolvent. . . ." ⁹³

The attempt to lay aside the garb of stockholder after a corporation has become bankrupt is looked upon with suspicion. A Federal court has held that the right to rescind should be denied under any of the following circumstances: ⁹⁴ (1) if a considerable period of time has elapsed since the subscription was made; (2) if the subscriber has actively participated in the management of the corporation; (3) if there has been any want of diligence on the part of the stockholder either in discovering the alleged fraud or in taking steps to rescind when the fraud was discovered; or (4) above all, if any considerable amount of corporate indebtedness has been created since the subscription was made.

⁹⁰ *Mitschele v. Pyramid Bond & Mortgage Corp.*, (1938) 124 N. J. Eq. 190, 1 A. (2d) 59.

⁹¹ *Gannon v. Grayson Water Co.*, (1934) 254 Ky. 251, 71 S. W. (2d) 433; *Upton v. Tribilcock*, (1875) 91 U. S. 203. See also *Trinity Universal Ins. Co. v. Maxwell*, (1937) (Tex. Civ. App.) 101 S. W. (2d) 606.

⁹² *Forman v. Irby*, (1938) (Tex. Civ. App.) 115 S. W. (2d) 1229; *Willentz v. Hickox Finance Corp.*, (1939) 125 N. J. Eq. 28, 4 A. (2d) 43.

⁹³ *Martin v. South Salem Land Co.*, (1896) 94 Va. 28, 26 S. E. 591 (citing *Upton v. Tribilcock*, (1875) 91 U. S. 45; *Webster v. Upton*, (1875) 91 U. S. 65; *Sanger v. Upton*, (1875) 91 U. S. 56; *Chubb v. Upton*, (1877) 95 U. S. 665, and others).

⁹⁴ *In re Marcella Cotton Mills*, (1925) 8 F. (2d) 522.

Insolvency alone does not take from the subscriber his right to rescind the contract, unless insolvency proceedings have been instituted or an act of insolvency committed. For example, it has been held that if the subscriber is diligent in discovering fraud and repudiating the contract, he does not lose his right to rescind.⁹⁵ If the creditors had knowledge of the fraud, insolvency does not bar the defrauded subscriber's right to rescind the subscription agreement.⁹⁶

Release of subscriber from subscription—consent of stockholders. A corporation, for a valuable consideration,⁹⁷ may release a subscriber from his subscription contract only under the following circumstances: (1) upon consent of all the stockholders to the release;⁹⁸ or (2) upon authorization by the board of directors, if the statute, charter, or by-laws of the corporation confer upon the directors the power to release the subscriber without the consent of all the stockholders.⁹⁹ Consent of the stockholders may be implied from their acquiescence.¹⁰⁰

The release of a subscription need not be given expressly or formally by the stockholders, or by the directors when they have authority to act without the consent of the stockholders.¹⁰¹ It is nevertheless advisable to get the necessary consent to the release at a properly called meeting and to enter in the minutes the resolution authorizing the release of a subscriber from all or a part of his subscription contract. The release of a subscriber, however, can be proved in a legal action by parol or circumstantial evidence. For example, if it can be shown that the subscription contract was deemed abandoned by all the stock-

⁹⁵ *Gordon v. Ralston*, (1936) 155 Ore. 310, 62 P. (2d) 1328.

⁹⁶ *Jagels v. Cox*, (1930) 50 Idaho 67, 294 P. 515.

⁹⁷ A release, like any other contract, must be supported by a valuable consideration. *Zirkel v. Joliet Opera House Co.*, (1875) 79 Ill. 334; *United Growers Co. v. Eisner*, (1879) 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906; *In re Eureka Furniture Co.*, (1909) 170 F. 485; *W. H. Stenners Co. v. Lake Worth Realty & Building Co.*, (1930) 45 F. (2d) 297, cert. denied 283 U. S. 833, 51 S. Ct. 366.

⁹⁸ *Thomas v. Wentworth Hotel Co.*, (1911) 16 Cal. App. 403, 117 P. 1041; *Mutual Loan Soc. v. Letson*, (1919) 202 Ala. 683, 81 So. 659; *E. M. T. Coal Co. v. Rogers*, (1926) 216 Ky. 440, 288 S. W. 342; *Warren Co-op. Ass'n v. Boyd*, (1916) 171 N. C. 184, 88 S. E. 153; *Marcuse v. Broad-Grace Arcade Corp.*, (1935) 164 Va. 553, 180 S. E. 327; *American Nat. Bank v. Tinsley Millinery Co.*, (1936) 20 Tenn. App. 459, 100 S. W. (2d) 665. See also "Release of Stock Subscriptions," 53 *Harvard Law Review* 313 (1939).

⁹⁹ *Thomas v. Wentworth Hotel Co.*, *supra* (Note 98).

¹⁰⁰ *Silica Brick Co. v. Winsor*, (1915) 171 Cal. 18, 151 P. 425.

¹⁰¹ *Inter-Mountain Ass'n of Credit Men v. Davies*, (1923) 61 Utah 461, 214 P. 307.

holders of the corporation and by the subscriber himself,¹⁰² the subscriber will be released.

Release of subscriber from subscription—rights of creditors. Even if all the stockholders consent, and the directors act with proper authority in canceling a subscription or releasing a subscriber from liability under his subscription contract, the release is ineffective as against existing creditors where their rights are involved.¹⁰³ No definite rule can be given as to the effect of a release given with the consent of all the stockholders for a proper consideration, upon the rights of subsequent creditors, since the courts are divided on this question. In some cases, the release has been held to be invalid as against existing creditors only, while in others it has been ineffective as against existing and subsequent creditors.

The reason for holding a release invalid as against creditors is generally found in the doctrine known as the "trust fund" theory.¹⁰⁴ This doctrine views the subscribed capital stock of a corporation, both paid and unpaid, as a trust fund. The stockholders and creditors have the right to insist that it shall not be reduced, diminished, or impaired except with their consent.¹⁰⁵ The creditor, under the "trust fund" theory, is presumed to have given credit upon the faith that the working capital of the corporation, whether actually paid in or promised to be paid in, will be kept available to satisfy his debts.¹⁰⁶ The release of a subscriber from the obligation of his unpaid subscription would have the effect of reducing the fund upon which the creditor depends for the payment of his debt; hence any such release without the

¹⁰² *Inter-Mountain Ass'n of Credit Men v. Davies*, supra (Note 101); *Elliott v. Ashby*, (1905) 104 Va. 716, 52 S. E. 383 (citing *Stuart v. Valley Railroad Co.*, (1897) 32 Gratt. (Va.) 146).

¹⁰³ *Cartwright v. Dickinson*, (1890) 88 Tenn. 476, 12 S. W. 1030; *Farnsworth v. Robbins*, (1887) 36 Minn. 369, 31 N. W. 349; *Myers v. C. W. Toles & Co.*, (1939) 287 Mich. 340, 283 N. W. 603.

¹⁰⁴ In *Shoemaker v. Washburn Lumber Co.*, (1897) 97 Wis. 585, 73 N. W. 333, it was held that a solvent corporation has a right by the unanimous vote of its stockholders, to cancel stock subscribed but not paid for, and a subsequent corporate creditor is not prejudiced by such action, whereas in *Christman-Sawyer Banking Co. v. Independence Wool Mfg Co.*, (1902) 168 Mo. 634, 68 S. W. 1026, in an able and exhaustive opinion in which many cases pro and con are cited on this point, it was held that unpaid stock subscriptions were "an asset of an incorporated company, which all creditors, without regard to when their debts were contracted, have a right to look to, and which cannot be exhausted, released, given away, wiped out, or impaired by any act of the corporation or the stockholder to the injury of the creditor, except by his consent."

¹⁰⁵ *Thomas v. Wentworth Hotel Co.*, (1911) 16 Cal. App. 403, 117 P. 1041.

¹⁰⁶ *Silica Brick Co. v. Winsor*, (1915) 171 Cal. 18, 151 P. 425.

consent of creditors is regarded as a fraud upon the creditors of the company.¹⁰⁷

Compromise release of subscription. Under certain circumstances, the board of directors of a solvent corporation, without the consent of the stockholders, can release subscribers from their liability and accept the surrender of the shares agreed to be taken. Thus, directors acting in good faith may make a compromise with subscribers who are insolvent, or who are of doubtful financial responsibility.¹⁰⁸ Such a release is a compromise release. While good against subsequent creditors, it is not good against the rights of existing creditors.¹⁰⁹

The board of directors of a solvent corporation has the power, as against stockholders and creditors, to compromise a bona fide dispute as to the amount due upon an unpaid subscription. Payment of a certain sum in satisfaction of the entire debt will relieve the subscriber from a claim for unpaid subscription.¹¹⁰

Waiver of right to release from subscription. As indicated above (see page 359), a subscriber is released from his subscription if there is a material change in the charter of the corporation without his consent. He waives his right to a release, however, if he pays any installments on his stock, or participates in any meeting of the stockholders, after the charter is obtained.¹¹¹

A subscriber waives his right to a release, when the required amount of stock is not subscribed, if he co-operates in any act that indicates the subscribers intend to proceed with the corporate organization with the stock partially taken up. These acts include voting for the spending of money, or the making of contracts.¹¹²

Even if the subscription is obtained through fraud, the subscriber waives the fraud and ratifies the subscription when he does any material act after he learns of the fraud.¹¹³ Some of

¹⁰⁷ *Burke v. Smith*, (1872) 83 U. S. 390.

¹⁰⁸ *Thomas v. Wentworth Hotel Co.*, supra (Note 105); *New Albany v. Burke*, (1870) 78 U. S. 96. See also "Release of Stock Subscriptions," 53 *Harvard Law Review* 313 (1939).

¹⁰⁹ *Thomas v. Wentworth Hotel Co.*, supra (Note 105).

¹¹⁰ *Fire Ins. Ass'n, Ltd. v. Wickham*, (1891) 141 U. S. 564, 12 S. Ct. 84; *Martin v. Cushwa*, (1920) 86 W. Va. 615, 104 S. E. 97.

¹¹¹ *Watters & Martin v. Homes Corp.*, (1923) 136 Va. 114, 116 S. E. 366; *W. End Real Estate Co. v. Claiborne*, (1900) 97 Va. 734, 34 S. E. 900.

¹¹² *New Hampshire Cent. R. Co. v. Johnson*, (1885) 30 N. H. 390, citing *Cabot and West Springfield Bridge v. Chapin & Co.*, (1850) 6 Cush. (Mass.) 50.

¹¹³ *Fulmele v. Los Angeles Inv. Co.*, (1921) 51 Cal. App. 417, 196 P. 923; *In re Marcella Cotton Mills*, (1925) 8 F. (2d) 522.

the material acts that amount to ratification are: (1) attending meetings of stockholders, (2) signing a proxy,¹¹⁴ (3) accepting dividends, and (4) taking an active part in the management of the corporation.

Power of corporation to accept conditional subscriptions. Capital stock subscription contracts, like other contracts, may be made upon conditions either precedent or subsequent; in general, the same principles and rules of law are applicable to conditional subscriptions as to other conditional contracts.¹¹⁵ For an explanation of conditions precedent, see page 373; for conditions subsequent, see page 376.

A corporation may receive conditional subscriptions to its capital stock at any time after actual incorporation, unless it is prohibited from accepting conditional subscriptions by statute.¹¹⁶ Whether subscriptions taken prior to organization may be made conditional depends upon the statute and the attitude of the courts of the state in which the corporation is organized. In some jurisdictions, if a condition is attached to a subscription taken before organization of the corporation, the subscription is void;¹¹⁷ in others, the subscription is binding in spite of the condition, but the condition is void.¹¹⁸ If the law under which the corporation is organized requires that a certain amount of the stock shall be subscribed before the corporate powers may be exercised, the subscriptions obtained prior to organization and for the purpose of organization must be absolute and unconditional.¹¹⁹

In a sense, all subscriptions obtained prior to incorporation

¹¹⁴ See, however, *Wilson v. Empire Holding Corp.*, (1934) 145 Ore. 598, 28 P. (2d) 843, in which it was held that the giving of a proxy was not an affirmation of a contract, where the buyer had given notice of intention to rescind the contract.

¹¹⁵ *Nowlin v. Packing Corp.*, (1923) 161 Ark. 294, 255 S. W. 1092.

¹¹⁶ *Armstrong v. Karshner*, (1890) 47 Ohio St. 276, 24 N. E. 897. In New York, conditional agreements to take shares of stock in a corporation are contrary to public policy and hence void; the statute authorizes only absolute subscriptions. *General Electric Co. v. Wightman*, (1896) 3 N. Y. App. Div. 118, 39 N. Y. Supp. 420; *Harriman Nat. Bank v. Palmer*, (1916) 93 N. Y. Misc. 431, 158 N. Y. Supp. 111; *Talbot v. Chattanooga Automobile Identification Underwriters*, (1931) 163 Tenn. 256, 43 S. W. (2d) 220.

¹¹⁷ *Bavington v. Pittsburgh, etc. R. Co.*, (1859) 34 Pa. St. 455; *Berger v. Callender*, (1936) 81 F. (2d) 687.

¹¹⁸ *People v. Chambers*, (1871) 42 Cal. 201.

¹¹⁹ *Burke v. Smith*, (1872) 83 U. S. 361. There are cases where subscriptions upon conditions precedent, procured prior to the organization of the corporation, have been sustained. See *Montpelier & W. R. R. Co. v. Langdon*, (1873) 46 Vt. 284; *People's Ferry Co. v. Balch*, (1857) 74 Mass. 303.

are conditional upon acceptance by the corporation when it is organized.

Subscriptions on conditions precedent. A subscription on a condition precedent means that some condition is set up in the subscription agreement which must be performed by the corporation before the subscription will be binding or effectual.¹²⁰

An example is where the subscriber agrees to take the stock of a railroad corporation under an agreement that payment shall not be due unless and until the company raises a specified sum of money for the purchase of a locomotive.¹²¹ Capital stock subscription contracts may be made upon any expressed conditions precedent which the parties desire, so long as there is no provision in the statute, charter, or by-laws to the contrary. Thus, it may be stipulated in the contract that a note given in payment for stock shall become due and payable when subscription and payment have been made for a certain number of shares. Performance of this condition precedent by the corporation is necessary before the corporation can recover on the subscription.¹²² Neither issuance or tender of a stock certificate¹²³ nor payment on the subscription is an implied condition precedent to a stock subscription contract.¹²⁴

Implied conditions precedent. As previously indicated, the liability of a subscriber on a subscription for stock in a corporation to be formed is subject to the following conditions precedent implied by law, even if the subscription is, on its face, absolute: (1) the corporation must be legally organized; and (2) the corporation organized shall be the corporation contemplated by the subscription, and not a different corporation. (See page 359.)

¹²⁰ Chase v. Sycamore & C. R. Co., (1865) 38 Ill. 215; National Bank of the Republic v. Beckstead, (1926) 68 Utah 421, 250 P. 1033; Felton v. Highlands Hotel Co., (1928) 165 Ga. 598, 141 S. E. 793; Martin v. Steinke, (1925) 22 Ohio App. 146, 154 N. E. 47; "Conditional Share Subscriptions," 37 *Yale Law Journal* 226.

¹²¹ Chase v. Sycamore & C. R. Co., *supra* (Note 120).

¹²² Nowlin v. Packing Corp., (1923) 161 Ark. 294, 255 S. W. 1092.

¹²³ Dickinson County Hospital Co. v. Kessinger, (1929) 128 Kan. 576, 279 P. 7; Atlantic Transp. Co. v. Alexander Shipping Co., (1927) 261 Mass. 1, 157 N. E. 725; National Bank of the Republic v. Beckstead, (1927) 68 Utah 421, 250 P. 1033; Rutter v. Kilpatrick, (1876) 63 N. Y. 604; Wheeler v. Millar, (1882) 90 N. Y. 353; U. S. Radiator Co. v. N. Y., (1913) 208 N. Y. 144, 101 N. E. 783; Smith v. Universal Service Motors Co., (1929) 17 Del. Ch. 58, 147 A. 247; Commonwealth v. Nixon, (1929) 94 Pa. Super. 333.

¹²⁴ Nicholson-Watson Shoe & Clothing Co. v. Urquhart, (1903) 32 Tex. Civ. App. 527, 75 S. W. 45. See First Nat. Bank v. Morgan, (1930) 132 Ore. 515, 286 P. 558.

Any subscription, whether before or after incorporation, is subject to the following implied conditions precedent:

(1) The corporation must have the power to issue the stock subscribed for.¹²⁵ Thus, a contract of subscription for shares beyond the authorized capital stock of a corporation is void, since a corporation cannot issue shares in excess of the amount authorized by its charter. Therefore, under such a contract, the subscriber will be released from liability to the corporation and its creditors.¹²⁶

(2) All or a particular part of the capital stock must be subscribed in accordance with the governing statute, charter, or by-laws.¹²⁷ This implied condition, however, can be set aside by the terms of the statute, charter, or subscription contract.¹²⁸ Thus, where the statute permitted corporate organization upon subscription of less than the authorized capital stock, it was held that the rule requiring subscription of the total amount of capital stock did not apply.¹²⁹ The same result may be reached where the subscriber, expressly or impliedly, waives the implied condition precedent that all the capital stock be subscribed before his liability attaches.¹³⁰ (See waiver of conditions precedent, on page 371.) In a subscription contract for shares upon an increase of the capital stock, there is no implied condition precedent that all the new shares must be subscribed to fix the absolute liability of the subscriber.¹³¹

Release of subscriber upon failure of corporation to perform condition precedent. Until the performance of the condition

¹²⁵ *Marion Trust Co. v. Bennett*, (1907) 169 Ind. 346, 82 N. E. 782; *Winters v. Armstrong*, (1889) 37 F. 508; *Knoxville, C. G. & L. R. Co. v. Knoxville*, (1896) 98 Tenn. 1, 37 S. W. 883; *In re Rombach & Co.*, (1924) 3 F. (2d) 46; *Clark v. Millsap*, (1926) 197 Cal. 765, 242 P. 918.

¹²⁶ *Scoville v. Thayer*, (1881) 105 U. S. 968.

¹²⁷ *Mountain View Development Co. v. Burnett*, (1932) 164 Tenn. 210, 46 S. W. (2d) 809; *Heiskell v. Morris*, (1916) 135 Tenn. 238, 186 S. W. 99; *Enterprise Sheet Metal Works v. Schendel*, (1918) 55 Mont. 42, 173 P. 1059; *Whalen v. Hudson Hotel Co.*, (1918) 183 N. Y. App. Div. 316, 170 N. Y. Supp. 855; *Fitzgerald v. Guaranty Security Corp.*, (1921) 239 Mass. 174, 131 N. E. 463; *Val Verde Hotel Co. v. Hubbell*, (1921) 27 N. M. 545, 202 P. 982; *Huxtable v. Shumate*, (1922) 79 Ind. App. 293, 134 N. E. 896; *Holliday v. Persons*, (1923) 29 Ga. App. 784, 116 S. E. 907; *Eastern Products Corp. v. Tenn. Coal, Iron & R. Co.*, (1925) 151 Tenn. 239, 269 S. W. 4; *Poultry Producers v. Nilsson*, (1925) 197 Cal. 245, 239 P. 1086.

¹²⁸ *Anderson v. Middle East Tennessee Cent. R. Co.*, (1891) 91 Tenn. 44, 17 S. W. 803. See also *Tyler v. Receivers of the Cambridge Furniture Co.*, (1931) 160 Md. 333, 152 A. 896.

¹²⁹ *Morgan v. Laudstreet*, (1909) 109 Md. 558, 72 A. 399.

¹³⁰ *Ibid.*

¹³¹ *Aspinwall v. Butler*, (1890) 133 U. S. 595, 10 S. Ct. 417.

precedent, the subscriber does not become a stockholder of the company.¹³² Upon performance of the condition, the subscription becomes an unconditional and absolute subscription, payable according to the terms of the contract;¹³³ the subscriber becomes a shareholder, entitled to all the rights and privileges, and subject to all the liabilities, of a stockholder.¹³⁴ A subscriber will be released from a conditional subscription by the failure of the corporation to perform the condition precedent within the time stated in the subscription contract, or, if no time is stipulated, within a reasonable time.¹³⁵ This rule does not apply if he waives the performance of the condition (see page 371) or is otherwise prevented from setting up nonperformance as a defense.¹³⁶

The corporation is not required to give the subscriber notice that the condition has been met, unless the subscription contract calls for such notice. Notice of performance is necessary where the fact of performance is peculiarly within the knowledge of the corporation. For example, if the subscription contract is made upon a condition that the corporation raise a definite sum of money for the purchase of specified equipment, the corporation alone would know when the condition had been fulfilled.¹³⁷

Withdrawal by subscriber from subscription upon conditions precedent. In some states, the courts have held that subscriptions to stock upon conditions precedent are not effective as contracts, but are continuing offers. They may develop into contracts upon performance by the corporation of the conditions precedent. Such an offer may be withdrawn by the subscribers

¹³² *Webb v. Baltimore & E. S. R. Co.*, (1893) 77 Md. 92, 26 A. 113.

¹³³ *Amick v. Elliott*, (1928) 222 Ky. 753, 2 S. W. (2d) 367; *Sparrow v. Oklahoma Club*, (1928) 131 Okla. 110, 267 P. 835; *Martin v. Steinke*, (1926) 22 Ohio App. 146, 154 N. E. 47.

¹³⁴ *Cravens v. Eagle Cotton Mills Co.*, (1889) 120 Ind. 6, 21 N. E. 981.

¹³⁵ *Natwick v. Terwilliger*, (1916) 24 Wyo. 253, 157 P. 696, 160 P. 338. A subscription contract entitling the subscriber to stock certificates "when, as and if issued," was held to be a conditional subscription, entitling the subscriber to a return of his money on failure of the corporation to issue the certificates within a reasonable time. *Bahr v. Breeze Corporations*, (1939) 126 N. J. Eq. 124, 8 A. (2d) 185, aff'd, (1940) 127 N. J. Eq. 257, 12 A. (2d) 678. Recovery was barred in this case because of the statute of limitations.

¹³⁶ See *New Hampshire Cent. R. Co. v. Johnson*, (1885) 30 N. H. 390 (citing *Cabot and West Springfield Bridge v. Chapin & Co.*, (1850) 6 Cush. (Mass.) 50); *Shiffer v. Akenbrook*, (1921) 75 Ind. App. 149, 130 N. E. 241; *Johnson v. Broadway Bros.*, (1928) 90 Cal. App. 260, 265 P. 855; *Shaw v. Nolen*, (1930) (Tex. Civ. App.) 23 S. W. (2d) 445; *Thielsen v. Linde*, (1928) 127 Ore. 639, 271 P. 983.

¹³⁷ See *Chase v. Sycamore & C. R. Co.*, (1865) 38 Ill. 215.

prior to acceptance of the offer by performance of the conditions precedent.¹³⁸

In other states, stock subscriptions upon conditions precedent are considered binding contracts, and subscribers may not withdraw even before performance of the conditions.¹³⁹ In states which hold that a subscription is a contract between the subscribers, there can be no withdrawal without acquiescence of all the subscribers.¹⁴⁰

Subscriptions upon conditions subsequent. Under a stock subscription made upon conditions subsequent, an absolute and binding contract between the corporation and the subscriber becomes effective at the time the contract is made.¹⁴¹ The subscriber agrees to take stock in the corporation and to pay for it. Coupled with this agreement is a collateral agreement on the part of the corporation that it will perform a certain act.¹⁴² For example, a subscriber agrees to take stock in the corporation, and the corporation agrees to locate its plant at a certain place for a fixed period,¹⁴³ or to establish a depot within a certain number of feet from a fixed place.¹⁴⁴ A subscription upon special terms is sometimes called a subscription under conditions subsequent. The special terms may consist of a particular mode of paying for the subscription; the company cannot enforce payment of the subscription in any other manner.¹⁴⁵

A corporation may accept subscriptions upon conditions subsequent or under special terms, provided that: (1) the special conditions or terms do not constitute a fraud upon other stockholders or subscribers, or upon the creditors of the corporation, and (2) the conditions or special terms are not contrary to public

¹³⁸ *Webb v. Baltimore & E. S. R. Co.*, (1893) 77 Md. 92, 26 A. 113; *Armstrong v. Karshner*, (1890) 45 Ohio St. 276, 24 N. E. 897.

¹³⁹ *Cravens v. Eagle Cotton Mills Co.*, (1889) 120 Ind. 6, 21 N. E. 981; *Philadelphia, etc., R. R. Co. v. Hickman*, (1857) 28 Pa. St. 318.

¹⁴⁰ *Cravens v. Eagle Cotton Mills Co.*, (1889) 120 Ind. 6, 21 N. E. 981. See also *Farm Lands Development Co. v. Taft*, (1922) 194 Iowa 481, 186 N. W. 431.

¹⁴¹ *Morrow v. Nashville Iron & Steel Co.*, (1889) 87 Tenn. 262, 10 S. W. 495; *Appeal of Cornell*, (1886) 114 Pa. St. 153, 6 A. 258; *Bryan v. St. Andrews Bay Community Hotel Corp.*, (1930) 99 Fla. 132, 126 So. 142.

¹⁴² *Schwab v. Getty*, (1927) 145 Wash. 66, 258 P. 1035.

¹⁴³ *Bobzin v. Gould Balance Valve Co.*, (1909) 140 Iowa 744, 118 N. W. 40. See also *Independent Harvester Co. v. Anderson*, (1921) 45 S. D. 60, 186 N. W. 112; *Bryan v. St. Andrews Bay Community Hotel Corp.*, (1930) 99 Fla. 132, 126 So. 142.

¹⁴⁴ *Paducah & M. R. Co. v. Parks*, (1888) 86 Tenn. 554, 8 S. W. 842.

¹⁴⁵ *Nippenose Mfg. Co. v. Staddon*, (1871) 68 Pa. St. 256.

policy, are not prohibited by law, and are not beyond the charter powers of the corporation.¹⁴⁶

Effect of corporation's failure to meet conditions subsequent or special terms. A subscription upon conditions subsequent or under special terms is an absolute and unconditional subscription; the subscriber becomes a stockholder, liable as such for the amount of the subscription, upon acceptance of the subscription by the corporation. He is not released from his subscription by failure of the corporation to meet the stipulation or to comply with the agreement for special rights of the subscriber. The subscriber, however, does have the right to bring an action against the corporation for its failure to perform the condition.¹⁴⁷ However, if the failure of the corporation to perform its condition amounts to a failure of the consideration of the contract, the subscriber will be released from liability except as against creditors.¹⁴⁸ Thus, it has been held that if the contract of subscription to stock of a railroad company fixes the points at which the railroad shall begin and end and indicates the route, the abandonment of either terminus or any material part of the road as set forth in the contract constitutes a failure of consideration, and the subscriber is released from his obligation.¹⁴⁹

Payment at time of subscription. Neither all nor any particular part of the subscription price of stock need be paid in at the time of subscribing, unless the charter or statute requires otherwise. Payment may be called for by the board of directors as the money is needed by the corporation.¹⁵⁰ At one time the

¹⁴⁶ *Spratling v. Westbrook*, (1913) 140 Ga. 625, 79 S. E. 536; *Talbot v. Automobile Identification Underwriters, Inc.*, (1931) 163 Tenn. 256, 43 S. W. (2d) 220. See also *O'Dell v. Appalachian Hotel Corp.*, (1929) 153 Va. 283, 149 S. E. 487.

¹⁴⁷ *Bryan v. St. Andrews Bay Community Hotel Corp.*, (1930) 99 Fla. 132, 126 So. 142; *Bobzin v. Gould Balance Valve Co.*, (1909) 140 Iowa 744, 118 N. W. 40; *Paducah & M. R. Co. v. Parks*, (1888) 86 Tenn. 554, 8 S. W. 842. But see *Patterson v. U. S. Bond & Mortgage Co.*, (1940) 240 Ala. 474, 199 So. 695. In this case the assignee of the subscriber became entitled to a refund of payments made by the subscriber because the corporation had not lived up to the special terms of the subscription agreement. These terms gave the corporation the right to cancel the subscription if payments were not made as called for, offer the shares for resale, and refund payments made by the subscriber less certain costs. The corporation had not used reasonable diligence in trying to resell the stock.

¹⁴⁸ *Seymour v. Detroit Copper & Brass Rolling Mills*, (1885) 56 Mich. 117, 22 N. W. 317, 23 N. W. 186.

¹⁴⁹ *Caley v. Phila. & Chester Co. Ry. Co.*, (1876) 80 Pa. St. 363.

¹⁵⁰ *Nicholson-Watson Shoe & Clothing Co.*, (1903) 32 Tex. Civ. App. 527, 75 S. W. 45; *Port Edwards, C. & N. Ry. Co. v. Arpin*, (1891) 80 Wis. 214, 49 N. W. 828; *Ross v. Bank of Gold Hill*, (1888) 20 Nev. 191, 19 P. 243; *Peoria Inv. Corp. v. Hoagland*, (1939) 300 Ill. App. 54, 20 N. E. (2d) 627, distinguishing *Rockford*

corporation laws of many states provided that subscriptions must be accompanied by a cash payment of at least a specified percentage of the face amount of the subscription. Many of these statutes, however, have been repealed. The mere fact that a subscriber has not paid for his stock in full does not mean that he is not the owner of the stock.¹⁵¹

The courts that have been called upon to interpret the effect of nonpayment of the specified amount of cash have laid down the following general principles:

1. If the subscription is made after incorporation, failure to pay the required amount at the time of subscribing will not entitle the subscriber to a release from his liability on the subscription, unless the statute or charter expressly provides that a subscription unaccompanied by the required payment shall be void.¹⁵²

2. On subscriptions made before incorporation, release from liability because of failure of the subscriber to pay the amount on his subscription required by statute or charter depends upon whether it is the intention of the statute that payment with the subscription shall constitute a condition precedent to incorporation. If the statute indicates that the payment is a condition precedent to incorporation, failure to pay the required amount will release the subscriber from liability unless he is estopped from denying the legal existence of the corporation.¹⁵³

3. Where the statute indicates that subscriptions without the required payment shall be void, or that the corporation is prohibited from accepting subscriptions without the required payment, the subscriber will be released from the subscription if the corporation has not obtained the required payment.¹⁵⁴

The courts disagree as to the effect of a failure to make the initial payment where the statute does not specifically prohibit subscriptions to stock without payment of a deposit, or does not state that such subscriptions shall be void, but merely calls for the payment of a certain percentage with each subscription. In

Metal Specialty Co. v. Wester, (1924) 234 Ill. App. 260; *Davidson v. American Paper Mfg. Co.*, (1937) 188 La. 69, 175 So. 753.

¹⁵¹ *Marshall v. Wittig*, (1933) 213 Wis. 374, 251 N. W. 439.

¹⁵² *Minneapolis and St. Louis Railway Co. v. Joel B. Bassett*, (1874) 20 Minn. 535. In *New York & Oswego Midland R. Co. v. Van Horn*, (1874) 57 N. Y. 473, the subscription was held invalid under the statute then in force.

¹⁵³ *Jenkins v. Union Turnpike Co.*, (1804) 1 Cain Cas. (N. Y.) 86; *Crocker Crane*, (1839) 21 Wend. (N. Y.) 211.

¹⁵⁴ *Boyd v. Peach Bottom Railway Co.*, (1879) 90 Pa. St. 169.

some jurisdictions a subscription without payment of a deposit is void under such conditions.¹⁵⁵ In others, the subscription is not considered void and failure to pay the required amount at the time of subscribing is no defense in an action against the subscriber.¹⁵⁶ Where the charter and by-laws required each subscriber to pay a given percentage of his subscription in cash at the time of subscribing, it was held that the subscription was not enforceable if the payment had not been made.¹⁵⁷

Liability of stockholder to pay for stock. The primary liability of a person who becomes a stockholder is to take and pay for his stock.¹⁵⁸ In the absence of an express promise to pay, there is an implied promise on the part of the subscriber to pay in full.¹⁵⁹ This liability is contractual¹⁶⁰ and may be enforced as a contract by the corporation. The corporation can enforce liability for unpaid subscriptions by legal and equitable remedies, as in the case of any other valid debt.¹⁶¹

The distinction between liability of a stockholder to pay to the corporation the purchase price of his stock, or any unpaid balance, and the liability of a stockholder to make such payment to creditors of an insolvent corporation should be kept clearly in mind.¹⁶² The corporation may recover the purchase price of stock regardless of the existence of corporate creditors, in accordance with the terms of the contract of subscription.¹⁶³ The

¹⁵⁵ See *State Ins. Co. v. Redmond*, (1880) 1 McCrary (U. S.) 308; *Taggart v. Western Maryland R. R. Co.*, (1886) 24 Md. 563.

¹⁵⁶ *Smith v. Tallassee Branch of Central Plank-Road Co.*, (1857) 30 Ala. 650; *Piscataqua Ferry Co. v. Jones*, (1859) 39 N. H. 491; *Wight v. Shelby R. R. Co.*, (1855) 16 B. Mon. (Ky.) 4; *The Sedalia, etc. Ry. Co. v. Abell*, (1885) 17 Mo. App. 645.

¹⁵⁷ *State Ins. Co. v. Redmond*, (1880) *supra* (Note 155).

¹⁵⁸ *Cartwright v. Dickinson*, (1890) 88 Tenn. 476, 12 S. W. 1030; *Beals v. Buffalo Expanded Metal Const. Co.*, (1900) 49 N. Y. App. Div. 589, 63 N. Y. Supp. 635; *Southwestern Slate Co. v. Stevens*, (1909) 139 Wis. 616, 120 N. W. 408; *McNelus v. Stillman*, (1916) 172 N. Y. App. Div. 307, 158 N. Y. Supp. 428; *Amick v. Elliott*, (1928) 222 Ky. 753, 2 S. W. (2d) 367.

¹⁵⁹ *Hodde v. Hahn*, (1920) 283 Mo. 320, 222 S. W. 799; *In re Hannevig*, (1926) 10 F. (2d) 941.

¹⁶⁰ *Lamphere v. Lang*, (1915) 213 N. Y. 585, 108 N. E. 82; *Dickinson County Hospital Co. v. Kessinger*, (1929) 128 Kan. 576, 279 P. 7.

¹⁶¹ *Stoddard v. Lum*, (1899) 159 N. Y. 265, 53 N. E. 1108. See also *Big Creek Ditch Co. v. Hulick*, (1929) 130 Ore. 401, 280 P. 492; *Levy v. Doherty*, (1930) 136 N. Y. Misc. 34, 239 N. Y. Supp. 239; *Peoria Inv. Corporation v. Hoagland*, (1939) 300 Ill. App. 54, 20 N. E. (2d) 627; *Buckman v. Gordan*, (1942) 312 Mass. 6, 42 N. E. (2d) 811.

¹⁶² This distinction is clearly brought out in *Philips v. Slocomb*, (1933) 35 Del. 462, 167 A. 698, and in *Harr v. Mikalarias*, (1937) 328 Pa. 49, 195 A. 86.

¹⁶³ *Basting v. Ankeny*, (1896) 64 Minn. 133, 66 N. W. 266; *Commerce Trust Co.*

stockholders' liability is several and not joint, unless the statute otherwise provides.¹⁶⁴ It extends only to the purchase price,¹⁶⁵ or the unpaid portion of the price, of the stock subscribed for by the stockholder individually.¹⁶⁶ Under the statute or charter, the liability of the subscriber may be for the full balance due, even if all the stock has not been sold or subscribed.¹⁶⁷ See implied conditions precedent on page 373.

Liability of stockholder for interest. The liability to pay for stock includes the liability to pay interest, at the legal rate, unless the contract of subscription provides otherwise. Interest generally runs from the date of default to the date of payment.¹⁶⁸ Usually a stock subscription contract bears interest on each installment from the time it becomes due.¹⁶⁹ In the absence of a provision for call for payment in the contract of subscription, interest runs from the due date of the subscription. The due date may be the day the contract is entered into, if the purchase price is immediately payable. Or it may be the date fixed for payment, when, by the contract, the purchase price is made payable on a certain day.¹⁷⁰

Stockholders may be liable to forfeiture of their shares of stock on failure to make payment (see page 511). For a discussion of calls for the payment of stock, see page 506. For effect of transfer of stock on liability for payment of stock, see page 535.

v. Hettinger, (1914) 181 Mo. App. 338, 168 S. W. 911; *Preston v. Jeffers*, (1918) 179 Ky. 384, 200 S. W. 654; *Geary St. P. & O. R. Co. v. Rolph*, (1922) 189 Cal. 59, 207 P. 539; *Philips v. Slocomb*, (1933) 35 Del. 462, 167 A. 698.

¹⁶⁴ *Terry v. Little*, (1880) 101 U. S. 864; *Turner v. Fidelity Loan Concern*, (1905) 2 Cal. App. 122, 83 P. 62; *Williams v. Chamberlain*, (1906) 29 Ky. 606, 94 S. W. 29; *Edwards v. Schillinger*, (1910) 245 Ill. 231, 91 N. E. 1048.

¹⁶⁵ *Levassor v. Metropolitan Fire Ins. Co.'s Receiver*, (1920) 188 Ky. 23, 220 S. W. 752.

¹⁶⁶ *Shipman v. Portland Const. Co.*, (1913) 64 Ore. 1, 128 P. 989.

¹⁶⁷ *Tyler v. Receivers of the Cambridge Co.*, (1931) 160 Md. 333, 152 A. 896.

¹⁶⁸ *Bergman v. Evans*, (1916) 92 Wash. 158, 158 P. 961.

¹⁶⁹ *Eastern, etc. Exposition v. Vail's Estate*, (1923) 96 Vt. 517, 121 A. 415.

¹⁷⁰ *Mountain Timber Co. v. Case*, (1913) 65 Ore. 417, 133 P. 92.

CHAPTER 14

FORMS RELATING TO SUBSCRIPTIONS TO STOCK

No. 322

Individual subscription agreement between a subscriber and a proposed corporation, showing payment to be made in property, cash, or services.

WHEREAS, it is proposed by certain interested parties to organize a corporation under the laws of the State of, to be known as, with its principal office and place of business at (Street), (City), (State), said corporation to have an authorized capital stock of (....) shares of Class A stock having a par value of (\$....) Dollars per share, and (....) shares of Class B stock without par value:

NOW, THEREFORE, I,, do hereby subscribe to (....) shares of the Class B stock of the said corporation, on the following terms and conditions:

1. Payment for said subscription shall be made at the rate of (\$....) Dollars per share.
2. There shall be credited to the amount due on said subscription the sum of (\$....) Dollars, representing advances made by me for and in behalf of the corporation up to the time of incorporation.
3. The said subscription shall be payable in cash, in property, or in services rendered to the corporation by me before or after incorporation, and accepted by the Board of Directors, at such reasonable valuation as the Board shall determine.
4. Payment for said subscription shall be made within (....) years from the date of incorporation of said corporation, in such amounts and at such time or times within said period as shall be determined by me.
5. The said corporation shall issue to me a certificate for the full amount of said subscription as soon as possible after the organization of said corporation is completed, and shall note thereon the amount paid on said subscription by me up to the time of incorporation, and all sums thereafter paid by me on account of said subscription.

6. The said corporation, at any time, at my request, shall transfer as fully paid and nonassessable, any or all shares of stock that shall be fully paid for by me at the rate of (\$....) Dollars per share up to the time of transfer, and the proper officers shall issue a new certificate or certificates for such shares so transferred to whomsoever I may direct. In the event that less than all of the shares hereby subscribed for by me are transferred as aforesaid, the proper officers shall issue to me a new certificate, representing the difference between the number of shares hereby subscribed for and the aggregate number of shares so transferred, and shall note thereon the amount paid for said subscription, including moneys advanced before incorporation, and the sum represented by the stock transferred—that is, (\$....) Dollars times the number of shares transferred.

Dated, 19... ..

No. 323

Subscription agreement prior to organization in which the subscribers contract with each other and with the promoters.

WHEREAS, it is proposed to organize under the laws of the State of, a corporation, to be known as, or by such other name as the parties in interest may determine; and

WHEREAS, it is proposed that said Corporation shall transact the business of, and

WHEREAS, it is proposed that the said Corporation shall have an authorized capital stock of (\$....) Dollars, divided into (....) shares of the par value of (\$....) Dollars each,

NOW, THEREFORE, the signers hereto, in consideration of their mutual promises, do severally agree with one another, and with, the promoter and founder of said Corporation, that they will take and pay for, and they do hereby severally subscribe to, the number of shares of the capital stock of said Corporation set opposite their respective names; and they do further severally agree to pay for said shares at their par value, in the following manner: (....%) per cent of their subscriptions immediately upon organization of the Corporation and upon notice to that effect from; (....%) per cent within (....) months thereafter; and the remaining (....%) per cent on demand and when called for by the Board of Directors of the corporation, but not later than (....) months after incorporation of said corporation.

Dated, 19..

<i>Name</i>	<i>Residence</i>	<i>Number of Shares</i>	<i>Amount</i>
.....
.....
.....

No. 324

Subscription to stock, to be paid for by cash and note; issuance of stock upon payment of note; effect of default in payment; power of corporation to reject application; obligation to offer stock to corporation before transfer.

I hereby subscribe for (....) shares of the preferred stock of the Corporation, (*City*), (*State*), and agree to pay therefor one hundred (\$100) Dollars per share, on the following terms: Not less than one fourth in cash, accompanying this application, and the balance thereof, as evidenced by my promissory note of this date, with interest at six (6%) per cent per annum, payable days after date.

It is expressly agreed that no stock is to be issued until the amount of this subscription and note given therefor are paid in full in cash, and any payment becoming due on the stock hereby subscribed for, or any note given therefor, not paid within sixty (60) days after its due date, shall, at the option of the Corporation, cause this subscription and any note or notes given therefor to become null and void, and all payments made on this subscription by the subscriber shall become the property of the Corporation absolutely as liquidated damages for the failure of the subscriber to carry out this contract.

The Corporation may reject this application by refunding all moneys paid thereon.

This subscription contract contains the entire contract between the subscriber and the Corporation, and no agent or representative of the Corporation or any other person has any power to change or alter the terms of this subscription.

I hereby agree that, before selling or agreeing to sell the stock hereby subscribed for, I will first offer same to the Corporation.

All payments will be made to the Corporation, at (*City*), (*State*).

Dated this .. day of, 19...

.....
(Name of subscriber)
.....
(Address)

[*Note.* See *Hedman v. Security Title & Guaranty Co.*, (1935) 245 N. Y. App. Div. 224, 281 N. Y. Supp. 565, in which it was held that the provision on a printed agreement for the sale of guaranteed mortgage certificates, that no agent or other person had permission to change or in any way alter the terms of the agreement or bind the company by any representations, oral or written, not contained therein, applied only to the negotiations leading up to the execution of the agreement. Where the agreement was executed in accordance with the printed form, the provision did not prevent modification of the agreement by a district manager after its execution.]

No. 325

Subscription to stock; part payment at time of subscription, balance before fixed date; application of subscription price; reservation of right to reject or allot subscriptions; issuance of receipts.

SUBSCRIPTION AGREEMENT

NEW ISSUE

..... SHARES

..... COMPANY OF THE CITY OF

AUTHORIZED CAPITAL SHARES PAR VALUE \$.....

PRESENT OFFERING SHARES AT \$..... PER SHARE

PAYABLE \$..... PER SHARE WITH SUBSCRIPTION,

BALANCE, 19..

COMPANY'S TREASURY WILL RECEIVE ENTIRE PROCEEDS OF THIS STOCK, FULLY PAID AND NONASSESSABLE. NO PERSONAL LIABILITY ATTACHES TO STOCKHOLDERS

The undersigned hereby subscribes at one hundred (\$100) Dollars per share for (....) shares of the capital stock of Company of the par value of (\$....) Dollars each, and agrees to pay (\$....) Dollars therefor, as follows: (\$....) Dollars (at least \$..... per share) herewith: Balance on or before , 19...

TERMS AND CONDITIONS OF SUBSCRIPTION

..... (\$....) Dollars per share shall be applied to the capital of the Company, and (\$....) Dollars per share shall be applied to the surplus and reserve funds of the Company.

It is understood and agreed that the Company reserves the right to accept subscriptions in excess of the present offering and to issue stock therefor, including the right to increase, to the extent of an additional (....) shares, the authorized capital stock of the Company, if necessary, to provide for subscriptions accepted. The Company also reserves the right to reject, reduce, and/or allot all subscriptions received.

Receipts will be issued in respect of payments received on account

of subscriptions, the amount represented thereby to be applied toward payment for the number of shares finally allotted.

Checks for payments on account of subscriptions shall be drawn to the order of Company, and may be forwarded to the following firms, banks, or trust companies or their branches:

..... (Name of bank) (Name of bank)
..... (Address) (Address)

Subscription books will close at p.m., , 19...

IN WITNESS WHEREOF, I (we) have hereunto set my (our) hand(s) and seal(s), this .. day of, 19...

.....
(Signature)
.....
(Address)

.....
(Witness)

No. 326

Letter containing offer to subscribe to stock.

..... Co.
..... CITY, STATE
..... , 19..

Gentlemen:

We hereby subscribe to (....) shares of your common stock without nominal or par value at the subscription price of (\$....) Dollars per share, and hand you herewith (\$....) Dollars, representing (....%) per cent payment on account of such subscription, the balance of the subscription to be payable on call of the board of directors of your company, provided not less than (....) days' notice of such call shall be given.

Will you kindly indicate your acceptance of this offer by signing in the space below, and thereby constitute this an agreement between us.

Very truly yours,

Accepted, , 19..
..... Co.
By
Vice President

..... Co.
By
President

No. 327

Application for stock on cash plan or monthly payment plan, in accordance with circular *; right to reject or reduce application; adjustment of accrued dividends and interest allowances.**

Dated , 19..

To Company, Inc.,
.....
(Address)

I hereby apply for shares of Class A stock of the Company, in accordance with the terms of your circular of , 19.., as follows:

..... CASH PLAN—Approximate payment in full to accompany the application; difference between this payment and cost of stock to be refunded or collected before delivery of certificate.
No. of Shares

..... MONTHLY PAYMENT PLAN—Payment to be made in total monthly installments of \$..... (first payment \$..... per share, subsequent monthly payments \$....., or multiple thereof per share), first payment to accompany application; an adjustment for accrued dividends and interest allowances to be made in connection with final payment.
No. of Shares

Total amount of payment made on account of this application, \$.....
Please make remittances payable to the Company, Inc.

.....
(Signature of applicant—give first or middle name in full; if a woman, indicate whether “Miss” or “Mrs.”)

Applicant will please also PRINT name in this space
Applicant’s address to which stock certificates and notices should be mailed:
.....
(Street and Number) (City or Town) (State)

It is understood that you may reject this application or accept it for a lesser number of shares.
(see reverse side of application)

* A prospectus or other writing may be included as part of the subscription agreement. See *Co-operative Telephone Co. v. Katus*, (1905) 140 Mich. 367, 103 N. W. 814.
** For right to allow interest on installments paid, see *Hardin County v. Louisville & N. R. Co.*, (1891) 92 Ky. 412, 17 S. W. 860.

[reverse side of application]

PRICE

The price per share is the price at which the last sale is made on the New York Curb Exchange on the day on which the application is received by the Company, plus an amount equal to brokerage charges, which at present are (.....¢) cents a share. The applicant will be notified of the price at which the application is accepted.

PAYMENT IN FULL PLAN

Stock may be paid for in full by a single payment to accompany the application.

MONTHLY PAYMENT PLAN

Monthly payments shall be (\$.....) Dollars or any multiple thereof per share. A first payment of (\$.....) Dollars per share must accompany the application.

Interest will be allowed on each monthly payment, at the rate of (.....%) per cent per annum, from the first of the month on payments received on or before the day of such month; otherwise from the day of the following month. An adjustment on account of accrued dividends will be made in connection with the final payment.

The applicant will be granted, upon request, one extension of monthly payments for not exceeding months. The applicant, at any time, may take up any or all of the shares applied for by payment of the balance due.

At any time prior to the final payment, the applicant may elect, by written notice, to have his contract canceled as to any or all of the shares applied for, in which case he will be refunded the amount paid in, with interest at the rate of (.....%) per cent per annum; or, he may take up the number of shares which the amount paid in, plus interest at the rate of (.....%) per cent per annum, will pay for in full, any balance to be refunded in cash. However, if, on the day of such cancellation, the last sale of the stock is made on the New York Curb Exchange at a price less than the price to be paid for the shares (including adjustment for accrued dividends), the applicant will be charged with the difference. The Company reserves the right to reject any application under either option, or to accept it for a lesser number of shares, and to withdraw this offer at any time without notice, and to cancel the application, with refund under the above terms, in case of an unadjusted differ-

ence with the applicant, or if a monthly payment is not received within months after it is due.

..... Company
By
President

Dated , 19..

No. 328

Notice of allotment of shares.

..... COMPANY
..... CITY, STATE

Dear:

Respecting your recent subscription to (....) shares of the capital stock of Company, you have been allotted (....) shares, and your subscription has been accepted to this extent. The following is a statement of your account:

- 1. Number of shares allotted (....) at \$30 per share..... \$.....
- 2. Paid at time of subscription \$.....
Paid since filing of subscription \$..... \$.....
Balance due or (if item No. 2 exceeds item No. 1)
amount of overpayment \$.....

Payment of balance due on allotted shares is due and payable by , 19.., at the office of the undersigned bank.

Check for overpayment, if any, will be sent on or about , 19...

The undersigned will be prepared to deliver on , 19.., definitive or temporary stock certificate for the number of shares allotted.

Yours very truly,
.....
(Insert name of bank)
Depository for Company

No. 329

Receipt for note and cash payment on subscription.

No..... Amount \$.....
Date , 19..

RECEIVED, of of (City), (State), the sum of (\$....) Dollars and note(s) for (\$....) Dollars of even date, all payable to the order of the.....

Company, in payment for (....) shares of the Capital Stock
of the Company.

.....

(see reverse side)

(The reverse side of the receipt contains a duplicate of the subscription contract.)

[Note. See Long v. Mayo, (1931) 156 Va. 185, 157 S. E. 767, in which it was held that a receipt for cash and note given in payment of stock may be construed as forming part of the contract of subscription.]

No. 330

Receipt for full payment of subscription price.

..... City, State, , 19...

RECEIVED, of, (\$....) Dollars in full
payment for (....) shares of stock of
Corporation.

This receipt will be exchangeable, on surrender, for an engraved
certificate when said certificate is completed and ready for delivery.

..... Corporation

By

President

No. 331

Transfer of subscription; assumption of liability by transferee; con-
sent of corporation and other subscribers.

KNOW ALL MEN BY THESE PRESENTS, That I,, in
consideration of (\$....) Dollars, lawful money of the United
States, to me paid before the ensealing and delivery of these presents,
the receipt whereof is hereby acknowledged, and for other good and
valuable considerations, have sold, assigned, transferred, and set over,
and by these presents do sell, assign, transfer, and set over unto
....., my right, title, and interest as a subscriber to
and an incorporator of, a corporation organized
under the laws of the State of, to the extent of
(....) shares, and I do hereby request and direct the said Corporation
to issue the certificate for said (....) shares to and in the
name of said, or such other person as he may
name.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this ..
day of, 19...

..... (L.S.)

Sealed and delivered in the presence of:

.....

IN CONSIDERATION of the above transfer of subscription, I hereby assume all liabilities, obligations, and duties attached to said subscription for said (.....) shares of the Capital Stock of the said Corporation, or devolving upon me by reason thereof.

..... (L.S.)
Witness:
.....

The undersigned hereby consent to the foregoing Transfer of Subscription.

Witness: Corporation
..... By
Witness: President
..... (L.S.)
..... (L.S.)
..... (L.S.)
Original Subscribers to
Capital Stock of
.....
Corporation

No. 332

Resolution of directors authorizing subscriptions to be taken for remaining unissued stock, and requiring part payment with subscription.

RESOLVED, That subscriptions for the remainder of the authorized capital stock at par, amounting to (.....) shares of unissued common stock, be opened forthwith at the office of the company, and that each subscriber shall be required to pay to the Treasurer at least (.....%) per cent of the amount of his subscription in cash at the time of subscribing, the balance to be paid upon call made pursuant to the statutory and by-law requirements.

No. 333

Resolution of directors appointing agent to receive subscriptions to capital stock.

RESOLVED, That the Trust Company be, and it hereby is, appointed the agent of this Company for the purpose of receiving subscriptions to its capital stock and is hereby authorized to countersign any subscriptions, warrants, or receipts in the form approved by this Board, which shall have been signed by the Company's Treasurer, or by its Assistant Treasurer;

RESOLVED FURTHER, That all moneys received by the

Trust Company on such subscriptions be held subject to the order of this Company, to be paid out only upon checks signed by any two of the following officers:, President;, Vice President;, Treasurer; and, Assistant Treasurer.

No. 334

Resolution of directors refusing to accept subscriptions.

RESOLVED, That the following subscriptions to the common stock of this corporation be refused, and that the Secretary be, and he hereby is, directed to notify the persons concerned of this action of the Board.

<i>Name of Subscriber</i>	<i>Address</i>	<i>Shares</i>
.....
.....
.....

No. 335

Resolution of directors authorizing partial release of subscribers.

RESOLVED, That all subscribers who subscribed to the common stock of this corporation prior to the .. day of, 19.., be, and they hereby are, authorized to surrender one half of the amount of stock subscribed for, or as much less as they may prefer, and the installments paid heretofore by said persons on account of the subscription price shall be applied as if they had been made upon the amount of the subscription retained, and shall be credited to them accordingly; provided that, if any subscribers to the stock of this corporation who surrender one half or other part of their subscription shall omit to pay any installment that may be hereafter called for, on the amount retained, such subscribers shall be considered as having waived this offer, and shall be bound for the amount of common stock originally subscribed for.

[*Note.* This resolution must have the unanimous consent of the stockholders. A resolution similar to the one above was held valid in *Cooper v. Frederick*, (1846) 9 Ala. 738. See also *La Fayette County Monument Corp. v. Ryland*, (1891) 80 Wis. 29, 49 N. W. 157, holding that the directors have no power to release subscribers to stock from payment of their subscriptions.]

No. 336

Resolution of stockholders ratifying release of subscribers by the corporation.

RESOLVED, That the action of the Board of Directors of this corporation, releasing subscribers from their subscriptions to stock of this corporation, as expressed in a resolution adopted by the Board of

Directors on the .. day of, 19.., which resolution reads as follows:

(Here insert form No. 335.)

be and the same hereby is approved.

No. 337

Resolution of stockholders releasing conditional subscriber upon inability of corporation to meet condition.

WHEREAS, at and before the organization of this company, the following parties agreed to subscribe for the common stock of this company, in the amounts set opposite their names—to wit:

"A"	shares
"B"	shares
"C"	shares
"D"	shares

and

WHEREAS, the said "A" and "B" subscribed for the number of shares of stock set opposite their respective names as above, upon the condition that the same should be paid for in services to be rendered this corporation in the construction of a fourteen-story building to be located at the corner of and Streets in the City of, State of, and the said "C" and "D" subscribed for the number of shares of stock set opposite their respective names as above, upon the condition that the company would proceed forthwith to erect the said building upon said lot, and the said "C" and "D" have paid in upon said stock subscriptions the following amounts—to wit:

"C"	\$.....
"D"	\$.....

and

WHEREAS, it has been decided by the stockholders and officers of this corporation that it is not expedient at this time to proceed with the erection of said building, in view of the fact that a sufficient amount of stock has not been subscribed to enable the corporation to proceed therewith, and

WHEREAS, it has become unnecessary for "A" and "B" to render the services with which they were to pay for their respective subscriptions, be it

RESOLVED, That each of the subscribers to the common stock of this corporation above mentioned be, and he hereby is, released from any

and all liabilities on his subscription to the stock of this corporation, it being recognized by the stockholders of this corporation that the corporation is unable to fulfill the conditions upon which said subscriptions were made, and

RESOLVED FURTHER, That the Treasurer be, and he hereby is, authorized and directed to remit to "*C*" the sum of (\$....) Dollars and to "*D*" the sum of (\$....) Dollars, being the amounts paid in upon said stock subscriptions by the said "*C*" and "*D*" respectively.

CHAPTER 15

ISSUANCE AND SALE OF CAPITAL STOCK

Issuance of Stock and Stock Certificates

Power of corporation to issue stock. The power to issue capital stock must be conferred upon the corporation either by the law of the state in which it is organized, or by its articles of incorporation.¹ The articles also fix the maximum amount of stock which the corporation may issue.²

A corporation that has issued the full amount of its authorized capital stock can make no further issues unless it increases the amount of capital stock in the manner prescribed by statute.³ (See methods of increasing stock, on page 716). After an additional issue is authorized, the laws that apply to the original issue generally apply to the additional issue.⁴ For example, if a state law requires that the corporation must get permission from a state committee to issue stock for any consideration other than money, the permission must be obtained whether the issue is of new stock or the original stock.

Issuance of authorized stock. Action in regard to the issuance of authorized stock must be taken by the directors at a valid meeting, regularly called.⁵ However, if all the stockholders and

¹ *Bodell v. General Gas & Electric Corporation*, (1927) 15 Del. Ch. 420, 140 A. 264; *Cooke v. Marshall*, (1899) 191 Pa. St. 315, 43 A. 314; rehearing (1900) 196 Pa. St. 200, 46 A. 447; *Reno Oil Co. v. Culver et al.*, (1901) 60 N. Y. App. Div. 129, 69 N. Y. Supp. 969; *Lewis v. Oscar C. Wright Co.*, (1930) 234 Ky. 814, 29 S. W. (2d) 566; *Savic v. Kramlich*, (1932) 52 Idaho 156, 12 P. (2d) 260; *Chicago Title & Trust Co. v. Central Republic Trust Co.*, (1939) 299 Ill. App. 483, 20 N. E. (2d) 351.

² *Mitchell v. Mitchell Woodbury Co.*, (1928) 263 Mass. 160, 160 N. E. 539; *Kress v. Tooker-Jordan Corp.*, (1930) 103 Cal. App. 275, 284 P. 685.

³ *Commissioner of Banks v. Tremont Trust Co.*, (1927) 259 Mass. 162, 156 N. E. 7; *Bahr v. Breeze Corp.*, (1939) 126 N. J. Eq. 124, 8 A. (2d) 185, aff'd, (1940) 127 N. J. Eq. 257, 12 A. (2d) 678.

⁴ *State ex rel. Weede v. Iowa Southern Utilities Co. of Delaware*, (1942) 231 Iowa 784, 2 N. W. (2d) 372.

⁵ *Elliott v. Kern*, (1928) 90 Ind. App. 453, 161 N. E. 662; *Rice & Hutchins v. Triplex Shoe Co.*, (1929) 16 Del. Ch. 298, 147 A. 317; *Belle Isle Corp. v. MacBean*, (1946) (Del. Ch.) 49 A. (2d) 5.

directors are present and concur in the authorization of an issue of stock, formal action by the board of directors is unnecessary.⁶ In such a case the board will be presumed to have ratified the action of the stockholders, though in fact it did not go formally into the matter. The kind of stock to be issued, the consideration for which the stock is to be issued, and the manner of issuing the stock are governed by the laws of the state in which the corporation is organized,⁷ by the certificate of incorporation, and by the provisions of the by-laws of the corporation. The requirements set forth therein must be met by those authorizing the issuance of stock.

The resolution adopted by the directors authorizing the issuance of stock should contain the following information: (1) the kind of stock to be issued; (2) the amount to be issued; (3) the price at which the stock is to be sold; (4) the consideration to be received for the stock; (5) the terms of the sale; and (6) authority for the proper officers to issue and deliver the certificates of stock upon payment.

Under the blue-sky laws of some of the states, it is necessary for certain corporations to obtain authority from some designated commission or officer before stock authorized to be sold and issued by proper authority of the corporation may actually be issued.⁸ Under the corporation laws of some of the states, it is necessary for the corporation to file a certificate with the secretary of state or some other designated official, showing that the directors have authorized the issuance of stock and giving other required information.⁹ The authorities differ as to whether an issue of stock is illegal¹⁰ or merely irregular,¹¹ when the required certificate of issue is not filed.

⁶ *Fitzpatrick v. O'Neill*, (1911) 43 Mont. 552, 118 P. 273. In *East Lake Lumber Co. v. Van Gorder*, (1919) 105 N. Y. Misc. 704, 174 N. Y. Supp. 38, it was held that no formal resolution was necessary for the issuance of stock, where the stock was in fact issued as a result of corporate action, acquiesced in by the stockholders, and was part of the very plan and purpose which underlay the formation and organization of the corporation.

⁷ *Young v. Titcomb*, (1929) 268 Mass. 14, 167 N. E. 286.

⁸ For a discussion of the effect of sale of securities in violation of blue-sky laws, see 23 *Minnesota Law Review* 828 (1939).

⁹ *Clark v. Millsap*, (1926) 197 Cal. 765, 242 P. 918.

¹⁰ *Black v. Taft*, (1933) 284 Mass. 77, 187 N. E. 96. For a criticism of the decision in this case, see 82 *University of Pennsylvania Law Review* 284 (1933).

¹¹ *Chicago Title & Trust Co. v. Central Republic Trust Co.*, (1939) 299 Ill. App. 483, 20 N. E. (2d) 351, citing *Cook on Corporations*, 8th Ed., Vol. 1, ¶ 291; *Fletcher Cyc. of Corp.*, Perm. Ed., Vol. 11, Ch. 58, § 5167, et seq.

As to registration of stock under Federal law, see pages 399-401.

Void or irregularly issued stock. Any issue of stock in excess of the amount prescribed or limited by the charter, or any amendment of the charter, is void.¹² Stock issued for a consideration that does not meet constitutional and statutory requirements is also void.¹³ (See consideration for stock on pages 414, et seq.) No one can be the owner of stock that the corporation is not authorized to issue.¹⁴ Therefore, a void issue is void even in the hands of a bona fide purchaser for value,¹⁵ or a bona fide pledge.¹⁶ A bona fide holder, however, is entitled to damages;¹⁷ the corporation cannot claim the defense of fraud in the issuance of the stock against a bona fide holder.¹⁸

Stock which the corporation has power to issue, but which it issues irregularly, is valid so far as the holder of the stock is concerned. In a suit for the payment of the stock the stockholder may not avoid his obligation on the ground that the stock was irregularly issued.¹⁹ The state alone may raise the question of irregularity.²⁰

Issuance of certificates of stock. The issuance of a certificate of stock is not necessary to establish the existence of the shares or their ownership.²¹ A certificate of stock is not the stock itself,

¹² *Scovill v. Thayer*, (1881) 105 U. S. 968; *Crawford v. Twin City Oil Co.*, (1927) 216 Ala. 216, 113 So. 61; *Taylor v. Lounsbury-Soule Co.*, (1927) 106 Conn. 41, 137 A. 159; *Pruitt v. Oklahoma Steam Baking Co.*, (1913) 39 Okla. 509, 135 P. 730.

¹³ *Rochell v. Oates*, (1941) 241 Ala. 372, 2 So. (2d) 749; *Oklahoma Gas & Elec. Co. v. Hathaway*, (1943) 192 Okla. 626, 138 P. (2d) 832.

¹⁴ *Bahr v. Breeze Corporation*, (1939) 126 N. J. Eq. 124, 8 A. (2d) 185, aff'd, (1940) 127 N. J. Eq. 257, 12 A. (2d) 678; *Oklahoma Gas & Elec. Co. v. Hathaway*, supra (Note 13).

¹⁵ *East River Bottom Water Co. v. Dunford*, (1946) 109 Utah 510, 167 P. (2d) 693; *Oklahoma Gas & Elec. Co. v. Hathaway*, supra (Note 13).

¹⁶ *Commercial Bank of Spanish Fork v. Spanish Fork South Irr. Co.*, (1944) 107 Utah 279, 153 P. (2d) 547.

¹⁷ *Commercial Bank of Spanish Fork v. Spanish Fork South Irr. Co.*, supra (Note 16); *East River Bottom Water Co. v. Dunford*, supra (Note 15).

¹⁸ *First Nat. Bank of Fairbanks, Alaska, v. Alaska Airmotive*, (1941) 119 F. (2d) 267.

¹⁹ *Benedict v. Anderson*, (1934) 70 F. (2d) 227. See also *Gill v. Wading River Realty Co.*, (1931) 10 N. J. Misc. Rep. 65, 157 A. 840.

²⁰ *Randall v. Mickle*, (1931) 103 Fla. 1229, 138 So. 14, 141 So. 317; *In re Rombach & Co.*, (1926) 9 F. (2d) 359, aff'g decree 3 F. (2d) 46; *Upton v. Tribilcock*, (1875) 91 U. S. 45.

²¹ *Illinois-Indiana Fair Assn. v. Phillips*, (1926) 328 Ill. 368, 159 N. E. 815; *Mau v. Montana Pac. Oil Co. et al.*, (1928) 16 Del. Ch. 114, 141 A. 828; *Curtis v. Prudential Ins. Co. of America*, (1932) 55 F. (2d) 97; *Savic v. Kramlich*, (1932) 52 Idaho 156, 12 P. (2d) 260; *Gibson v. Oswalt*, (1934) 269 Mich. 300, 257 N. W. 825; *Greenspun v. Greenspun*, (1946) (Tex. Civ. App.) 194 S. W. (2d) 134.

but merely the tangible evidence of a stockholder's interest in the corporation²²—evidence that the person named is the owner of the number of shares stated in the certificate.²³ A person may be a full-fledged stockholder even if no certificate of stock is issued;²⁴ title to shares may pass without delivery of the certificates.²⁵ For example, a person accepted stock from the corporation in payment of a debt, with the understanding that the corporation would buy back the stock at a certain time. No certificate was delivered. In the meantime, the corporation became bankrupt and could not buy back the stock. (See agreement by corporation to repurchase stock, on page 437.) The stockholder could not claim that he was a creditor instead of a stockholder, on the basis that no certificate was ever delivered to him.²⁶

Every stockholder who has fully paid for his stock has a right to a certificate as evidence of his title to the stock.²⁷ The statutes generally confirm this right to a certificate. In addition, provision for issuance of the stock certificate is often included in the by-laws. Refusal by the corporation to accept tender for payment, or refusal to issue the shares, does not deprive the stockholder of his privileges.²⁸

Where stock is only part paid, the corporation generally withholds the certificate. It may, however, issue the certificate immediately, marking it "part paid," provided the charter or statute

²² *Martin v. Central Trust Co. of Ill.*, (1927) 327 Ill. 622, 159 N. E. 319; *McWilliams v. Geddes & Moss Undertaking, etc. Co.*, (1936) (La. App.) 169 So. 894; *Polish American Pub. Co. of Detroit v. Wojcik*, (1937) 280 Mich. 466, 273 N. W. 771; *Kansas, O. & G. Ry. Co. v. Helvering*, (1941) 124 F. (2d) 460; *Laden v. Baader*, (1943) 134 N. J. Eq. 24, 34 A. (2d) 82; *In re Golos' Will*, (1946) 64 N. Y. Supp. (2d) 625.

²³ *Laden v. Baader*, *supra* (Note 22).

²⁴ *Conover v. Hasselman*, (1928) 206 Iowa 100, 220 N. W. 42; *Burchett v. Louisa Light & Power Co.*, (1930) 235 Ky. 296, 31 S. W. (2d) 373.

²⁵ *Commonwealth v. Nixon*, (1928) 94 Pa. Super. Ct. 333; *In re Penfield Distilling Co.*, (1942) 131 F. (2d) 694, citing *McIntyre v. E. Bement's Sons*, (1906) 146 Mich. 74, 109 N. W. 45; *Helvering, Com'r of Internal Revenue v. Kaufmann*, (1943) 136 F. (2d) 356.

²⁶ *In re Penfield Distilling Co.*, *supra* (Note 25).

²⁷ *Southwestern Slate Co. v. Stephens*, (1909) 139 Wis. 616, 120 N. W. 408; *Williams v. Everett*, (1917) (Mo.) 200 S. W. 1045; *Gallatin County Farmers' Alliance v. Flannery*, (1921) 59 Mont. 534, 197 P. 996. See also *Conover v. Hasselman*, (1928) 206 Iowa 100, 220 N. W. 42; *Harris v. Chicago Title & Trust Co. of Ill.*, (1930) 338 Ill. 245, 170 N. E. 285.

²⁸ *Beck v. Beck Inv. Co.*, (1946) 249 Wis. 5, 23 N. W. (2d) 454; *Mellen v. Berg*, (1944) 316 Mass. 252, 55 N. E. (2d) 463.

does not prohibit issuance of stock certificates before full payment has been made.²⁹

The provision found in the constitutions and statutes of many states that no corporation shall issue stock, except for money paid, labor done, or property actually acquired by the corporation (see page 414), does not prohibit the corporation from issuing stock as partly paid for; the provision is considered violated only if shares are issued as fully paid, when in fact they are totally or partly unpaid.³⁰ Subscribers have no right to require the corporation to issue to them paid-up stock certificates to the amount of cash paid in on their entire subscription.³¹

Generally, the board of directors, acting under authority given to it in the by-laws, decides the units in which certificates representing the shares owned by a single stockholder shall be drawn. A stockholder, however, may specify the manner in which the certificates are to be issued, provided his demands are reasonable and there is no regulatory provision on the subject.³²

Form of certificate of stock. There is no required form for a certificate of stock. The statutes in most of the states, however, specify the contents of the certificate. These usually include: ³³

1. The name of the record holder.
2. The number of shares represented by the certificate.
3. The class of shares represented by the certificate.
4. The par value of the shares, or a statement that they are without par value.
5. The rights and restrictions of the respective classes of stock.
6. The number of shares constituting each class of stock.

There should be no ambiguity in the face of the certificate. For example, a certificate should not be made out to "A and/or B." ³⁴

²⁹ *California Southern Hotel Co. v. Callender*, (1892) 94 Cal. 120, 29 P. 859.

³⁰ *Scully v. Automobile Finance Co.*, (1917) 11 Del. Ch. 355, 101 A. 908.

³¹ *Cisco & N. E. R. Co. v. Ricks*, (1931) (Tex. Civ. App.) 33 S. W. (2d) 878.

³² See *Schell v. Alston Mfg. Co.*, (1906) 149 F. 439, in which the court held the demand of a shareholder who owned twenty-five shares to have twenty-five certificates issued of one share each to be unreasonable.

³³ See *Watson v. Santa Carmelita Mut. Water Co.*, (1943) 58 Cal. App. (2d) 709, 137 P. (2d) 757.

³⁴ *Ward v. Jersey Central Power & Light Co.*, (1945) 136 N. J. Eq. 181, 41 A. (2d) 22. In this case, the certificate was issued to "A and B as joint tenants with right of survivorship." The court refused to reform the certificate and have it issued to "A and/or B."

Registration of stock under Securities Act of 1933, as amended. Before any action is taken on the disposition of stock, it is important to determine whether or not the sale of the securities is subject to the federal Securities Act of 1933, as amended.³⁵ The purposes of this Act are (1) to provide full and fair disclosure to prospective investors of the character of the securities, and (2) to prevent fraud and misrepresentation in the sale of the securities.

To effect the first purpose, the Act requires that, before new offerings of securities may be made to the public³⁶ through the mails or through the channels of interstate commerce, the securities must, with certain exceptions, be registered with the Securities and Exchange Commission by the filing of a registration statement. This statement must contain certain specified details regarding the securities, calculated to enable the buying public to judge the value of the security offered. The Act also requires the use of prospectuses containing information similar to that contained in the registration statement. Civil liabilities and criminal penalties are imposed for noncompliance with registration and prospectus requirements. To effect the second purpose, the Act imposes civil liabilities and criminal penalties for the sale of any securities by means of fraud or misrepresentation.

The primary duty of registering the securities would appear to rest with the issuer of the securities. However, any person who sells an unregistered security that should have been registered may be liable to the purchaser. Penalties are also imposed on anyone who sells securities in interstate transactions or through the use of the mails unless a required registration statement is in effect.

Registration of stock under Securities Exchange Act of 1934.³⁷ In addition to registration of stock under the Securities Act of 1933 as amended, it must also be determined whether or not registration is required under the Securities Exchange Act of 1934, as amended. The purposes of the Securities Exchange Act of 1934 are (1) to compel corporations to furnish adequate information regarding securities publicly traded in, (2) to con-

³⁵ For complete information regarding the Securities Act of 1933, as amended, see *Prentice-Hall Securities Regulation Service*.

³⁶ For a discussion of the meaning of the phrase "to the public," see 12 *Southern California Law Review* 473 (1939), discussing *Mary Pickford Co. v. Bayly Bros.*, (1939) 97 Cal. Dec. 41, 86 P. (2d) 102.

³⁷ For complete information regarding the Securities Exchange Act of 1934, see *Prentice-Hall Securities Regulation Service*.

trol unfair use of information by corporate insiders, and (3) to regulate securities exchanges and markets. The Act also seeks to prevent unfair practices on such exchanges and markets, and to prevent the use of credit in financing excessive speculation in securities.

Information by corporation. The Securities Exchange Act of 1934 requires the registration under the Act of securities listed on an exchange, and the furnishing of periodical and other reports. Registration is effected by filing, with the exchange on which the security is listed, a registration statement containing certain information and accompanied by certain documents listed in the Act. Duplicates of the registration statement are filed by the exchange with the Securities and Exchange Commission. Ordinarily only issued securities may be registered. Unissued securities may be registered only if they are to be distributed to holders of previously registered securities. An issuer of a registered security must file with the exchange information and documents necessary to keep current the information and documents filed in registering the securities. Duplicate originals are to be filed with the Commission as required. The issuer must also file annual and other reports as prescribed by the Commission. The Act makes it unlawful for a member of an exchange, or for a broker or dealer, to effect a transaction in any security on a registered exchange unless the security is registered under the Securities Exchange Act.

The Act also provides that a registered security may be withdrawn from an exchange listing in accordance with the rules of the exchange and upon terms that the Commission imposes to protect the investors.

Control of acts of insiders. Corporate "insiders" whose acts and transactions are controlled by the Securities Exchange Act of 1934 include owners of more than 10% of any class of registered equity securities,³⁸ and all directors and officers of a corporation having registered equity securities. Control is exercised by requiring such insiders to file periodic statements with the exchange and with the Commission, showing the amount of securities owned by them and any changes in ownership. Profits realized from the purchase and sale of such securities by corpo-

³⁸ The expression "equity security" is primarily intended to mean "stock." It also includes (1) bonds convertible into stock, (2) bonds carrying warrant or right to subscribe to stock, (3) any warrant or right to subscribe to stock, and (4) any other similar security which the Commission may, by rules and regulations, treat as an equity security.

rate insiders within any period of less than six months are recoverable by the corporation. The Act further regulates the acts of insiders by prohibiting them from selling stock of their company "short" or "against the box," and by making solicitation of proxies in respect to registered securities subject to rules and regulations of the Commission.

Regulations of securities exchanges and markets. All exchanges must be registered with the Commission as national securities exchanges, except small exchanges exempt by the Commission on application. The Act makes it unlawful for a broker, a dealer, or an exchange to use the mails or the channels of interstate commerce for the purpose of using a facility of an exchange to effect or report a transaction in a security unless the exchange is registered. The Act also regulates brokers and dealers trading in over-the-counter markets. No broker or dealer may use the mails or the channels of interstate commerce to effect a transaction in any security otherwise than on a registered exchange unless such broker or dealer is registered with the Securities and Exchange Commission in accordance with its rules.

Listing stock on an exchange. Whether or not stock should be listed on an exchange is a question of policy to be determined by the board of directors. Details of the listing are generally attended to by the secretary of the corporation, often with the aid of bankers or attorneys familiar with listing procedure. These details include conferences with the Stock Exchange Committee on Listing of the particular exchange, and the preparation and filing of the formal application for listing.

Underwriting the issuance of stock. The general purpose of underwriting an issue of stock is to guarantee through bankers the successful flotation of the securities.³⁹ A new issue of stock

³⁹ See *Bone v. Hayes*, (1908) 154 Cal. 759, 99 P. 172; *Fraser v. Home Telephone & Telegraph Co.*, (1916) 91 Wash. 253, 157 P. 692; *International Products Co. v. Vail's Estate*, (1924) 97 Vt. 318, 123 A. 194; *Stewart v. G. L. Miller & Co.*, (1926) 161 Ga. 919, 132 S. E. 535; *Marine Nat. Exchange Bank of Milwaukee v. Kalt-Zimmers Mfg. Co.*, (1934) 293 U. S. 540, 55 S. Ct. 85; 28 *Columbia Law Review* 634; C. B. Masslich, "Financing a New Corporate Enterprise," 5 *Ill. Law Rev.* 70-78.

An underwriting agreement must be distinguished from a subscription agreement. In a subscription agreement, the signer unqualifiedly obligates himself to take the amount of securities designated. In the underwriting agreement, the obligation is to take only what is unsold. See *Positype Corp. of America v. Flowers*, (1930) 36 F. (2d) 617, in which an agreement designated as an "underwriting syndicate agreement" was held to be a subscription contract. See also *Positype Corp. of America v. Mahin*, (1929) 32 F. (2d) 202; *In re Danville Hotel*

may also be underwritten by the stockholders themselves.⁴⁰ An issue of stock may be underwritten whether or not the new securities are first offered to existing stockholders. One of two methods may be used to effect distribution of the stock with the aid of bankers: (1) distribution of the securities to the public after the banker or a group of bankers has purchased the issue of stock outright from the corporation, or has received an option thereon, or has been authorized to act as selling agent; or (2) an agreement between the corporation and the bankers, before the securities are offered to the corporation's stockholders, that in the event all the stock offered is not taken up, the bankers or underwriters will purchase the remaining stock from the corporation.⁴¹

The arrangement between the corporation and the bankers is reduced to a written contract, usually in the form of a letter. The contract may be signed by each of the bankers in the group that is underwriting the security issue, or by one banker as agent and representative of the rest of the purchasing group. Each of the bankers assumes a definite contractual liability to take a fixed proportion of the security issue.

The contract entered into by the corporation with the bankers must be duly authorized by proper corporate action. Whether the stockholders or the directors must approve the underwriting arrangement depends upon the nature of the financing and upon the provisions of the statute, charter, or by-laws governing the corporation. For example, if a corporation desires to increase its stock and to have the offering of such stock to its old stockholders underwritten by bankers, it will generally be necessary for the directors to obtain the consent of the stockholders to the increase of stock. The matter of entering into a contract for the sale of a security issue, on the other hand, may be a detail of corporate management that the directors of a particular corporation may have the power to determine.

Co., (1930) 38 F. (2d) 10; *Bush v. Stromberg-Carlson Telephone Mfg. Co.*, (1914) 217 F. 328.

For a discussion of the difference between the relation of a corporation to an underwriter and to a subscriber, see "The Nature and Function of Underwriting Agreements," 79 *Univ. of Pa. Law Review* 941.

⁴⁰ See *Weichsel v. Jones*, (1937) (Tex. Civ. App.) 109 S. W. (2d) 332, rehearing denied, 109 S. W. (2d) 1097, involving such an underwriting agreement.

⁴¹ For a discussion of underwriting agreements under Securities Act of 1933, see Lockwood and Anderson, "Underwriting Contracts Within Purview of Securities Act of 1933, with Certain Suggested Provisions," 8 *George Washington Law Review* 33 (1939).

Classification of Stock

Right to classify stock. In the absence of charter regulation or prohibition by the law of the state under which it is organized, the corporation may, at its organization, classify its stock and provide for a preference of one class over another.⁴² On the statute books of many states, express authority can be found to provide for the issuance of two or more kinds of stock. Ordinarily, the certificate of incorporation sets forth the classes of stock which the corporation may issue, and, if a change in classification is desired, the certificate is amended. If the statute or charter does not forbid, additional classes of stock can be created with priority over preexisting classes.⁴³ See reclassification of stock, on page 723.

The various kinds of stock that may be provided for in the articles of incorporation or by an amendment thereto are discussed in the following paragraphs.

Common and preferred stock. Stock may be broadly divided into two kinds:

1. Common stock.
2. Preferred stock.

The universal attribute of common stock is that owners are entitled to a pro rata division of profits and participation in the management of the corporation.⁴⁴ Preferred stock, as its name implies, entitles its holders to some preference over another class of stock.⁴⁵ This preference may relate to a right to dividends, a right to vote, a right to assets of the corporation upon dissolution, or any other preference. The most usual preference which preferred stock bears is the right to receive dividends from the earnings of the corporation before the holders of the common stock can participate in the profits.⁴⁶ (See the attributes of preferred stock on page 405.)

⁴² *Hamlin et al. v. Toledo St. L. & K. C. R. Co. et al.*, (1897) 78 F. 664; *People ex rel. Recess Exporting & Importing Corp. v. Hugo*, (1920) 191 N. Y. App. Div. 628, 182 N. Y. Supp. 9. See also *Breslav v. New York & Queens Elec. L. & P. Co.*, (1936) 249 N. Y. App. Div. 181, 291 N. Y. Supp. 932.

⁴³ *Shanik v. White Sewing Mach. Corp.*, (1940) 25 Del. Ch. 154, 15 A. (2d) 169, *aff'd* (1941) 25 Del. 371, 19 A. (2d) 831, citing *Morris v. American Public Utilities Co.*, (1923) 14 Del. Ch. 136, 122 A. 696.

⁴⁴ *General Inv. Co. v. Bethlehem Steel Corp.*, (1917) 87 N. J. Eq. 234, 100 A. 347; *Elko Lamoille Power Co. v. Comm. of Internal Revenue*, (1931) 50 F. (2d) 595.

⁴⁵ *Storrow v. Texas Consolidated Compress & Mfg Ass'n*, (1898) 87 F. 612; *Starring v. American Hair & Felt Co.*, (1937) 21 Del. Ch. 380, 191 A. 887.

⁴⁶ *Totten & Co. v. Tison*, (1875) 54 Ga. 140.

In recent years many corporations have issued stock designated as Class A, Class B, etc. These are, in effect, classes of preferred and common stock. Both common and preferred stock may be subdivided into various classes with distinguishing designations, each class having different attributes. Stock may be further classified into par value and no par value stock.

Stock with or without par value. Par value stock has a definite value, fixed by the certificate of incorporation.⁴⁷ The value is stated in terms of dollars, but usually the stock may be issued for money, property, or services. (See consideration for stock, page 414, et seq.)

No par value stock may be defined roughly as stock without any nominal or designated money value. Such stock may be either common or preferred. No par stock can be issued only by authority of the statutes.⁴⁸ However, all of the states except Nebraska and the District of Columbia now have statutes permitting a corporation to issue stock without any face or par value. Most of the statutes require that provision must be made for its issuance in the certificate of incorporation or in an amended certificate. If the issuance of no par stock was not authorized at the time of incorporation, subsequent legislation may allow it. Such a change, it has been held, does not fundamentally alter the contract of stockholders to whom par value stock has been previously issued.⁴⁹ It has also been held that constitutional provisions prohibiting the issuance of stock except for money, services, or property do not prohibit the issuance of stock without par value.⁵⁰

The statutes authorizing the issuance of no par stock generally provide that (1) no individual liability shall attach to any holder of such stock beyond his obligation to comply with the terms of subscription, and (2) stock for which the agreed consideration shall have been paid shall be nonassessable.

Change of par stock into no par stock. Stock which has been issued with a par value may not subsequently be changed to stock without a par value, against a stockholder's objection, in

⁴⁷ *G. Loewus & Co., Inc. v. Highland Queen Packing Co.*, (1939) 125 N. J. Eq. 534, 6 A. (2d) 545.

⁴⁸ No par stock can come into existence only by authority of the statutes. *West Texas Utilities Co. v. Ellis*, (1939) 133 Tex. 104, 126 S. W. (2d) 13, discussed in 18 *Texas Law Rev.* 67 (1939).

⁴⁹ *Grausman v. Porto Rican American Tobacco Co.*, (1923) 95 N. J. Eq. 155, 121 A. 895.

⁵⁰ *Lewis v. Oscar C. Wright Co.*, (1930) 234 Ky. 814, 29 S. W. (2d) 566.

the absence of statutory authority. Statutes in some states specifically authorize such a change, and, conversely, allow the exchange of no par shares for shares with par value. The exchange is usually brought about by an amendment to the articles of incorporation. In some states, it is effected by the filing of a certificate by the directors with the designated state authorities, after the adoption of a resolution by the stockholders. The procedure prescribed by the statute must be strictly followed.

Attributes of preferred stock. Calling stock "preferred stock" does not of itself determine the rights of the holders. If no description of the preference is indicated, calling the stock "preferred" is useless, and the shares are treated exactly like common stock.⁵¹ The extent of the preference is determined by the terms of the contract between the corporation and the stockholders.⁵² Preferred stock has only those preferences that are specifically defined; in all other respects, preferred stock has no rights that are not shared equally with common stock.⁵³ The preferences must be clearly expressed, either by direct statement or by necessary implication.⁵⁴

The statutes vary considerably as to the terms upon which preferred stock may be issued. Some of them leave the details to the corporation. When no restriction or limitation is placed upon the authorized issuance of preferred stock, the company is free to attach such conditions as it sees fit, provided only that the conditions do not violate any law and are not contrary to public policy.⁵⁵ In many states, the statutes specifically provide that stock may be issued: ⁵⁶

1. With preferences as to dividends.
2. With preferences as to assets upon liquidation of the corporation.
3. With full, limited, or no voting powers.

⁵¹ *Rice & Hutchins, Inc. v. Triplex Shoe Co.*, (1929) 16 Del. Ch. 298, 147 A. 317.

⁵² *Lloyd v. Pennsylvania Electric Vehicle Co.*, (1909) 75 N. J. Eq. 263, 72 A. 16. See *Lyman v. Southern Ry. Co.*, (1928) 149 Va. 274, 141 S. E. 240; *Windhurst v. Central Leather Co.*, (1931) 107 N. J. Eq. 528, 153 A. 402.

⁵³ *Grover v. Cavanagh*, (1907) 40 Ind. App. 340, 82 N. E. 104; *Penington v. Commonwealth Hotel Const. Corp.*, (1930) 17 Del. Ch. 188, 151 A. 228.

⁵⁴ *Holland v. National Automotive Fibres*, (1937) 22 Del. Ch. 99, 194 A. 124.

⁵⁵ *Coggeshall v. Ga. Land & Inv. Co.*, (1914) 14 Ga. App. 637, 82 S. E. 156; *Vanden Bosch v. Michigan Trust Co.*, (1929) 35 F. (2d) 643.

⁵⁶ For a discussion of the various attributes of preferred stock, see I. Grossman, "Corporate Securities—Especially Common and Preferred Stocks," 17 *American Bar Association Journal* 123.

4. With or without the right to convert the stock into stock of another class or bonds. This is called a conversion right.
5. Subject to redemption.
6. With right to render the stock assessable.

Stock with preference as to dividends. The statutes of many states permit a corporation to issue various classes of stock with preferences. The most common privilege granted under this provision is a preference as to dividends. Usually this means that a class of stock may be given the right to receive a fixed percentage of the profits of the company before any dividend is declared on another class of stock. See Chapter 23, page 621, for a discussion of the rights of stockholders to dividends; page 628, for the rights of preferred stockholders to cumulative dividends.

Stock with preference as to assets on liquidation. Holders of stock preferred as to assets have the right to be paid back the par value of their stock, or, if stock is without par value, a certain fixed amount, before any other class of stockholders receives anything. Of course, creditors must first be satisfied,⁵⁷ and there may not be enough funds left to pay the full par value. Sometimes the preference is designated as nonparticipating. This means that the holders of the nonparticipating preferred stock will receive the full par value of their stock if there are sufficient funds, but that they cannot participate in the profits which may be left after all the stockholders receive the amount of their shares.

Nature of voting rights attached to stock. A stockholder has the power to vote as an incident of his holding stock in the corporation.⁵⁸ This applies to preferred stock as well as to common stock.⁵⁹ Although a stockholder has not fully paid for his shares, he may vote them,⁶⁰ in the absence of an agreement

⁵⁷ In distribution upon dissolution, the rights of creditors are ordinarily superior to those of stockholders. See *Koeppler v. Crocker Chair Co.*, (1930) 200 Wis. 476, 228 N. W. 130; *Hoyt v. Hampe*, (1927) 206 Iowa 206, 214 N. W. 718, 220 N. W. 45; *Sommer v. New York Mill End Pants Co.*, (1924) 33 Ga. App. 374, 126 S. E. 266; *Wright v. Johnston*, (1918) 183 Iowa 807, 167 N. W. 680; *Armstrong v. Union Trust & Savings Bank*, (1918) 248 F. 268; *Guaranty Trust Co. of New York v. Galveston City R. Co.*, (1901) 107 F. 311.

⁵⁸ *Reimer v. Smith*, (1932) 105 Fla. 671, 142 So. 603; *In re Wallace's Estate*, (1929) 131 Ore. 597, 282 P. 760; *Hall v. Woods*, (1927) 325 Ill. 114, 156 N. E. 258; *Talbot J. Taylor & Co. v. Southern Pac. Co.*, (1903) 122 F. 147.

⁵⁹ *Millspaugh v. Cassedy*, (1920) 191 N. Y. App. Div. 221, 181 N. Y. Supp. 276; *Williams v. Davis*, (1944) 297 Ky. 626, 180 S. W. (2d) 874.

⁶⁰ *Price v. Holcomb*, (1893) 89 Iowa 123, 56 N. W. 407.

to the contrary. The right to vote is a contractual one; the stockholder may not subsequently be deprived of it without his consent.⁶¹ However, the statutes and the articles of incorporation are part of that contract. The right to vote, therefore, is not necessarily exempt from the corporation's general power to amend its charter in any way permitted by law.⁶² Amendments of the charter that transfer the voting power from one class of stock to another, or that change the capital structure with the same result, have been upheld.⁶³ It must be remembered, however, that some of the statutes that permit a reclassification of stock through amendment of the charter with consent of a fixed proportion of the stockholders (under which voting rights may be transferred from one class of stock to another), provide that a dissenting stockholder is entitled to appraisal of his shares and payment for them.

Stock with voting restrictions. The right to vote may be relinquished by the stockholder. A corporation has the right to restrict the voting power of the stock and make a contract with a stockholder whereby he will have no voice in the management of the business, unless the state statute makes equal voting rights for all classes of stock mandatory. There is no rule of public policy which forbids a corporation and its stockholders to make any contract they please in regard to restrictions on the voting power.⁶⁴

The statutes in some of the states expressly provide that a corporation may create classes of stock with restrictions on the power to vote.⁶⁵ For a complete discussion of the methods of voting see page 41.

⁶¹ *Lord v. Equitable Life Assur. Society*, (1909) 194 N. Y. 212, 87 N. E. 443; *Stokes v. Continental Trust Co.*, (1906) 186 N. Y. 285, 78 N. E. 1090 (decided before amendment of the New York statute that permits reclassification of stock with changes in voting rights).

⁶² *Lord v. Equitable Life Assur. Society*, (1909) 194 N. Y. 212, 87 N. E. 443; *Morris v. American Public Utilities Co.*, (1923) 14 Del. Ch. 136, 122 A. 696; *Topkis v. Delaware Hardware Co.*, (1938) 23 Del. Ch. 125, 2 A. (2d) 114. See also *Brown v. McLanahan*, (1944) 58 F. Supp. 345.

⁶³ *Topkis v. Delaware Hardware Co.*, *supra* (Note 62); *Heller Inv. Co. v. Southern Title & Trust Co.*, (1936) 17 Cal. App. (2d) 202, 61 P. (2d) 807; *Aldridge v. Franco-Wyoming Oil Co.*, (1939) 24 Del. Ch. 126, 7 A. (2d) 753, *aff'd* 14 A. (2d) 380.

See also "Corporate Charter Amendments and The Impairment of Voting Rights," 54 *Harvard Law Review* 1368 (1941).

⁶⁴ *Orme v. Salt River Valley Water Users' Ass'n*, (1923) 25 Ariz. 324, 217 P. 935; *Millspaugh v. Cassedy*, (1920) 191 N. Y. App. Div. 221, 181 N. Y. Supp. 276.

⁶⁵ See *Heller Inv. Co. v. Southern Title & Trust Co.*, (1936) 17 Cal. App. (2d) 202, 61 P. (2d) 807.

Ordinarily, restrictions on voting power are attached to preferred rather than to common stock,⁶⁶ although some statutes authorize the creation of non-voting common shares.⁶⁷ Common stock frequently carries with it the exclusive right to vote.⁶⁸

Non-voting stock is often given certain voting rights upon the occurrence of designated defaults in the payment of dividends,⁶⁹ in sinking fund payments or in other obligations. Provision is also made in many instances that the consent of a specified portion of stockholders is required to do certain acts, whether or not such stockholders are otherwise entitled to voting rights. Some of these acts are: increase of stock, creation of stock with prior rights, issuance of bonds, and so forth.

Convertible stock. Stock which may be converted into some other form of security, for example, another class of stock or bonds, is called convertible stock. Ordinarily, preferred stock rather than common stock is made convertible, and the conversion is at the option of the preferred stockholder rather than at the election of the corporation. Provision is also generally made for the exercise of the option within a specified time. The right to convert is usually suspended while the transfer books are closed.

Some doubt exists as to whether statutory authority is necessary to enable a corporation to issue convertible stock. The statutes in some states expressly authorize the issuance of stock convertible into bonds or some other class of stock, under terms and conditions set forth in the certificate of incorporation or in an amendment thereto, or in the resolution providing for the issue of such stock. However, even in the absence of statutory authority, it has been held that such stock could be issued.⁷⁰

⁶⁶ *Miller v. Ratterman*, (1890) 47 Ohio St. 141, 24 N. E. 496; *People ex rel. Browne v. Koenig*, (1909) 133 N. Y. App. Div. 756, 118 N. Y. Supp. 136; *Morris v. Am. P. U. Co.*, (1923) 14 Del. Ch. 136, 122 A. 696; *Rice & Hutchins v. Triplex Shoe Co.*, (1929) 16 Del. Ch. 298, 147 A. 317.

⁶⁷ See *General Investment Co. v. Bethlehem Steel Corp.*, (1917) 87 N. J. Eq. 234, 100 A. 347.

⁶⁸ See *Starring v. American Hair & Felt Co.*, (1937) 21 Del. Ch. 380, 191 A. 887.

⁶⁹ See *Pierce Oil Corporation v. Voran*, (1923) 136 Va. 416, 118 S. E. 247. Where power to vote is given to preferred stock when dividends for two or more periods shall not have been paid, it is assumed that the reference is to lawful dividends. *Vogtman v. Merchants' Mortgage & Credit Co.*, (1935) 20 Del. 364, 178 A. 99. In the case cited, the preferred stock obtained exclusive voting power between the time of the convening of the annual meeting and an adjourned session thereof. It was held that the common stock could not vote at the adjourned session.

⁷⁰ *General Inv. Co. v. Bethlehem Steel Corp.*, (1917) 88 N. J. Eq. 237, 102 A. 252. In this case, the right of the corporation to issue convertible stock was

Under some statutes stock cannot be made convertible into bonds except at the option of the corporation; otherwise stockholders would convert their stock when the company became insolvent and thus would get an advantage over creditors.

Where convertible stock is issued, the corporation usually makes provision to carry the conversion into effect by having available sufficient shares of the stock or bonds into which the change is to be made. A sufficient number of shares of common stock may be reserved to make the conversion. The converted stock is not reissued, but the total authorized capital stock is reduced by the number of shares so converted. Or a financial plan may be necessary to take care of the conversion. For example, if the stock is convertible into stock of another class, it may be necessary to increase the latter class in accordance with the statutory provisions.

Redeemable stock. Stock is redeemable if the corporation may require the stockholder to surrender his shares and accept in lieu of them a certain sum of money. A corporation cannot compel a stockholder to give up his stock in redemption, unless the right to redeem has been granted to the corporation by statute, by the certificate of incorporation, or by agreement with the stockholder.⁷¹ The statutes of many states authorize the issuance of stock subject to redemption. These statutes generally refer only to preferred stock.

Corporation's rights and obligations attached to redeemable stock. The right and the obligation of a corporation to redeem a class of stock are contractual.⁷² The contract terms—the terms upon which the stock is to be redeemed—and the time when the redemption may be effected, must usually be set forth in the articles of incorporation or in an amendment thereto. These terms must include any statutory conditions that are imposed on the privilege of redeeming stock.⁷³ In some states, the terms

based on its right to issue preferred stock, to retire it, and to issue common stock purchased with the proceeds of the preferred stock. The court permitted the corporation to take the short cut of issuing preferred shares convertible into common shares. See also *Berger v. U. S. Steel Corp.*, (1902) 63 N. J. Eq. 809, 53 A. 68, which holds that if the corporation may purchase its own shares, it may do so by the device of issuing the shares convertible into bonds and then buying them back with its bonds upon exercise of the conversion right.

⁷¹ *Star Pub. Co. v. Ball*, (1922) 192 Ind. 158, 134 N. E. 285; *Empire Trust Co. v. Panola Cotton Mills*, (1929) 149 S. C. 8, 146 S. E. 612.

⁷² *Ammon v. Cushman Motor Works*, (1935) 128 Neb. 357, 258 N. W. 649; *Crimmins & Peirce Co. v. Kidder Peabody Acceptance Corp.*, (1933) 282 Mass. 367, 185 N. E. 383.

⁷³ *In re Culbertson's*, (1932) 54 F. (2d) 753; *In re Greenbaum Bros. & Co.*, (1945) 62 F. Supp. 769.

may be fixed by resolution of the directors providing for the issuance of the stock, pursuant to authority vested in the board by the articles, or by an amendment granting such authority. The terms of the statute, articles of incorporation, or resolution relating to the redemption must be strictly observed.⁷⁴ Thus, if the stock is to be redeemed at a fixed date, the corporation cannot make it payable only at the call of the corporation, unless the stockholders consent.⁷⁵ Nor can the corporation redeem stock before the redemption date.⁷⁶ A corporation cannot reclassify preferred stock, not subject to redemption, so as to make it subject to redemption at a price below its real value.⁷⁷

When redemption contract cannot be enforced. An agreement to redeem stock is at all times conditional upon the solvency of the corporation at the time the stockholder attempts to exercise his right to have the stock redeemed.⁷⁸ When the stock matures, the stockholder is entitled to have it redeemed in accordance with the terms of the agreement, unless the redemption will prejudice the rights of the creditors of the corporation.⁷⁹ Stock cannot be redeemed even though permitted by a valid contract, or by statute or charter, if the retirement of the stock will be detrimental to the interests of the corporation's creditors.⁸⁰ The corporation's contractual obligations will not be

⁷⁴ *People ex rel. Colby v. Imbrie & Co.*, (1926) 126 N. Y. Misc. 457, 214 N. Y. Supp. 53, aff'd 214 N. Y. Supp. 819; *State ex rel. Waldman v. Miller-Wohl Co., Inc.*, (1942) 42 Del. 73, 28 A. (2d) 148. See *Allied Magnet Wire Corp. v. Tuttle*, (1926) 199 Ind. 166, 154 N. E. 480. See also *Corbett v. McClintic-Marshall Corp.*, (1930) 17 Del. Ch. 165, 151 A. 218. In this case, the stock was redeemable at the corporation's option at \$100 per share or at book value, if the book value, as shown by the last annual statement, exceeded \$100. The directors voted to redeem the stock at the book value. A stockholder refused to surrender her shares on the ground that the price fixed did not truly reflect the book value. It was held that the directors could not be compelled to redeem at the higher and true value. The stockholder was entitled to no more relief than a decree continuing her in her status as a stockholder, if she could establish that the directors were not justified in approving the values at which the assets were carried on the books.

⁷⁵ *Koeppler v. Crocker Chair Co.*, (1930) 200 Wis. 476, 228 N. W. 130.

⁷⁶ *People ex rel. Colby v. Imbrie & Co.*, (1926) 126 N. Y. Misc. 457, 214 N. Y. Supp. 53, aff'd 214 N. Y. Supp. 819.

⁷⁷ *Breslav v. New York & Queens Elec. Light & Power Co.*, (1937) 273 N. Y. 593, 7 N. E. (2d) 708, aff'g 249 N. Y. App. Div. 181, 291 N. Y. Supp. 932.

⁷⁸ *Campbell v. Grant Trust & Savings Co.*, (1932) 97 Ind. App. 169, 182 N. E. 267.

⁷⁹ *Cring v. Sheller Wood Rim Mfg. Co.*, (1932) 98 Ind. App. 310, 183 N. E. 674. See also *Koeppler v. Crocker Chair Co.*, (1930) 200 Wis. 476, 228 N. W. 130.

⁸⁰ *In re Fechheimer Fishel Co.*, (1914) 212 F. 357; *Westerfield-Bonte Co. v. Burnett*, (1917) 176 Ky. 188, 195 S. W. 477; *Koeppler v. Crocker Chair Co.*, (1930) 200 Wis. 476, 228 N. W. 130; *Vanden Bosch v. Mich. Tr. Co.*, (1929) 35 F.

enforced if the corporation has become insolvent and its capital stock depleted.⁸¹ Its refusal, in such a situation, is not a breach of its agreement to redeem, though the corporation is not in liquidation and though no creditor is asking relief.⁸² Usually shares cannot be redeemed if there is reasonable ground for believing that the redemption would leave the corporation with less assets than liabilities.⁸³ If a corporation has actually cancelled shares under circumstances that do not prejudice existing creditors, a subsequent creditor cannot complain.⁸⁴

Status and liability of stockholder when stock is redeemed. After the redemption date, the holder of redeemable stock has no further rights as a stockholder, except to receive the redemption price of the stock.⁸⁵ If a corporation illegally redeems stock by a method not authorized, the owner's status as a stockholder is not changed.⁸⁶ Of course, if the corporation fails to redeem the stock, the stockholder does not lose any of his rights. Provision for redemption of preferred stock does not make the stockholder a creditor of the corporation.⁸⁷ The board cannot change a mandatory call for the redemption of stock to an optional call, if the change is detrimental to another class of stock.⁸⁸

The statutes of many of the states provide that, if capital stock is refunded to the stockholders before payment of the corporation's debts, the stockholders shall be liable to creditors

(2d) 643; *Miller v. M. E. Smith Bldg. Co.*, (1929) 118 Neb. 5, 223 N. W. 277; *Campbell v. Grant Trust & Savings Co.*, (1932) 97 Ind. App. 169, 182 N. E. 267.

⁸¹ *In re Greenebaum Bros. & Co.*, (1945) 62 F. Supp. 769.

While the corporation may redeem only if it has the funds with which to do so, a person who guarantees redemption may be called upon to pay if the corporation does not do so, regardless of whether or not the corporation could be compelled to redeem. *Hamilton v. Meiks*, (1936) 210 Ind. 610, 4 N. E. (2d) 536.

⁸² *Booth v. Union Fibre Co.*, (1919) 142 Minn. 127, 171 N. W. 307.

⁸³ *Wildermuth v. Lorain Coal & Dock Co.*, (1941) 138 Ohio St. 1, 32 N. E. (2d) 413.

⁸⁴ *Peoples-Pittsburgh Trust Co. v. Pittsburgh United Corp.*, (1940) 338 Pa. 328, 12 A. (2d) 430.

⁸⁵ *In re Greenebaum Bros. & Co.*, (1945) 62 F. Supp. 769.

⁸⁶ *State ex rel. Waldman v. Miller-Wohl Co., Inc.*, supra (Note 74). In this case, a clause in the certificate of incorporation provided for redeeming stock "by lot or pro rata, or otherwise." The court held that the method designated by "or otherwise" had to conform in principle with the method designated by "by lot or pro rata." Therefore, selection for redemption of shares belonging to stockholders who were not company officers or employees was an attempt at an illegal redemption.

⁸⁷ *In re Culbertson's*, (1932) 54 F. (2d) 753.

⁸⁸ *Taylor v. Axton-Fisher Tobacco Co.*, (1943) 295 Ky. 226, 173 S. W. (2d) 377, discussed in 42 *Michigan Law Review* 530 (1943).

of the corporation. They are liable to the amount of the sum refunded to them.⁸⁹ A stockholder who accepts the redemption price of stock offered in violation of the redemption provisions of the stock may subject himself to subsequent liability to repay the money received.⁹⁰

Procedure in redeeming stock. The usual practice, in effecting a redemption of stock, is to have the board of directors vote upon a resolution to redeem the shares in accordance with the terms of the contract.⁹¹ After the board calls certain stock for redemption, it cannot rescind or modify its action.⁹² The stock is usually made redeemable on a dividend date, in order to avoid any question as to accrued dividends. Notice is generally required; from ten days to several months is not unusual.

Effect of redemption of stock. When a corporation redeems stock, it is in effect purchasing its own shares.⁹³ The mere fact that it has purchased shares does not mean that the shares are retired.⁹⁴ As in the case of an ordinary purchase, the corporation may either retire and cancel the redeemed stock or hold it to be reissued. However, if the statute or charter under which the redeemable stock has been issued provides that stock redeemed must be retired and may not be reissued, the corporation has no alternative; it must cancel the shares.

In the case of a redemption, just as in the ordinary repurchase of stock, the capital stock is not reduced where the corporation does not retire the stock but sells and transfers it to others or holds the stock ready for such sale and transfer.⁹⁵ When the stock is retired, and a reduction in the capital stock is made, the provisions of the statute with regard to a decrease in the

⁸⁹ *First Nat. Bank v. A. Heller Sawdust Co.*, (1927) 240 Mich. 688, 216 N. W. 464.

⁹⁰ *In re Fechheimer Fishel Co.*, supra (Note 80). See also *A. B. Leach & Co. v. Grant*, (1932) 54 F. (2d) 731.

⁹¹ See *Hackett v. Northern Pac. R. Co.*, (1901) 36 N. Y. Misc. 583, 73 N. Y. Supp. 1087. In this case, a resolution of the board of directors authorizing the retirement of preferred stock was held to be a valid exercise of the option by the corporation to redeem the preferred stock. The charter of the corporation provided for the management of its affairs by the directors. They were vested with all the powers of the corporation, with certain exceptions. The charter also provided for the retirement of the preferred stock.

⁹² *Taylor v. Axton-Fisher Tobacco Co.*, (1943) 295 Ky. 226, 173 S. W. (2d) 377.

⁹³ *Mannington v. Hocking Valley Ry. Co.*, (1910) 183 F. 133.

⁹⁴ *Borg v. International Silver Co.*, (1926) 11 F. (2d) 143.

⁹⁵ *Ruffner v. Sophie Mae Candy Corporation*, (1925) 35 Ga. App. 114, 132 S. E. 396. See also *Porter v. Plymouth Gold Mine Co.*, (1904) 29 Mont. 347, 74 P. 938, holding that, whether the stock is extinguished or is held as an asset for sale is much a matter of intention on the part of the corporation.

capital stock must be complied with. In a case where the corporation failed to comply with the statute, the retired stock was considered "outstanding capital stock" for franchise tax purposes.⁹⁶

See the corporation's power to purchase its own stock, on page 435.

Assessable stock. Assessable stock is stock upon which the corporation is given the privilege of demanding additional payment after the full consideration has been paid. The corporation has the right to issue such stock in the absence of statutory or charter prohibition. The stockholder is free to make a contract with the corporation waiving certain rights and submitting to certain restrictions,⁹⁷ and, having accepted the assessable provision as part of his subscription agreement, he is bound by it.⁹⁸

Difficulty arises where the corporation issues stock without indicating that it is subject to future assessments and then attempts to make such additional assessments. In such cases, as later indicated,⁹⁹ assessments upon fully paid stock may be made only if (1) the statute authorizes the assessment, or (2) if an express agreement for the assessment, supported by a valid consideration, is made with the stockholder.

A second difficulty arises where an attempt is made to amend the articles so as to permit either the issuance of assessable stock in the future or an assessment to be made upon stock already issued and fully paid. If the statute permits an assessment to be levied, and the articles of incorporation do not contain any provision for such an assessment, the articles may subsequently be amended so as to authorize the issuance in the future of stock that will be subject to assessment.¹⁰⁰ However, as to stock already issued and fully paid, it has generally been held that an amendment making nonassessable fully paid stock assessable affects the contractual relations of the stockholders among themselves, and is an impairment of the obligation of a contract.¹⁰¹

⁹⁶ *A. B. Frank Co. v. Latham*, (1945) (Tex. Civ. App.) 190 S. W. (2d) 739, aff'd, (1946) 145 Tex. 30, 193 S. W. (2d) 671.

⁹⁷ *Blue Mt. Forest Ass'n v. Borrowe*, (1901) 71 N. H. 69, 51 A. 671.

⁹⁸ *Dotson v. Hoggan*, (1914) 44 Utah 295, 140 P. 128.

⁹⁹ See Chapter 19, page 513.

¹⁰⁰ *Nelson v. Keith-O'Brien Co.*, (1907) 32 Utah 396, 91 P. 30.

¹⁰¹ *Garey v. St. Joe Mining Co.*, (1907) 32 Utah 497, 91 P. 369. See also *Evans v. Nellis*, (1900) 101 F. 920, in which an act doubling the liability of stockholders was held invalid as impairing the obligation of a contract. See, however, *South Bay Meadow Dam Company v. Gray*, (1849) 30 Me. 547, and *Gardner v. Hope Insurance Company*, (1869) 9 R. I. 194, both of which cases hold that such an

Preferred stock issued in series. In some states the certificate of incorporation may authorize the issuance of preferred stock in series. Instead of designating the preferences and other attributes of the authorized stock in the certificate of incorporation, the board of directors is given authority to determine the details of any series issued by resolution adopted upon the issuance of the stock. Under such a statute, if the corporation desires to issue stock with preferences other than those already authorized, no amendment of the certificate of incorporation is necessary, the board of directors having the broad power to determine the particular qualification of the stock by resolution. If the certificate fails to provide for the issuance of stock in series, it may subsequently be amended in the manner prescribed by statute so as to authorize it.

If not prohibited by statute, preferred stock issued in series may be subject to redemption, or it may be converted into another class of stock, or from one series to another. The conversion is made at prices and with such adjustments as are set forth in the articles of incorporation, or in an amendment, or in the resolution adopted by the board of directors for the issuance of the stock.

Consideration for Stock

Nature of consideration to be paid for stock. The corporation must receive a consideration for the issuance of stock.¹⁰² The nature of this consideration is indicated by the statutes in most of the states. When the nature of the consideration is indicated, stock issued for anything else is void.¹⁰³ If no special provision is made as to the kind and quality of consideration for which no par stock may be issued, and the laws of the state indicate the nature of consideration for which stock shall be

amendment may be made. See also *Wilson v. Cherokee Drift Mining Co.*, (1939) 14 Cal. 56, 92 P. (2d) 802, in which it was held that a corporation could amend its articles to provide for the power of assessment and could assess its stockholders for debts existing prior to the amendment.

¹⁰² Stock issued without consideration was held void in *Kahle v. Stephens*, (1931) 214 Cal. 89, 4 P. (2d) 145. See also *Rice & Hutchins v. Triplex Shoe Co.*, (1929) 16 Del. Ch. 298, 147 A. 317; *Bryan v. Northwest Beverages*, (1939) 69 N. D. 274, 285 N. W. 689. But in *Kittinger v. Churchill*, (1936) 161 N. Y. Misc. 3, 292 N. Y. Supp. 35, aff'd 249 N. Y. App. Div. 703, 292 N. Y. Supp. 51, it was stated that stock issued without consideration may nevertheless confer rights as stockholders on bona fide holders for value.

¹⁰³ *Thomas v. Sutherland et al.*, (1931) 52 F. (2d) 592.

issued, the provision would apply to no par stock as well as to stock with par value.¹⁰⁴

The usual statutory provision is that stock may be issued for money,¹⁰⁵ labor done, or property actually received.¹⁰⁶ The corporation, in the absence of a statutory or other express provision to the contrary, may issue stock for property or services.¹⁰⁷ This power is subject to the following provisions: (1) the corporation must have the express or implied power under its charter to acquire the property taken or contracted to be taken in payment for the stock, and to contract for the labor; and (2) the action of the corporation in issuing the stock for such consideration must be taken in good faith and not as a fraud upon other stockholders or creditors.¹⁰⁸ The agreement of a stockholder with the corporation to purchase its stock for property or labor, or to accept the stock in payment of a claim against the corporation, is an agreement to take the stock at its par value, in the absence of any special agreement for a different price.¹⁰⁹

The stock need not be issued to the person who puts up the consideration. For example, two men formed a corporation. One supplied all the property that made up the assets of the corporation. Half the stock was issued to each of them. All the stock was legally issued because the corporation received full value for it.¹¹⁰

Notwithstanding the usual prohibition against issuing stock except for money, labor done, or property actually received, a corporation may issue stock as a dividend out of surplus.¹¹¹ (See payment of dividends in stock, pages 576 and 578.) The

¹⁰⁴ See *Bodell v. General Gas & Electric Corporation*, (1926) 15 Del. Ch. 119, 132 A. 442, aff'd (1927) 15 Del. Ch. 420, 140 A. 264, cited in *Atlantic Refining Co. v. Hodgman et al.*, (1926) 13 F. (2d) 781; *Cohen v. Beneficial Industrial Loan Corp.*, (1946) 69 F. Supp. 297.

¹⁰⁵ See *Electromatic Cooling Co. v. Milne-Ryan-Gibson, Inc.*, (1931) 160 Wash. 320, 294 P. 1113.

¹⁰⁶ *Rice & Hutchins v. Triplex Shoe Co.*, (1929) 16 Del. Ch. 298, 147 A. 317.

¹⁰⁷ *Parrish v. Am. Ry., etc. Corp.*, (1927) 83 Cal. App. 298, 256 P. 590.

¹⁰⁸ *Thomas v. Scoutt*, (1927) 115 Neb. 848, 215 N. W. 140; *New Bern Tire Co. v. Kirkman & Cobb*, (1927) 193 N. C. 534, 137 S. E. 585; *Reed & Fibre Products Corp. v. Rosenthal*, (1927) 153 Md. 501, 138 A. 665; *Crumley v. Crumley Business College*, (1927) 120 Ore. 306, 252 P. 85; *Macbeth v. Banfield*, (1904) 45 Ore. 553, 78 P. 693; *Coffin v. Ransdell*, (1887) 110 Ind. 417, 11 N. E. 20.

¹⁰⁹ *San Bernardino County Sav. Bank v. Denman*, (1921) 186 Cal. 710, 200 P. 606; *Hoffman v. Bloomsburg & S. R. Co.*, (1893) 157 Pa. St. 174, 27 A. 564.

¹¹⁰ *Winston v. Saugerties Farms, Inc.*, (1941) 262 N. Y. App. Div. 435, 29 N. Y. Supp. (2d) 292, aff'd, (1942) 287 N. Y. 718, 39 N. E. (2d) 934.

¹¹¹ *Young v. Bradford County Tel. Co.*, (1941) 341 Pa. 394, 19 A. (2d) 134, citing *In re De Soto Coal Mining & Development Co.*, (1914) 218 F. 892.

issuance of a new prior preferred stock in exchange for outstanding preferred and common stock also meets the usual requirement for consideration.¹¹² A plan that gives employees an option to purchase stock at a definite price is not prohibited by the requirement of adequate consideration.¹¹³

Stock issued in satisfaction of a judgment in a consent decree does not meet the requirement, where the judgment satisfied was without adequate consideration of the sort required by the constitution or statute.¹¹⁴

Payment for stock in services. In most of the states the statutes provide that stock may be issued for "labor done." This term generally includes services performed in the promotion and organization of the corporation, if the amount is reasonable and the stockholders consent to the issue.¹¹⁵ For example, the services of an attorney in preparing a charter and other papers necessary for incorporation have been held to be "labor done" for which stock could be issued.¹¹⁶ But an issue of stock to promoters must be free from fraud or concealment in order to be valid.¹¹⁷ In several of the states, the courts have construed the statutory provision that stock shall not be issued except for money paid to, or work done for, or property actually received by, the corporation, to preclude the issuance of stock for promotion services.¹¹⁸

A corporation cannot legally issue stock to a person upon the sole consideration that that person's name may be used in the

¹¹² *Johnson v. Lamprecht*, (1938) 133 Ohio St. 567, 15 N. E. (2d) 127; *Topkis v. Delaware Hardware Co.*, (1938) 23 Del. Ch. 125, 2 A. (2d) 114; *Francke v. Axton-Fisher Tobacco Co.*, (1942) 289 Ky. 687, 160 S. W. (2d) 23.

¹¹³ *Holthusen v. Edward G. Budd Mfg. Co.*, (1943) 52 F. Supp. 125; see s.c. 53 F. Supp. 488; *Diamond v. Davis*, (1942) 38 N. Y. Supp. (2d) 103.

¹¹⁴ *Mudd v. Lanier*, (1945) 247 Ala. 363, 24 So. (2d) 550.

¹¹⁵ *Fitzpatrick v. O'Neill*, (1911) 43 Mont. 552, 118 P. 273; *Denis v. Nu-Way Puncture Cure Co.*, (1919) 170 Wis. 333, 175 N. W. 95; *Reed & Fibre Products Corp. v. Rosenthal*, (1927) 153 Md. 501, 138 A. 665; *Shore v. Union Drug Co.*, (1931) 18 Del. Ch. 74, 156 A. 204; *Bryan v. Northwest Beverages, Inc.*, (1939) 69 N. D. 274, 285 N. W. 689; *Blish v. Thompson Automatic Corp.*, (1948) (Del.) 64 A. (2d) 581, comment, 63 *Harvard Law Rev.* 351 (Dec. 1949).

¹¹⁶ *Hackney v. York*, (1929) (Tex. Civ. App.) 18 S. W. (2d) 923.

¹¹⁷ *State v. Bellin*, (1935) 55 R. I. 374, 181 A. 804.

¹¹⁸ *Stevens v. Episcopal Church History Co.*, (1910) 140 N. Y. App. Div. 570, 125 N. Y. Supp. 573; *Lamphere v. Lang*, (1913) 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967, rev'd on other grounds in 213 N. Y. 585, 108 N. E. 82. See also *Cooney v. Arlington Hotel Co.*, (1917) 11 Del. Ch. 286, 101 A. 879; *Blair v. F. H. Smith Co.*, (1931) 18 Del. Ch. 150, 156 A. 207; *Dancey v. Brieger Press, Inc.*, (1932) 235 N. Y. App. Div. 861, 257 N. Y. Supp. 547.

corporation,¹¹⁹ nor can it legally issue stock upon the sole consideration that a certain person shall act as president for the ensuing year, or that the corporation shall have the benefit of his business and financial standing.¹²⁰ But the power of a corporation to compensate its agents and officers for services rendered by the issuance of stock is implied from its power to allow suitable compensation to its agents and officers.¹²¹

Issuance of stock for future services. There is some difference of opinion as to whether stock may be issued for services to be rendered in the future. Some cases have held that, under a statute which prohibits the issuance of stock except for money paid, labor done, or property actually received, services to be rendered in the future cannot be a valid consideration for the issuance of fully paid nonassessable shares.¹²² Shares of stock may be issued, however, for services to be rendered so long as they are not marked "full paid" until the services have been rendered.¹²³ A contract providing for the future delivery of stock if and when certain services are performed has been upheld.¹²⁴ There is some authority which supports the issuance of stock for services to be performed in the future if the transaction is bona fide.¹²⁵

Valuation of services accepted in payment of stock. Services accepted in payment for stock must be reasonably worth the face value of the stock given therefor. The principles concerning the issuance of stock for overvalued property, discussed on pages

¹¹⁹ *Bowen v. Imperial Theatres*, (1922) 13 Del. Ch. 120, 115 A. 918.

¹²⁰ *B. & C. Electrical Const. Co. v. Owen*, (1917) 176 N. Y. App. Div. 399, 163 N. Y. Supp. 31, aff'd, 227 N. Y. 569, 126 N. E. 927.

¹²¹ *Rogers v. Guaranty Trust Co. of New York, et al.*, (1932) 60 F. (2d) 114.

¹²² *B. & C. Electrical Const. Co. v. Owen*, (1917) 176 N. Y. App. Div. 399, 163 N. Y. Supp. 31, aff'd, 227 N. Y. 569, 126 N. E. 927; *Scully v. Automobile Finance Co.*, (1920) 12 Del. Ch. 174, 109 A. 49; *Mas Patent Bottle Corp. v. Cox*, (1932) 163 Md. 176, 161 A. 243; *Blair v. F. H. Smith Co.*, (1931) 18 Del. Ch. 150, 156 A. 207.

¹²³ *Scully v. Automobile Finance Co.*, (1920) 12 Del. Ch. 174, 109 A. 49.

¹²⁴ *McQuillen v. National Cash Register Co.*, (1939) 27 F. Supp. 639, aff'd, (1940) 112 F. (2d) 877, cert. denied, (1940) 311 U. S. 695, 61 S. Ct. 140, rehearing denied, (1940) 311 U. S. 729, 61 S. Ct. 316.

¹²⁵ *Shannon v. Stevenson*, (1896) 173 Pa. St. 419, 34 A. 218, in which it was held that a proviso that no stock shall be issued "except for money, labor done, or money or property actually received" does not prevent either payment for bona fide labor or services to be thereafter rendered, or contracts to pay in advance for property to be furnished. See also *Vogeler v. Punch*, (1907) 205 Mo. 558, 103 S. W. 1001; *Vineland Grape Juice Co. v. Shandler*, (1912) 80 N. J. Eq. 437, 85 A. 213.

424—430, are equally applicable to the issuance of stock for over-valued services.¹²⁶

The statutes of some of the states require that, where stock is issued for a consideration other than money, the board of directors shall by resolution state its opinion of the actual value of any consideration other than money for which it authorizes such stock to be issued. In some states a statement must be filed with a designated official showing the valuation of services or property received for stock issued. Where such statutes exist, a resolution should be passed by the directors, or by those having authority to authorize the issuance of stock, showing the price paid or to be paid for the labor for which the stock is to be issued. As a matter of good practice, such a resolution should be presented, adopted, and recorded in the minutes of the corporation, even where no formal resolution valuing the labor done is required by statute.¹²⁷

Payment for stock in notes. In a few states, the statutes specifically provide that a promissory note shall not be accepted in payment for stock. These statutes apply to stock issued after the corporation is a going concern, as well as to subscriptions before organization.¹²⁸ However, they do not usually forbid the substitution of a note for a subscription contract as evidence of indebtedness.¹²⁹

In states where there is no such express prohibition against the acceptance of notes but where the statute provides that stock may be issued only for money, labor done, or property actually received, the courts have differed in their decisions as to whether or not a promissory note can be included in the term "property actually received."¹³⁰ Decisions fall, generally, into two groups. In the first group are those cases which regard a note as personal property and hence a valid consideration for the issuance of stock.¹³¹ In the second group are those that ordinarily regard

¹²⁶ *Chouteau, Harrison & Valle v. Dean*, (1879) 7 Mo. App. 210.

¹²⁷ See *Bowen v. Imperial Theatres*, (1922) 13 Del. Ch. 120, 115 A. 918.

¹²⁸ *Merchants Bank & Trust Co. v. Walker*, (1942) 192 Miss. 737, 6 So. (2d) 107.

¹²⁹ *In re Gillham's Estate*, (1936) 286 Ill. App. 370, 3 N. E. (2d) 524; *Thomas v. Arkansas State Fair Ass'n*, (1930) 181 Ark. 748, 27 S. W. (2d) 515.

¹³⁰ For a consideration of the various statutes and conflicting decisions on this subject, see Paskus, "The 'Illegal' Creation of Shares in Return for Notes," 39 *Yale Law Journal* 706 (1930). Waterman, "The Creation of Corporate Shares in Return for Promissory Notes," 7 *Texas Law Rev.* 215.

¹³¹ See *Pacific Trust Co. v. Dorsey*, (1886) 72 Cal. 55, 12 P. 49; *Meholin v. Carlson*, (1910) 17 Idaho 742, 107 P. 755; *German Mercantile Co. v. Wanner*, (1913) 25 N. D. 479, 142 N. W. 463; *Schiller Piano Co. v. Hyde*, (1917) 39 S. D.

the note merely as a promise to pay and not as property.¹³² However, if something in addition is given with the note, such as the indorsement of a financially responsible person or a valid first mortgage on real estate, the note is considered as property and sufficient consideration to support the issue of stock.¹³³ In jurisdictions following the second line of decisions, if the stock is not actually issued and the purchaser is not recognized as a stockholder until after the note has been paid, there is no violation of the provision prohibiting the issuance of stock other than for money, labor done, or property actually received.¹³⁴

A note accepted in payment for stock and the stock issued therefor are not necessarily void, even though the note may not be a valid payment.¹³⁵ The note may be enforced against the maker in a suit by the corporation or its trustee in bankruptcy.¹³⁶ The provisions of the statute that stock shall be issued only for money paid, for labor done, or for property actually received are intended for the protection of the corporation, its creditors and other stockholders, and not for the relief of the offending stockholder.¹³⁷ In some jurisdictions, however, the note is not enforceable by the corporation or holders who knew that the note

74, 162 N. W. 937; *Empire Holding Corp. v. Coshaw*, (1935) 150 Ore. 252, 41 P. (2d) 426.

¹³² The rule applying in these cases is clearly stated in *Teehan v. U. S.*, (1928) 25 F. (2d) 884, as follows: "It is settled law that, where a statute or a constitutional provision permits a corporation to issue stock only for money paid, services rendered, or property actually received, stock issued for notes of the shareholder is not stock legally issued." This rule was applied in *Sohland v. Baker*, (1927) 15 Del. Ch. 431, 141 A. 277; *Lepanto Gin Co. v. Barnes*, (1930) 182 Ark. 422, 31 S. W. (2d) 746. See also *Bank of Commerce v. Goolsby*, (1917) 129 Ark. 416, 196 S. W. 803; *Washer v. Smyer*, (1919) 109 Tex. 398, 211 S. W. 985; *Lofland v. Cahall*, (1922) 13 Del. Ch. 384, 118 A. 1; *Southwestern Tank Co. v. Morrow*, (1925) 115 Okla. 97, 241 P. 1097; *Shafer v. Home Trading Co.*, (1932) 227 Mo. App. 347, 52 S. W. (2d) 462; *Arndt v. Abbott*, (1941) 308 Ill. App. 633, 32 N. E. (2d) 342.

¹³³ *Gen. Bonding & Casualty Ins. Co. v. Moseley*, (1920) 110 Tex. 529, 222 S. W. 961; *Harn v. Smith*, (1922) 85 Okla. 137, 204 P. 642.

¹³⁴ *Smith et al. v. McAdams et al.*, (1918) (Tex. Civ. App.) 206 S. W. 955; *Turner v. Cattlemen's Trust Co.*, (1919) (Tex. Com. App.) 215 S. W. 831. Stock must be issued and actually or constructively received by the subscriber to constitute him a stockholder. *Corp. Com. of N. C. v. Harris*, (1929) 197 N. C. 202, 148 S. E. 174.

¹³⁵ *Washer v. Smyer*, (1919) 109 Tex. 398, 211 S. W. 985; *Cahall v. Lofland*, (1921) 12 Del. Ch. 299, 114 A. 224, *aff'd*, (1922) 13 Del. Ch. 384, 118 A. 1; *Teehan v. U. S.*, (1928) 25 F. (2d) 884; *Joy v. Godechaux*, (1929) 35 F. (2d) 649.

¹³⁶ *Backus v. Hutson*, (1930) 136 N. Y. Misc. 290, 240 N. Y. Supp. 610.

¹³⁷ *Washer v. Smyer*, *supra* (Note 135); *Theunissen v. Continental Trust Co.*, (1926) 15 F. (2d) 894; *Bell v. Aubel*, (1943) 151 Pa. Super. 569, 30 A. (2d) 617.

was given for stock.¹³⁸ Other jurisdictions hold that the note and the stock issued for it are void.¹³⁹

Payment for stock in property. In each state the constitution or the statute, directly or indirectly, sanctions the issuance of capital stock for property. These provisions differ in their requirements regarding: (1) the kinds of property which the corporation may accept in payment for stock; (2) the procedure to be followed in authorizing the issuance of stock for property; (3) the method of valuing the property; and (4) the liability resulting from the issuance of stock for overvalued property.

Kinds of property acceptable in payment of stock. In a few states the statutes indicate that real and personal property may be received in payment for stock; in others, in addition to real and personal property, such property as mining rights, patent rights, rights of way, goodwill, and contracts are specifically made acceptable. If the statutes do not expressly enumerate the kinds of property that the corporation may accept for its stock, it is generally held that the corporation may accept real or personal property. Such property, however, must be of the kind that the corporation has the power to acquire and hold in carrying out the objects and purposes for which it was organized. Or it must be of the kind in which the corporation is authorized by statute to invest its funds.¹⁴⁰ Patents,¹⁴¹ trade-marks, formulas, applications for patents,¹⁴² mines, leases,¹⁴³ and the assignments of contracts¹⁴⁴ are a few kinds of property which may be received. Extension of the due date of a mortgage has been held to be sufficient consideration for the issuance of stock;¹⁴⁵ also conveyance of the equity in mortgaged property, to avoid ex-

¹³⁸ *Western Nat. Bank v. Spencer*, (1922) 112 Tex. 49, 244 S. W. 123.

¹³⁹ *Southwestern Tank Co. v. Morrow*, (1925) 115 Okla. 97, 241 P. 1097; *Bank of Dermott v. Measel*, (1926) 172 Ark. 193, 287 S. W. 1017; *Aldridge v. Rice*, (1932) 161 Miss. 879, 138 So. 570; *Shafer v. Home Trading Co.*, (1932) 227 Mo. App. 347, 52 S. W. (2d) 462.

¹⁴⁰ *Harn v. Smith*, (1922) 85 Okla. 137, 204 P. 642.

¹⁴¹ *Hills v. Skagit Steel & Iron Works*, (1922) 122 Wash. 22, 210 P. 17.

¹⁴² *Ibid.*

¹⁴³ *Cassidy v. Horner*, (1922) 86 Okla. 220, 208 P. 775; *Seches v. Bard*, (1931) 67 Cal. App. 374, 4 P. (2d) 167; *McAlister v. Eclipse Oil Co.*, (1936) 128 Tex. 449, 98 S. W. (2d) 171, rev'g 92 S. W. (2d) 545; *Johnston v. Nat. Sand & Gravel Co.*, (1931) 172 La. 388, 134 So. 369.

¹⁴⁴ *Miller v. Youmans-Burke Oil & Gas Co.*, (1937) 278 Mich. 647, 270 N. W. 819; *Ainscow v. Potter*, (1937) 22 Del. Ch. 138, 193 A. 926; *Ewing v. Swenson*, (1926) 167 Minn. 113, 208 N. W. 645.

¹⁴⁵ *Burge v. Midway Pacific Oil Co.*, (1929) 99 Cal. App. 714, 279 P. 181; 28 *Michigan Law Review* 1048 (1930).

pense of litigation,¹⁴⁶ and the release of a valid, unliquidated claim against the corporation.¹⁴⁷ A license to use certain trademarks that is considerably broader than a prior license is good consideration for stock.¹⁴⁸

A corporation may accept stock in another corporation, in payment for its stock, if the corporation has the power to hold stock in other corporations.¹⁴⁹ The corporation may not issue its stock, however, for stock of another corporation that is worthless.¹⁵⁰

A corporation may discharge its indebtedness to a subscriber to whom it has issued its stock by writing off the indebtedness on its books, and crediting the amount to the subscriber in payment for his stock. To effect this result it is not necessary to go through the formality of having the subscriber pay for his stock and the corporation return to him a sum sufficient to discharge the indebtedness.¹⁵¹

What constitutes value in property acceptable in payment for stock. While property accepted in payment for stock need not have a market value, nevertheless, in order to constitute a satisfactory consideration for the issuance of stock, it must have a commercial value.¹⁵² For example, the anticipated profits of an executory contract may give commercial value to a contract, so that an assignment of it may be accepted in payment for stock.¹⁵³ The mere pretended exercise of judgment by the directors cannot give value to that which has no value.¹⁵⁴ Thus, a business idea which is not salable or transferable, that is, an idea which others have used and which anyone can use freely, has no commercial value and does not constitute a consideration for stock.¹⁵⁵ Equal value in property, dollar for dollar, need not

¹⁴⁶ *Morris v. North Evanston Manor Bldg. Corp.*, (1943) 319 Ill. App. 298, 49 N. E. (2d) 646.

¹⁴⁷ *Blish v. Thompson Automatic Corp.*, (1948) Del. 64 A. (2d) 581, comment, 63 *Harvard Law Rev.* 351 (Dec. 1949).

¹⁴⁸ *Sarasohn v. Andrew Jergens Co.*, (1943) 45 N. Y. Supp. (2d) 888.

¹⁴⁹ *Southern Trust & Deposit Co. v. Yeatman*, (1905) 134 F. 810.

¹⁵⁰ *Loring v. Lamson & Hubbard Corporation*, (1924) 249 Mass. 272, 143 N. E. 916.

¹⁵¹ *Rodgers et al. v. H. S. Kerbaugh, Inc. et al.*, (1921) 190 N. Y. Supp. 245.

¹⁵² *Kunkle v. Soule*, (1920) 68 Colo. 524, 190 P. 536.

¹⁵³ *Ewing v. Swenson*, (1926) 167 Minn. 113, 208 N. W. 645.

¹⁵⁴ *Ellis v. Penn Beef Co.*, (1911) 9 Del. Ch. 213, 80 A. 666; *Scully v. Automobile Finance Co.*, (1920) 12 Del. Ch. 174, 109 A. 49.

¹⁵⁵ *Scully v. Automobile Finance Co.*, *supra* (Note 154).

be received for stock. It is sufficient if the amount received reasonably approximates the amount of stock issued.¹⁵⁶

The goodwill of a business may be accepted in payment of stock,¹⁵⁷ but the goodwill must have value.¹⁵⁸ There is no value in the goodwill of a business which has never been profitable, even though the business when taken over is a going concern.¹⁵⁹ But the "going concern value" can be considered in evaluating the property.¹⁶⁰ The goodwill, prestige, and influence of subscribers in assisting in selling stock is not sufficient consideration¹⁶¹

Procedure in authorizing issuance of stock for property. The procedure to be followed in authorizing the issuance of stock for property depends upon the requirements of the statutes of the state in which the corporation is organized, and upon the provisions of the charter and by-laws of the corporation. In many states, the statutes require the corporation to keep a record showing the nature of property accepted in payment of stock, as well as the value of the property. Some of the states require that upon issuance of stock for a consideration other than cash, a certificate be filed with the Secretary of State, or some other designated official. Substantial compliance with these statutory provisions is required.

Ordinarily authority to value property and issue stock for it is vested under the statute or charter in the board of directors. In this case only the board can act in the matter. The minutes of the directors' meeting should contain an entry of the valuation of the property. However, failure to include such a record of the transaction will not invalidate it if appropriate corporate action was taken.¹⁶²

¹⁵⁶ *Park v. Compton*, (1932) 55 F. (2d) 80.

¹⁵⁷ *Linden Bros. v. Practical Electricity & Engineering Pub. Co.*, (1923) 309 Ill. 132, 140 N. E. 874; *Bryan v. Northwest Beverages, Inc.*, (1939) 69 N. D. 274, 285 N. W. 689; *Randall v. Bailey*, (1940) 23 N. Y. Supp. (2d) 173.

¹⁵⁸ A contract under which stock was issued in consideration of an agreement not to sell certain photographic paper in designated countries, was upheld where the restrictive covenant was incidental to a sale of the business. *Thoms v. Sutherland et al.*, (1931) 52 F. (2d) 592. For a discussion of this decision, see 30 *Michigan Law Review* 971 (1932).

¹⁵⁹ *William E. Dee Co. v. Proviso Coal Co.*, (1919) 290 Ill. 252, 125 N. E. 24; *Linden Bros. v. Practical Electricity & Engineering Pub. Co.*, (1923) 309 Ill. 132, 140 N. E. 874.

¹⁶⁰ *Randall v. Bailey*, *supra* (Note 157).

¹⁶¹ *Laing v. Hutton*, (1932) 138 Ore. 307, 6 P. (2d) 884.

¹⁶² *Whitlock v. Alexander*, (1912) 160 N. C. 465, 76 S. E. 538. See also *East Lake Lumber Co. v. Van Gorder*, (1919) 105 N. Y. Misc. 704, 174 N. Y. Supp. 38, leave to appeal denied, 189 N. Y. App. Div. 884, 177 N. Y. Supp. 914.

Offers to exchange property for stock of a corporation to be organized may be considered at the first meeting of incorporators, directors, or stockholders. However, if the meeting is being held by dummy incorporators or directors, it is not advisable to pass upon such matters as contracts concerning the purchase of property by the corporation. Consideration and vote upon such contracts should be postponed until a meeting in which the actual incorporators, directors, or stockholders participate.

For special minutes to be kept by corporations subject to statutes imposing a personal liability upon directors who participate in issuance of stock for overvalued property, see page 170.

Method of valuing property received in payment for stock. The issuance of stock for property always involves a valuation of the property to be acquired in exchange for the stock. The corporation laws or constitution of most of the states indicate the method of valuing property for the purpose of issuing stock therefor. The most usual statutory provision is that the corporation may issue stock to the amount of the value of the property taken in payment; the judgment of the directors as to the value of the property purchased is conclusive, in the absence of fraud.¹⁶³ Other statutory provisions permit the acquisition of property at (1) its reasonable value, (2) its actual value, (3) a bona fide and fair value, (4) its actual cash value, (5) its true money value, or (6) a value in the judgment of the directors at least equal to the full par value of the stock to be issued.¹⁶⁴

Under the usual statutory provision that the judgment of the directors as to the value of the property is conclusive, in the absence of fraud, a stockholder is protected from demands for further payment on account of stock acquired by him in exchange for property. He must, however, show that his property was accepted by the corporation in payment for his stock at a valuation determined by the board of directors. This protection is lost only when actual fraud in the transaction is shown by one who alleges that the stockholder has not paid for his stock in money or money's worth.¹⁶⁵

The directors must make an honest attempt to determine the

¹⁶³ See *Miller v. Youmans-Burke Oil & Gas Co.*, (1937) 278 Mich. 647, 270 N. W. 819.

¹⁶⁴ *Compton v. Perkins*, (1933) 144 Ore. 346, 24 P. (2d) 670.

¹⁶⁵ *New Bern Tire Co. v. Kirkman & Cobb*, (1927) 193 N. C. 534, 137 S. E. 585; *Lamprecht v. Swiss Oil Corp. et al.*, (1929) 32 F. (2d) 646. See also *Sokoloff v. Wildwood Pier & Realty Co.*, (1931) 108 N. J. Eq. 362, 155 A. 125.

value of property taken in exchange for stock. They must act in the interests of the corporation and secure for it all that it is justly entitled to. Anything less than that is dishonest and fraudulent.¹⁶⁶ Thus a conscious overvaluation by the directors constitutes fraud.¹⁶⁷ The directors may exercise very poor judgment, or may make a mistake, in the valuation of the property. If, in doing so, they act fairly and honestly and not in furtherance of their own interests, the valuation they arrive at is conclusive.¹⁶⁸ Property is not considered overvalued merely because it subsequently turns out to be so, if the valuation has been made in good faith.¹⁶⁹ Nor does the fact that the corporation may have to spend money to protect its property rights in the future necessarily make the consideration invalid.¹⁷⁰

“Good faith” and “true value” rules of valuation of property received for stock. The valuation fixed by the board of directors for property received by the corporation in payment for stock must meet the tests applied by the courts in passing upon the value fixed. Two rules have been developed to test such valuation, the “true value” rule and the “good faith” rule. Which of these rules shall be applied in a given case depends upon the decisions of the state in which the corporation issuing the stock is organized. In states in which the “true value” rule is followed, the motive, intent, or good faith of those valuing the property is disregarded. The subscriber must show that the property given for the stock was worth in dollars, at the time of the transaction, the face value of the shares, or the value that was authorized to be received for the issue.¹⁷¹ In states in which the “good faith” rule is followed, a subjective standard is set up. It is the presence or absence of good faith on the part of the directors, or others making the valuation, which determines the sufficiency or insufficiency of the value fixed. The only difficulty encountered in applying the good faith rule is in determining what constitutes

¹⁶⁶ *Rugger v. Mt. Hood Electric Co.*, (1933) 143 Ore. 193, 20 P. (2d) 412; *Atwell v. Schmitt*, (1924) 111 Ore. 96, 225 P. 325.

¹⁶⁷ *Scully v. Automobile Finance Co.*, (1920) 12 Del. Ch. 174, 109 A. 49.

¹⁶⁸ *Compton v. Perkins*, (1933) 144 Ore. 346, 24 P. (2d) 670.

¹⁶⁹ *Smith v. Schmitt*, (1924) 112 Ore. 687, 231 P. 176. See also *H. B. Humphrey Co. v. Pollack Roller Runner Sled Co.*, (1932) 278 Mass. 350, 180 N. E. 164.

¹⁷⁰ *West v. Sirian Lamp Co.*, (1944) (Del. Ch.) 37 A. (2d) 835, s.c. (1945) (Del. Ch.) 42 A. (2d) 883, 44 A. (2d) 658.

¹⁷¹ The following are some cases in which the “true value” rule has been followed: *Tramp v. Marquesen*, (1920) 188 Iowa 968, 176 N. W. 977; *Lavell v. Bullock*, (1919) 43 N. D. 135, 174 N. W. 764; *Detroit-Kentucky Coal Co. v. Bickett*, (1918) 251 F. 542.

good faith.¹⁷² Some of the decisions hold that, in the absence of an affirmative showing of fraud, mere overvaluation of the property given in exchange for stock will not render the stockholder liable for the difference between the amount paid and the value of the stock received. Others hold that overvaluation itself, especially if gross, constitutes, or at least raises a strong presumption of, fraud.¹⁷³

Liability of directors upon issuance of stock for overvalued property. In some states, the statutes impose a personal liability upon directors who participate in the issuance of stock for overvalued property. Where these laws are in force, the corporate minutes should record the names of the directors voting for the issuance of stock for property at the value fixed. Where the law also provides that directors, in order to escape personal liability for the acts of their fellow directors in authorizing the issuance of stock for overvalued property, must enter their dissent from the valuation in writing, the dissents should appear in the minutes.

Liability for payment of stock issued for overvalued property or for property not legal payment. Stock issued for overvalued property is commonly called "watered" stock.¹⁷⁴ Since the corporation may not issue watered stock, questions arise as to the rights and liabilities of parties involved in case the corporation does issue stock for overvalued property. Similar questions arise: (1) when stock is issued at less than par value in violation

¹⁷² The following are some cases in which the "good faith" rule has been followed: *Scully v. Automobile Finance Co.*, (1920) 12 Del. Ch. 174, 109 A. 49; *Winters v. Lindsay*, (1921) 52 Cal. App. 93, 198 P. 43, hearing denied by Supreme Court; *Caldwell v. Robinson*, (1920) 179 N. C. 518, 103 S. E. 75; *Miller v. Youmans-Burke Oil & Gas Co.*, (1937) 278 Mich. 647, 270 N. W. 819; *Johansen v. St. Louis Union Trust Co.*, (1939) 345 Mo. 135, 131 S. W. (2d) 599; *Diamond State Brewery, Inc. v. De La Rigaudiere*, (1941) 25 Del. Ch. 257, 17 A. (2d) 313; *West v. Sirian Lamp Co.*, (1944) (Del. Ch.) 37 A. (2d) 835, c.c. (1945) (Del. Ch.) 42 A. (2d) 883, 44 A. (2d) 658. See also *Coit v. Gold Amalgamating Co.*, (1886) 119 U. S. 343, which is cited as a leading case. The "good faith" rule is the general rule pronounced by the Supreme Court of the United States. *Clinton Mining & Mineral Co. v. Jamison*, (1919) 256 F. 577.

¹⁷³ *State Trust Co. v. Turner*, (1900) 111 Iowa 664, 82 N. W. 1029.

¹⁷⁴ The term "watered stock" embraces a variety of transactions, classified as follows in *Thomason v. Miller*, (1928) (Tex. Civ. App.) 4 S. W. (2d) 668:

- "1. Where stock is issued as a bonus or otherwise without consideration.
- "2. Where it is issued for a less sum of money than par value.
- "3. Where it is issued for labor, services, or property which at a fair valuation is less than par."

A distinction is sometimes made between bonus stock and watered stock. See 17 *Philippine Law Jour.* 85 (1937).

of a provision prohibiting the issue of stock at less than par value; (2) when stock is issued for an illegal consideration; (3) when, in violation of a statute, full paid certificates are issued before full payment has been received; and (4) when any fraudulent issue of stock has been made. The parties involved in such transactions are the corporation, the stockholders, subsequent transferees, and creditors. Their rights and liabilities depend upon the nature of the transaction, that is, whether it is fraudulent, illegal, or ultra vires. If the corporation's action in issuing watered stock is a fraud upon the public, the state may institute proceedings to forfeit the corporation's charter for misusing or abusing its franchise.¹⁷⁵

A contract to issue stock is illegal if it is made in violation of some statutory, constitutional, or charter provision. Illegal contracts are generally not enforceable either by or against the corporation. Thus, under a statute requiring that par value shares shall be issued only for a consideration equal to the par value, an executory stock subscription agreement for the issuance of stock for money less than the par value is not enforceable.¹⁷⁶ If the illegal contract has been executed, neither the corporation nor the person with whom the contract was made may bring a suit for relief from the effects of the contract.

The rights and liabilities of parties involved in an ultra vires contract to issue stock for an inadequate payment—that is, a contract beyond the powers of the corporation—are governed by the same principles that apply to ultra vires contracts in general. Thus, if an ultra vires contract to issue stock for overvalued property is still to be performed, the contract is void and will not be enforced.¹⁷⁷ If an ultra vires contract to issue watered stock has been executed, the transaction cannot be questioned by the corporation, or by stockholders who have consented to the transaction. Stockholders who dissent, however, have the right to enjoin the issuance of watered stock under an executory ultra vires contract.¹⁷⁸

Position of the corporation upon issuance of stock for overvalued property. A corporation that has issued stock as fully

¹⁷⁵ *State v. New Orleans Debenture Redemption Co.*, (1899) 51 La. Ann. 1827, 26 So. 586.

¹⁷⁶ *Stone v. Young*, (1924) 210 N. Y. App. Div. 303, 206 N. Y. Supp. 95, modifying 123 N. Y. Misc. 120, 204 N. Y. Supp. 690.

¹⁷⁷ *Garrett v. Kansas City Coal Min. Co.*, (1892) 113 Mo. 330, 20 S. W. 965; *Zelaya Min. Co. v. Meyer*, (1890) 8 N. Y. Supp. 487.

¹⁷⁸ *Fisk v. Chicago R. I. & P. R. Co.*, (1868) 53 Barb. (N. Y.) 513.

paid, without getting full value for it, cannot afterward repudiate the transaction, if there is no express statutory or charter provision declaring such a transaction void, and if the stockholders have unanimously consented to the issue.¹⁷⁹ It cannot exclude the holders of the stock from participating in the company's affairs. Nor can it compel them to pay the difference between the face value of the stock and what has been paid or agreed upon as full payment. As between the corporation and the stockholders, the corporation has no claim after taking property in full payment for stock.¹⁸⁰ See stockholders' liability to creditors, on page 430.

Many of the statutes that provide that no corporation shall issue stock except for money, for labor done, or for property actually received also declare that all fictitious increases of stock shall be void. Under such a constitutional or statutory provision, stock issued purely as a gratuity, nothing having been received in payment, has been held to be void; the person to whom such stock was issued obtained no rights as against the corporation.¹⁸¹ But, under such a statute, where some value had been given for the stock, only the part of the stock which was in excess of the payment received was held to be fictitious and voidable at the suit of the corporation.¹⁸² There are cases, however, that hold that a transaction to issue stock for overvalued property is not void, and that the parties to the transaction cannot question the sufficiency of the consideration.¹⁸³ These cases were decided under a statute that declared all fictitious increases of stock void.

The position of subscribers and stockholders upon issuance of stock for overvalued property. A stockholder who has paid full value for his shares, or a subscriber who undertakes to pay for his shares in full, has the right to assume that every other stockholder or subscriber has paid or will pay a full consideration

¹⁷⁹ *Scovill v. Thayer*, (1881) 105 U. S. 143; *Grants Pass Hardware Co. v. Calvert*, (1914) 71 Ore. 103, 142 P. 569; *Vasey v. New Export Coal Co.*, (1921) 89 W. Va. 491, 109 S. E. 619; *In re Associated Oil Co.*, (1923) 289 F. 693.

¹⁸⁰ *Martin v. Heymann*, (1929) 251 Ill. App. 89; *Heidler v. Werner & Co.*, (1924) 95 N. J. Eq. 374, 124 A. 49.

¹⁸¹ *Thornson v. Universal Mfg. Co.*, (1916) 164 Wis. 44, 159 N. W. 575; *J. F. Lucey Co. v. McMullen*, (1918) 178 Cal. 425, 173 P. 1000; *L. J. Mueller Furnace Co. v. Holmes*, (1921) 175 Wis. 518, 185 N. W. 641; *Clark v. Millsap*, (1926) 197 Cal. 765, 242 P. 918.

¹⁸² *Taylor v. Citizens' Oil Co.*, (1918) 182 Ky. 350, 206 S. W. 644; *Rice v. Thomas*, (1919) 184 Ky. 168, 211 S. W. 428.

¹⁸³ *Nicrosi v. Irvine*, (1893) 102 Ala. 648, 15 So. 429.

for his stock. However, a stockholder who assents to an issue of stock for payment not equal to the value of the shares issued therefor cannot complain against the issue of the fictitiously paid-up stock.¹⁸⁴ Nor can he complain, if, with knowledge of the facts, he does not object to the transaction within a reasonable time.¹⁸⁵ If a stockholder has not voluntarily assented to or acquiesced in an issuance of fully paid shares for a consideration less than par, or for property not equal in value to the stock issued for it, he may file a bill to annul the entire transaction.¹⁸⁶ Directors have been known to vote themselves unissued stock at reduced price, in consideration of "a large amount of labor and weighty responsibilities." Dissenting stockholders can compel them to pay the full price for the stock and certificates.¹⁸⁷

In some jurisdictions, if the issue has been made in violation of the constitution or statute, the dissenting stockholder can compel the surrender for cancellation of all stock in excess of the value paid.¹⁸⁸ A stockholder who dissents to a proposal to issue stock for less than its full value may enjoin the corporation from issuing the stock, if the proposed transaction violates the rights of existing stockholders, or the provisions of the constitution, the statute, or the corporation's charter.¹⁸⁹

According to the weight of authority, if fraud has been committed against creditors or stockholders who have paid for their stock in full, the holders of the watered stock, or fictitiously paid up stock, can be compelled to pay the difference between the amount actually paid for the stock and the par value, or value authorized to be received in return for the stock.¹⁹⁰ Only persons defrauded can obtain relief on the ground of fraud.

Position of the transferee of overvalued or watered stock. The rights of those who have become owners of watered or fic-

¹⁸⁴ *In re Charles Town Light & Power Co.*, (1912) 199 F. 846; *Vasey v. New Export Coal Co.*, (1921) 89 W. Va. 491, 109 S. E. 619; *Topkis v. Delaware Hardware Co.*, (1938) 23 Del. Ch. 125, 2 A. (2d) 114.

¹⁸⁵ *Keeney v. Converse*, (1894) 99 Mich. 316, 58 N. W. 325; *Taylor v. S. & N. Alabama R. Co.*, (1882) 13 F. 152.

¹⁸⁶ *Fisk v. Chicago R. I. & P. R. Co.*, (1868) 53 Barb. (N. Y.) 513; *Perry v. Tuscaloosa Cotton Seed Oil-Mill Co.*, (1891) 93 Ala. 364, 9 So. 217. See also *Meier v. First Citizens Bankers Corporation*, (1938) 301 Mass. 410, 17 N. E. (2d) 106.

¹⁸⁷ *Voorhees v. Mason*, (1910) 245 Ill. 256, 91 N. E. 1056.

¹⁸⁸ *Rice v. Thomas*, (1919) 184 Ky. 168, 211 S. W. 428; *Taylor v. Citizens' Oil Co.*, (1918) 182 Ky. 350, 206 S. W. 644.

¹⁸⁹ *Donald v. American Smelting & Refining Co.*, (1901) 62 N. J. Eq. 729, 48 A. 771, 1116; *American Alkali Co. v. Campbell*, (1902) 113 F. 398.

¹⁹⁰ *Camden v. Stuart*, (1892) 144 U. S. 104.

titiously paid up stock by purchase or transfer from a previous stockholder or subscriber generally depend upon whether the transferee acquired the stock with or without knowledge of the true state of the original transaction. An innocent purchaser of a certificate marked "full paid and nonassessable," but not in fact full paid, has the right to maintain an action for damages against those who defrauded him, or against the corporation if it is guilty of deception.¹⁹¹ On the other hand, a transferee with knowledge that stock issued as full paid was in fact illegally issued cannot compel a corporation to issue a new certificate to him which would state that the stock is full paid and nonassessable.¹⁹² The same rule applies to a transferee with notice of facts that in equity would attribute knowledge to him.¹⁹³ A transferee cannot complain against the corporation if the person from whom the stock was obtained had not the right to complain,¹⁹⁴ whether or not the transferee had knowledge that the stock had been fictitiously issued.

The liability of a purchaser of watered stock to the corporation also depends upon whether the transferee had knowledge of the facts concerning the fictitious issue. If the certificate states that the stock is full paid and nonassessable, and the transferee has no knowledge that full value has not been given for the stock by the original holder, the corporation will be estopped from claiming that the stock has not been fully paid for.¹⁹⁵ On the other hand, a purchaser with knowledge that the stock has been issued for overvalued property may be liable to the corporation for the difference between the value of the property conveyed to the corporation for the stock and the amount of stock issued therefor.¹⁹⁶ Under a statute which declares illegally issued stock void, a bona fide purchaser of such stock has been held to have acquired the stock subject to the corporation's right to cancel it.¹⁹⁷ In another state, a constitutional provision that declared all fictitious increases of stock void was held not to apply to one who had in good faith for value purchased stock from a third

¹⁹¹ *Fosdick v. Sturges*, (1858) 1 Biss. (U. S.) 255.

¹⁹² *Bowen v. Imperial Theatres*, (1922) 13 Del. Ch. 120, 115 A. 918.

¹⁹³ *Ibid.*

¹⁹⁴ *Church v. Citizens' St. R. Co.*, (1897) 78 F. 526; *Wood v. Corry Water Works Co.*, (1890) 44 F. 146; *Drake v. New York Suburban Water Co.*, (1898) 26 N. Y. App. Div. 499, 50 N. Y. Supp. 826.

¹⁹⁵ *Bowen v. Imperial Theatres*, (1922) 13 Del. Ch. 120, 115 A. 918.

¹⁹⁶ *Jose v. Utley*, (1921) 185 Cal. 656, 199 P. 1037.

¹⁹⁷ *Walton v. Standard Drilling Co.*, (1921) 43 S. D. 576, 181 N. W. 96.

person, without knowledge that full payment had not been made for the stock.¹⁹⁸ The liability of transferees to creditors is discussed below.

Liability of holder of watered stock to creditors. The liability of stockholders for watered stock is governed by the laws of the state in which the corporation is organized.¹⁹⁹ Creditors generally have a right to compel stockholders who have not paid for their stock in full, in money, property, or other good consideration, to make up the deficiency.²⁰⁰ They have this right even in cases where the contract is valid and binding as between the corporation and the stockholder or the transferee of the stockholder.²⁰¹ A creditor, however, in order to be entitled to this right, must have given credit on the faith that the stock was full paid. Thus, one who became a creditor before the watered or fictitiously paid up stock was issued could not compel the holders of such stock to pay for their shares in full.²⁰² Such an antecedent creditor could not have given credit on the faith that the stock had been paid for in full. Likewise, a creditor who knew that stock had been issued for overvalued property, or for less than par, cannot require the holders of watered stock to pay the full value of the shares.²⁰³ Thus, a creditor, who has participated as a stockholder or officer in the issuance as full paid of stock for which the corporation did not receive full payment, cannot recover from the holders of the fictitiously issued shares.²⁰⁴ In some jurisdictions, however, creditors may recover for unpaid stock, even though they had knowledge of the circumstances under which the unpaid stock was issued as full paid.²⁰⁵

A creditor can hold a transferee liable if the transferee had knowledge that the stock issued as full paid was not so in fact; but a creditor cannot compel a stockholder who is a transferee of watered stock to make good the overvaluation, if the trans-

¹⁹⁸ *Taylor v. Citizens' Oil Co.*, (1918) 182 Ky. 350, 206 S. W. 644.

¹⁹⁹ *Speakman v. Bernstein*, (1932) 59 F. (2d) 520.

²⁰⁰ *Scovill v. Thayer*, (1882) 105 U. S. 143; *Jeffrey v. Selwyn*, (1917) 220 N. Y. 77, 115 N. E. 275.

²⁰¹ *Camden v. Stuart*, (1892) 144 U. S. 104; *Handley v. Stutz*, (1890) 139 U. S. 417; *Fogg v. Blair*, (1890) 139 U. S. 118; *Scovill v. Thayer*, (1882) 105 U. S. 143; *J. F. Lucey Co. v. McMullen*, (1918) 178 Cal. 425, 173 P. 1000. See also *Mudd v. Lanier*, (1945) 247 Ala. 363, 24 So. (2d) 550.

²⁰² *Handley v. Stutz*, (1890) 139 U. S. 417.

²⁰³ *Coit v. Gold Amalgamating Co.*, (1886) 119 U. S. 343.

²⁰⁴ *Ibid.*

²⁰⁵ *Du Pont v. Ball*, (1918) 11 Del. Ch. 430, 106 A. 39. See also *Easton Nat. Bank v. American Brick & Tile Co.*, (1906) 70 N. J. Eq. 732, 62 A. 917.

feree took his stock unaware of the fact that the corporation did not originally receive full payment.²⁰⁶ The transferor in such cases remains liable.²⁰⁷

Amount of consideration for stock with par value. A corporation, in offering to sell its stock to a subscriber or purchaser, must set the price at which it is to be sold. If the stock has a par value fixed by the charter, by the general law, or by the articles of association, the price at which the stock is to be sold must be at least equal to the par value of the stock.²⁰⁸ In some states, the statutes authorize the board of directors or the stockholders to fix a price for the stock at less than its par value. In other states, the constitution or the statutes specifically require that the consideration paid for stock shall be equal to its par value. Stock issued for less is void. Its status is similar to that of an overissue and is generally void even in the hands of a bona fide purchaser for value.²⁰⁹ (See overissuance of stock, on page 394.) A requirement that the full par value of stock shall be paid does not keep the corporation from spending money to promote the sale of stock, although the expense brings the amount paid in below par.²¹⁰

A subscription made at a price above the par value of the stock is not ultra vires. A subscriber may be compelled to pay both the par value of the stock and the premium agreed to be paid before becoming entitled to a full paid nonassessable certificate for the shares purchased.²¹¹

Agreement to sell stock below par. In the absence of an express statutory, constitutional, or charter provision calling for the payment of stock at par value, a corporation may make a valid agreement with its subscribers for the sale of stock at less than par value. It can then issue full paid stock upon the payment of the agreed upon price. This can be done, however, only if the rights of the other stockholders are not violated and there is no fraud against creditors. As between the corporation and the subscriber, the agreement is valid; the corporation cannot

²⁰⁶ *Rhode v. Dock-Hop Co.*, (1920) 184 Cal. 367, 194 P. 11; *Enright v. Heckscher*, (1917) 240 F. 863.

²⁰⁷ *Palmer v. Scheftel*, (1921) 194 N. Y. App. Div. 682, 186 N. Y. Supp. 84.

²⁰⁸ *Wark Co. v. Beach Hotel Corp.*, (1931) 113 Conn. 119, 154 A. 252; *Dicker v. Italo-American Oil Corp.*, (1932) 119 Cal. App. 451, 6 P. (2d) 550.

²⁰⁹ *Oklahoma Gas & Electric Co. v. Hathaway*, (1943) 192 Okla. 626, 138 P. (2d) 832.

²¹⁰ *Restlawn Memorial Park Ass'n v. Solie*, (1940) 233 Wis. 425, 289 N. W. 615.

²¹¹ *Grone v. Economics Life Ins. Co.*, (1911) (Del. Ch.) 80 A. 809; *Esgen v. Smith*, (1901) 113 Iowa 25, 84 N. W. 954.

maintain a suit to collect the difference between the par value and the amount paid upon the stock for which the full paid certificates have been issued.²¹² But such a contract, while binding on the corporation, will not be binding on creditors; when the rights of creditors are to be satisfied, the stockholders who have paid less than par for their shares may be required to pay for their stock in full.²¹³

A going concern in need of capital, whose stock has fallen below par value, will of course find difficulty in selling its unissued stock at par value. In practice, the corporation will market its shares for the best price that can be obtained. So long as the transaction is bona fide, and the consideration obtained represents the actual value of the stock, the courts generally will not disturb the transaction. In the absence of fraud, the purchaser will be liable only for the contract price.²¹⁴ Creditors cannot recover the difference between the contract price and the par value of the stock without proof of bad faith on the part of those entering into such a transaction. They must also show that the stock of the corporation, when issued under such circumstances, had in fact a higher actual value at the time of its issuance than that at which the stock was sold.²¹⁵

Amount of consideration for no par shares. The statutes of all but a few of the states that provide for issuance of no par value shares indicate the manner of fixing the consideration for which such stock shall be issued.²¹⁶ The statutory provisions on the subject of determining consideration for which no par shares may be issued vary throughout the states. The most usual provision is that no par shares may be issued for such consideration as may be prescribed in the charter or an amendment, or, if there is no provision in this respect, then for such consideration (1) as may be fixed by the stockholders at a meeting duly called for that purpose; or (2) as may be fixed by the directors acting under general or special authority granted by the stockholders or conferred by the certificate of incorporation. The practice gen-

²¹² *Scovill v. Thayer*, (1882) 105 U. S. 143; *Bacich v. Northland Transp. Co.*, (1932) 185 Minn. 544, 242 N. W. 379.

²¹³ See pages 379 and 430.

²¹⁴ *Handley v. Stutz*, (1890) 139 U. S. 417; *Morrow v. Nashville Iron & Steel Co.*, (1889) 87 Tenn. 262, 10 S. W. 495. See also *Fogg v. Blair*, (1890) 139 U. S. 118; *J. F. Lucey Co. v. McMullen*, (1918) 178 Cal. 425, 173 P. 1000.

²¹⁵ *Ibid.*

²¹⁶ See Masterson, "Consideration for Non-par Shares and Liability of Subscribers and Stockholders," 17 *Texas Law Review* 247 (1939).

erally followed in the organization of corporations having no par shares is to have the charter provide that the directors shall have the power to determine from time to time the consideration to be received for stock without par value.²¹⁷ When this method is followed, the decision of the directors is conclusive, in the absence of fraud or clear abuse of discretion.²¹⁸

The action of directors or stockholders in fixing the price at which no par value shares shall be sold may be subject to the approval of public service commissions, blue-sky commissions, or other regulating bodies. In some states an affidavit must be filed with a designated state authority showing the financial plan under which stocks are to be issued before the corporation may issue its stock. Such a provision may apply to issues of par value stock as well as no par value stock.

Fixing the price of no par stock. In determining the price at which no par value shares shall be sold, the directors or stockholders who have authority to fix the consideration are furnished with no yardstick for measuring the amount that is to be paid for the stock. They are given practically unlimited latitude. Within the authority conferred by the articles of incorporation, the board of directors may fix the price at its real, market, or book value, or at a minute or arbitrary figure, subject to review by a court of equity.²¹⁹ If the board accepts an offer to transfer property for a certain number of shares of no par stock, the board thereby fixes the amount of consideration for the no par stock.²²⁰ Even if no par value shares are given a nominal value, it is no indication of their actual value, any more than the par value of shares is an indication of their actual value.²²¹

The sale price of no par shares should be fixed in the light of all legitimate considerations. These include appraisal and sale value of assets, book values, market values of outstanding shares, present and probable earning power, market conditions, size of the issue, and reputation of the corporation. The particular conditions surrounding the transaction, and such other consider-

²¹⁷ *Lewis v. Oscar C. Wright Co.*, (1930) 234 Ky. 814, 29 S. W. (2d) 566.

²¹⁸ *Alexander v. Phillips Petroleum Co.*, (1942) 130 F. (2d) 593.

²¹⁹ *Bodell v. General Gas & Electric Corp.*, (1926) 15 Del. Ch. 119, 132 A. 442, aff'd, (1927) 15 Del. Ch. 420, 140 A. 264; *Rice & Hutchins, Inc. v. Triplex Shoe Co.*, (1929) 16 Del. Ch. 298, 147 A. 317.

²²⁰ *G. Loewus & Co. v. Highland Queen Packing Co.*, (1939) 125 N. J. Eq. 534, 6 A. (2d) 545, discussed in 4 *Univ. of Newark Law Review* 448 (1939).

²²¹ *Chadwick v. McClurg*, (1928) 103 N. J. Eq. 55, 142 A. 173.

ations as honest and fair-minded men might properly take into account, are also weighed in fixing the sale price.²²²

The decision of the board of directors as to the sale price of no par shares will also depend upon whether the stock is issued by a corporation recently formed or by an old established corporation. If the corporation has just been formed, it makes little difference how much or how little is received in consideration of its original no par stock.²²³ If assets of \$1,000 are received, let us say, it is of no consequence whether five, ten, or one thousand shares are given for it. Each share is worth one-fifth, one-tenth, or one-thousandth part of the \$1,000, as the case may be. However, if the corporation is a going concern, it makes considerable difference to the existing stockholders at what price the stock is sold. The new no par stockholders and the existing no par stockholders will share equally in the total net assets of the corporation. Therefore, if the new shares are sold for less than the actual value of the existing shares, the interest of the old shareholders in the total net assets of the corporation after the new stock has been sold will be less than it was before the new stock was sold. Equity will interfere to protect existing stockholders where the consideration fixed for no par shares impairs the values underlying the holdings of existing stockholders.²²⁴

The directors authorized to fix the price of no par shares cannot ordinarily sell the same issue of no par stock at different prices to different persons. However, if such differential sales are justified by a showing of fairness in the light of all circumstances, and are made for the beneficial interest of the corporation, the sales will be sustained.²²⁵ It should be remembered that the power to sell shares of the same issue of stock at different

²²² *Bodell v. General Gas & Electric Corp.*, (1926) 15 Del. Ch. 119, 132 A. 442, *aff'd*, (1927) 15 Del. Ch. 420, 140 A. 264.

²²³ *Finch v. Warrior Cement Corp.*, (1928) 16 Del. Ch. 44, 141 A. 54. See also *State v. Pierce Petroleum Corp.*, (1928) 318 Mo. 1020, 2 S. W. (2d) 790.

²²⁴ See footnote 222.

²²⁵ The power of the directors to issue and sell no par value shares at different prices was sustained in *Bodell v. General Gas & Electric Corp.*, (1927) 15 Del. Ch. 420, 140 A. 264, *aff'g* (1926) 15 Del. Ch. 119, 132 A. 442, construing the Delaware statute. This case was cited and followed by the United States Circuit Court of Appeals for the Third Circuit, on an appeal from the United States District Court for the District of Delaware, in *Atlantic Refining Co. v. Hodgman et al.*, (1926) 13 F. (2d) 781. The Circuit Court of Appeals had before it the decision of the Court of Chancery, which it followed, and which decision was subsequently affirmed by the Supreme Court of Delaware.

prices is distinct from the question of having stocks of different par value in the capital structure.²²⁶

Amount of consideration for treasury stock. Treasury stock is capital stock which has been legally issued, fully paid for, and then returned to the treasury of the corporation, by purchase or otherwise, to be disposed of for the benefit of the corporation.²²⁷ In the disposition of treasury stock, the corporation is not controlled by the provisions of the constitution, statute, or charter regulating the kind or amount of consideration for which stock of an original issue must be sold.²²⁸ The corporation may sell treasury stock at whatever price it can procure for it;²²⁹ purchasers do not become liable to corporate creditors for the difference between the par value of the stock and the amount which they paid for it.²³⁰ Similarly, the corporation may give away treasury stock as a bonus to stimulate the sale of original issues of stock.

Acquiring Own Stock

Power of corporation to purchase its own stock. In this country, a majority of the courts have held that, in the absence of a constitutional, statutory, or charter provision prohibiting the corporation from acquiring its own stock, the corporation has implied power to purchase its own stock,²³¹ and may do so provided: (1) the transaction is fair and made in good faith; (2) it is free from fraud, actual or constructive; (3) the corporation is not insolvent²³² or in the process of dissolution, or does not thereby become insolvent or turn its surplus into a deficit; and

²²⁶ In *Westlake Park Inv. Co. v. Jordan*, (1926) 198 Cal. 609, 246 P. 807, it was stated that the capital stock structure cannot consist of shares of the same class of stock with different par values.

²²⁷ *State v. Stewart Bros. Cotton Co., Inc.*, (1939) 193 La. 16, 190 So. 317; *Vanderlip v. Los Molinos Land Co.*, (1943) 56 Cal. App. (2d) 747, 133 P. (2d) 467. See "Legal Status of Treasury Shares," 85 *Univ. of Pa. Law Rev.* 622 (1937); Ballantine, "The Curious Fiction of Treasury Shares," 34 *California Law Review*, 536 (Sept. 1946).

²²⁸ See *Borg et al. v. International Silver Co.*, (1925) 11 F. (2d) 147; *Mudd v. Lanier*, (1945) 247 Ala. 363, 24 So. (2d) 550.

²²⁹ *Mudd v. Lanier*, *supra* (Note 228). See, however, *State v. Stewart Bros. Cotton Co., Inc.*, *supra* (Note 227), involving a statute prohibiting officers from disposing of treasury stock for less than the price they paid for it.

²³⁰ *Enright v. Heckscher*, (1917) 240 F. 863; *Simonds v. Noland*, (1927) 142 Wash. 423, 253 P. 638; *Pullman v. Railway Equipment Co.*, (1897) 73 Ill. App. 313.

²³¹ See "The Power of a Corporation to Purchase Its Own Stock," Hemmers, *Wisconsin Law Review*, 1942, pp. 161-197.

²³² *Shuford v. Brown*, (1931) 201 N. C. 17, 158 S. E. 698; *Quinn-Marshall Co. v. McDaniels Co.*, (1934) 5 F. Supp. 937.

(4) the rights of creditors or other stockholders are not prejudiced thereby.²³³ This is known as the American rule.

The courts of a few states, however, have recognized the English doctrine and deny that the corporation has the implied right to acquire its own stock; a corporation may not purchase its own shares unless it has been expressly authorized to do so.²³⁴ However, even in these jurisdictions, a corporation may take its own stock as collateral for a loan,²³⁵ or accept its own stock either in payment of a debt due the corporation²³⁶ or to effect a compromise of a disputed claim against a stockholder,²³⁷ unless there is some restriction to the contrary.

In many of the states, the statutes specifically grant the corporation the right to purchase its own shares, and indicate the conditions under which the purchase may be made and the manner in which it may be authorized.²³⁸

Corporations that have acquired their own shares may not vote those shares at a corporate meeting, whether the shares are held directly by the corporation or indirectly by a trustee.²³⁹

Where the law permits a corporation to purchase its own stock,

²³³ Some of the cases in which the American rule was followed are: *Wolf v. Excelsior Automatic Scale & Supply Co.*, (1921) 270 Pa. 547, 113 A. 569; *Richards v. Ernst Wiener Co.*, (1912) 207 N. Y. 59, 100 N. E. 592; *Copper Belle Min. Co. v. Costello*, (1908) 11 Ariz. 334, 95 P. 94; *In re Int. Radiator Co.*, (1914) 10 Del. Ch. 358, 92 A. 255; *Reith v. University Housing Corp.*, (1929) 247 Mich. 104, 225 N. W. 528; *Barrett v. W. A. Webster Lumber Co.*, (1931) 275 Mass. 302, 175 N. E. 765; *Thompson v. Shepherd*, (1932) 203 N. C. 310, 165 S. E. 796; *Loveland & Co. v. Doernbecher Mfg. Co.*, (1934) 149 Ore. 58, 39 P. (2d) 668; *Gibbon v. Hill*, (1935) 79 F. (2d) 288; *West Texas Utilities Co. v. Ellis*, (1937) (Tex. Civ. App.) 102 S. W. (2d) 234, error granted; *Myers v. C. N. Toles & Co.*, (1939) 287 Mich. 340, 283 N. W. 603; *In re Independent Distillers of Kentucky*, (1940) 34 F. Supp. 724; *Steinbugler v. Wm. C. Atwater & Co.*, (1943) 289 N. Y. 816, 47 N. E. (2d) 432.

For a discussion of a corporation's right to purchase its own stock, see 3 *Brooklyn Law Review* 110 (1933); Cobert, "Illusory Aspect of Corporate Contract to Repurchase Stock," 12 *St. Johns Law Rev.* 115 (1937); Horowitz and Good, "May a Corporation Purchase Its Own Stock Out of Capital?—The Problem Revisited," 27 *Georgetown Law Jour.* 217 (1938) 12 *Southern Calif. Law Rev.* 198 (1939).

²³⁴ *Kom v. Cody Detective Agency*, (1913) 76 Wash. 540, 136 P. 1155; *Wilson v. Torchon Lace & Mercantile Co.*, (1912) 167 Mo. App. 305, 149 S. W. 1156.

²³⁵ *State v. Oberlin Building & Loan Ass'n*, (1879) 35 Ohio St. 258; *Peter Barceloux Co. v. Buffum*, (1932) 61 F. (2d) 145; *O'Brien v. Turner*, (1933) 174 Wash. 266, 24 P. (2d) 641.

²³⁶ *Taylor v. Miami Exporting Co.*, (1831) 6 Ohio St. 162; *Mancini v. Patrizi*, (1927) 87 Cal. App. 435, 262 P. 375; *Uffelman v. Boillin*, (1935) 19 Tenn. App. 1, 82 S. W. (2d) 545.

²³⁷ *Morgan v. Lewis*, (1888) 46 Ohio 1, 17 N. E. 558.

²³⁸ See state statutes in *Prentice-Hall Corporation Service*.

²³⁹ *American Railway-Frog Co. v. Haven*, (1869) 101 Mass. 398.

the general rule is that it may reissue the stock—that is, resell it for any price it can get.²⁴⁰

Agreement of corporation with stockholders to repurchase stock. The general rule is that corporations which do not possess the right to purchase their own stock cannot enter into agreement to repurchase their stock.²⁴¹ Corporations that do have the right to purchase their own stock may enter into agreements to repurchase. It has been held that a corporation does not have the right to make a valid contract to repurchase its own shares unless such right is conferred by the corporate charter.²⁴² Contracts to repurchase will be binding provided they do not operate to the disadvantage of creditors or other stockholders,²⁴³ and if they rest upon a good consideration.²⁴⁴ Even a binding contract, however, is not enforceable if the corporation has a deficit.²⁴⁵

Corporations sometimes contract with prospective stockholders to take the stock back within a certain time if the purchaser is not satisfied with the investment. Such contracts are valid and enforceable even in states which prohibit a corporation from purchasing its own stock, provided that the purchaser has performed his part of the agreement, and that the corporation has available a surplus out of which to pay the purchase price.²⁴⁶

²⁴⁰ *Furlong v. Johnston*, (1924) 209 N. Y. App. Div. 198, 204 N. Y. Supp. 710, aff'd 239 N. Y. 141, 145 N. E. 910.

²⁴¹ *State ex rel. Howland v. Olympia Veneer Co.*, (1926) 138 Wash. 144, 244 P. 261; *Latulippe v. New England Inv. Co.*, (1913) 77 N. H. 31, 86 A. 361.

²⁴² *Strong v. Frerichs*, (1938) (Mo. App.) 116 S. W. (2d) 533.

²⁴³ *Smith v. Citizens' Ins. & Mortg. Co.*, (1925) 284 Pa. 380, 131 A. 191; *Dustin v. Randall Faichney Corp.*, (1928) 263 Mass. 99, 160 N. E. 528; *Winchell v. Plywood Corp.*, (1949) (Mass.) 85 N. E. (2d) 312.

²⁴⁴ In *Topken, Loring & Schwartz, Inc. v. Schwartz*, (1928) 249 N. Y. 206, 163 N. E. 735, a contract of a corporation to repurchase the stock of an employee was held unenforceable as lacking in consideration. The corporation's promise to repurchase was limited by the legally implied provision that payment would be made out of surplus, and since the corporation would not be bound to carry out the agreement if it had no surplus, the promises were held not to be mutually binding, and the contract therefore without consideration. This decision was criticized in the *Cornell Law Quarterly* for December 1929, the suggestion being made that another construction of the contract would have sustained its validity; namely, that the contract included a promise by the corporation both to purchase the stock if at the date of performance it has a surplus, and to obtain and retain such a surplus in order to execute the contract, if the ordinary course of business permits. Criticisms of this case will also be found in notes in 29 *Columbia Law Review* 356 (1929), 42 *Harvard Law Review* 829 (1929), and Vol. III, No. 1, *Brooklyn Law Review*, 1933.

²⁴⁵ *Cross v. Beguelin*, (1929) 252 N. Y. 262, 169 N. E. 378; *Boggs v. Fleming*, (1933) 66 F. (2d) 859.

²⁴⁶ *Ophir Consolidated Mines Co. v. Brynteson*, (1906) 143 F. 829; *Spratling v.*

Under the decisions in some states, however, a corporation upon the sale of its capital stock may not give the right of return to a purchaser if the statute forbids the corporation to purchase its own stock.²⁴⁷

If the contract to repurchase is unenforceable because the corporation has no surplus available out of which to pay the repurchase price, the stockholder cannot collect damages for breach of contract. Nor can he recover the purchase price in a suit to rescind for failure of consideration.²⁴⁸ It has been held, however, that if the officers of the corporation agree to see to it that the corporation abides by its agreement to repurchase, the officers are liable to the stockholders.²⁴⁹

Unless a subscriber actually becomes a stockholder, there can be no promise by the corporation to "repurchase" the shares from him.²⁵⁰ He may then be treated as a creditor for the amount paid by him for his stock, and he may recover on the refund agreement, even when the corporation has no surplus.²⁵¹

As to agreements granting to the corporation the first option to purchase stock, see page 537.

Westbrook, (1913) 140 Ga. 625, 78 S. E. 536; Oklahoma Natural Gas Corp. v. Douglas, (1939) 170 Okla. 284, 39 P. (2d) 578.

²⁴⁷ Civil Service Inv. Ass'n v. Thomas, (1917) 138 Tenn. 77, 195 S. W. 775; Inter-State Grocer Co. v. Taylor, (1918) 200 Mo. App. 205, 204 S. W. 408.

²⁴⁸ Allen v. Bank, (1911) 191 F. 97; In re Tichenor-Grand Co., (1913) 203 F. 720; Hoover Steel Ball Co. v. Schaefer Co., (1919) 90 N. J. Ch. 164, 106 A. 471.

²⁴⁹ Strasburger v. Rosenheim, (1932) 234 N. Y. App. Div. 544, 255 N. Y. Supp. 316.

²⁵⁰ In re Tichenor-Grand Co., supra (Note 248); Hyman v. Real Estate Co., (1913) 79 N. Y. Misc. 439, 140 N. Y. Supp. 138; Mulford v. Torrey Co., (1909) 45 Colo. 81, 100 P. 596; Vent v. Duluth Coffee Co., (1896) 64 Minn. 307, 67 N. W. 70.

²⁵¹ Hyman v. Real Estate Co., supra (Note 250).

CHAPTER 16

RESOLUTIONS RELATING TO ISSUANCE AND SALE OF STOCK

No. 338

**Resolution of stockholders authorizing directors to issue stock, and
instructing them to comply with blue-sky laws.**

RESOLVED, That the Board of Directors of this Corporation be and it hereby is authorized and instructed to sell and issue the entire unsubscribed and unissued authorized capital stock of this Corporation, amounting to (....) shares of common stock with a par value of (\$.....) Dollars per share, at par, and that the President and the Secretary be and they hereby are authorized and directed to take all steps necessary to comply with the blue-sky laws of the State of and the Federal laws governing the issuance and sale of securities, before offering any of the authorized capital stock for sale.

No. 339

**Resolution of directors authorizing corporation to make application
under blue-sky laws to sell and issue stock to original
subscribers for cash or property.**

RESOLVED, That the President and the Secretary of this Corporation be and they hereby are directed to make an application to the (*insert department or officer*) of the State of for leave to sell and issue capital stock of this Corporation as follows:

If stock is to be issued to original subscribers for cash:

..... (....) shares of the common stock of this Corporation having a par value of (\$.....) Dollars per share, to each of the (*insert number*) original subscribers therefor, upon payment to the Corporation of the full par value of each share in cash.

If stock is to be issued to original subscribers in exchange for property:

..... (....) shares of the common stock of this Corporation having a par value of (\$.....) Dollars per share, fully paid and

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nonassessable, to each of the (*insert number*) original subscribers therefor, in exchange for property described in the written proposal of, submitted to this meeting; and

RESOLVED FURTHER, That the form of application to be made to the (*insert department or officer*) of the State of, submitted to this meeting by the Secretary, be and it hereby is approved, and the President and Secretary are hereby authorized to execute the same for and in behalf of this Corporation, and to take all steps necessary to present said application to the (*insert department or officer*); and

If stock is to be issued to original subscribers for cash:

RESOLVED FURTHER, That the President and the Secretary be and they hereby are directed, after they have obtained a permit from the (*insert department or officer*) of the State of, to issue to each of the original subscribers, (....) shares of the common stock of this Corporation having a par value of (\$.....) Dollars per share, upon payment therefor in cash.

If stock is to be issued to original subscribers in exchange for property:

RESOLVED FURTHER, That the President and the Secretary be and they hereby are directed, after they have obtained a permit from the (*insert department or officer*) of the State of, to issue to each of the original subscribers, (....) shares of the common stock of this Corporation having a par value of (\$.....) Dollars per share, upon payment therefor, and to accept as payment for said shares the property described in the proposal of, submitted to this meeting.

No. 340

Resolution of directors authorizing application for the sale and issuance of authorized stock (to comply with blue-sky laws).

RESOLVED, That, subject to the approval of the (*insert department or officer*) of the State of, this Corporation issue and sell at the par value of (\$.....) Dollars per share, for cash, (....) shares of the authorized capital stock of this Corporation; and

RESOLVED FURTHER, That the President and the Secretary of this Corporation be and they hereby are authorized and directed to make an application to the (*insert department or officer*) of the State of for leave to issue and sell (....)

shares of the authorized capital stock of this Corporation, or such part thereof as the Board of Directors may hereafter deem advisable, at the par value of (\$.....) Dollars per share for cash; and

- RESOLVED FURTHER, That, subject to the approval of the (insert department or officer), this Corporation pay as brokerage for the sale of stock of this Corporation, a commission not to exceed (%) per cent of the selling price.

No. 341

Resolution of directors authorizing bonus of common stock to purchasers of preferred stock.

WHEREAS, it is deemed advisable by the Board of Directors that this Corporation offer for sale (....) shares of unissued preferred stock, having a par value of (\$.....) Dollars per share, and

WHEREAS, this Corporation holds in its treasury (....) shares of fully paid common stock, having a par value of (\$.....) Dollars each, and

WHEREAS, it is the opinion of the Board of Directors that, in order to facilitate the sale of the preferred stock at par, it is advisable that the Corporation offer a bonus of one share of common stock with each share of preferred stock purchased,

NOW, THEREFORE, BE IT RESOLVED, That the President, or such other officer or officers as he may designate, be and he/they hereby is/are authorized to sell (....) shares of the preferred stock having a par value of (\$.....) Dollars each, at par for cash, and to offer as a bonus with each share of the preferred stock purchased, one share of common stock having a par value of (\$.....) Dollars, fully paid and nonassessable, and that the said shares of preferred and common stock be delivered upon receipt of full payment of the par value of each share of preferred stock purchased.

No. 342

Resolution of directors creating a series of preferred stock and fixing designations, preferences, and other rights of initial series.

RESOLVED, That, pursuant to authority expressly granted to and vested in the Board of Directors of the Corporation (hereinafter called the "Board of Directors") by the provisions of the Certificate of Incorporation of the Corporation as amended (hereinafter called the "Certificate of Incorporation"), the Board of Directors hereby creates a series of the Preferred Stock of the Corporation to consist initially

of 50,000 shares, and hereby fixes the designations, powers, conversion privileges, preferences and other special rights, and the qualifications, limitations or restrictions thereof, of the shares of such series (in addition to the designations, powers, preferences and other special rights, and the qualifications, limitations or restrictions thereof, set forth in the Certificate of Incorporation, as amended, which are applicable to the Preferred Stock of all series) as follows:

(a) The designation of the series of Preferred Stock created by this resolution shall be "\$4.25 Cumulative Convertible Preferred Stock" (hereinafter in this resolution referred to as "This Series");

(b) The dividend rate of This Series shall be \$4.25 per share in cash per annum, and no more, payable quarterly on the 15th days of January, April, July and October in each year, and the date from which dividends on all shares of such series issued prior to January 15, 19.. shall be cumulative shall be October 15, 19..;

(c) The redemption price which the holders of any shares of This Series shall be entitled to receive upon the redemption of such shares shall be

\$110 per share if redeemed on or before December 31, 19..;

\$109 per share if redeemed after December 31, 19.. and on or before December 31, 19..;

\$108 per share if redeemed after December 31, 19.. and on or before December 31, 19..;

\$107 per share if redeemed after December 31, 19.. and on or before December 31, 19..;

\$106 per share if redeemed after December 31, 19.. and on or before December 31, 19..;

\$105 per share if redeemed after December 31, 19..;

in each case plus an amount equal to all dividends accrued and unpaid to the redemption date;

(d) The shares of This Series shall be convertible at the option of the respective owners of record thereof upon surrender of the certificates representing the shares to be converted at the office of any transfer agent for the shares of This Series, at any time after December 15, 19.., or as to any shares of This Series called for redemption at any time up to, but not after the close of business on the day prior to the date fixed for such redemption, into fully paid and nonassessable shares (calculated to the nearest one-one-hundredth [$\frac{1}{100}$] of a share) of Common Stock of the corporation in the ratio of one and three-sevenths ($1\frac{3}{7}$) shares of Common Stock for each one (1) share of This

Series; subject, however, to the terms and conditions hereinafter stated with respect to the adjustment of such ratio and otherwise.

1. The basic conversion price per share of the Common Stock for the purpose of such conversion shall be deemed to be \$70; provided, however, that the conversion price per share of the Common Stock shall be subject to adjustment from time to time as hereinafter in this subdivision (d) provided; and in the event of the adjustment of the conversion price per share of the Common Stock as hereinafter in this subdivision (d) provided, the ratio in which shares of Common Stock shall thereafter be delivered upon conversion of each share of This Series shall be determined by dividing \$100 by such adjusted conversion price per share of the Common Stock.

The term "Additional Shares of Common Stock" as used in this subdivision (d) shall mean and include any and all shares of Common Stock of the corporation in excess of the shares of Common Stock now outstanding, which may at any time be issued and sold for cash at a price to net the corporation less than the conversion price then in effect, including any and all shares of Common Stock which may be deliverable in connection with any options or convertible securities issued by the corporation after December 1, 19.., and irrespective of whether or not such shares of stock are issued, sold or offered to officers, employees and stockholders of the corporation; provided, however, that the term "Additional Shares of Common Stock" shall not include the issue of all or any part of the following: 200,026 shares reserved as of October 1, 19.. for conversion of the corporation's Five Year 4½% Debentures due July 1, 19..; 13,196 shares reserved for exercise of options by officers and supervisory personnel of the corporation as of October 1, 19..; and 25,000 shares which may from time to time be reserved for future disposition by the Board of Directors.

In case, and whenever the corporation shall issue or sell any Additional Shares of Common Stock and such Additional Shares of Common Stock shall be issued and sold for cash at a price to net the corporation less than the conversion price then in effect, then the conversion price per share of the Common Stock shall be immediately adjusted, and, if more than one such issue and sale shall occur, shall successively be adjusted as hereinafter in this subdivision (d) provided.

2. The adjusted conversion price per share of the Common Stock shall be determined by multiplying 600,000 by \$70 and adding thereto the aggregate amount in cash (determined as provided in this subdivision (d)) received by the corporation from the issue and sale of all Additional Shares of Common Stock then and theretofore issued and sold and the resulting total shall be divided by 600,000 increased by the number of Additional Shares of Common Stock then and thereto-

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fore issued and sold, if any, and the quotient resulting from such division shall be the conversion price per share of the Common Stock after such adjustment, until a further adjustment, if any, of the conversion price of the Common Stock shall be required to be made by reason of the issue and sale of Additional Shares of Common Stock; provided, however, that, subject to the provisions of paragraph 13 of this subdivision (d), in no event shall the conversion price per share of the Common Stock ever be increased.

3. In case the corporation shall issue any shares of Common Stock for property or services instead of for cash, the net fair value to the corporation of such property or services shall be conclusively determined by resolution adopted by the Board of Directors of the corporation, and such stock shall be deemed to have been sold for cash within the meaning of paragraph 1 of this subdivision (d), and the amount of cash which the corporation shall be deemed to have received from the issue of such shares shall be the net fair value to the corporation of such property or services as so determined.

4. In case the corporation shall issue any shares of Common Stock (i) by the way of split-up of outstanding shares of Common Stock, or (ii) by way of dividends payable in Common Stock, such shares shall be deemed to have been sold for cash within the meaning of paragraph 1 of this subdivision (d) for the price of zero dollars and zero dollars shall be deemed the aggregate amount of cash received by the corporation from the issue of such shares.

5. In case the corporation after the date of filing of this resolution shall issue any securities other than the shares of This Series authorized by this resolution which may be convertible into Common Stock of the corporation, it shall be deemed to have issued shares of Common Stock, simultaneously with the issuance of such convertible securities, in an amount equal to the maximum number of shares of Common Stock deliverable upon the conversion of such convertible securities so issued, and such shares of Common Stock shall be deemed to have been sold for cash within the meaning of paragraph 1 of this subdivision (d) and the corporation shall be deemed to have received for such shares of Common Stock a price determined by dividing the aggregate par value or principal amount (or in the case of stock without par value, the amount of money or the value in money of any property, labor or services for which such stock without par value shall have been issued and sold) of the convertible securities so issued by the maximum number of shares of Common Stock issuable upon the conversion of such convertible securities so issued.

6. In case the corporation, after the date of filing of this resolution shall issue any options, rights or warrants to purchase or subscribe

for shares of Common Stock of the corporation, other than 25,000 shares reserved as provided in paragraph 1 hereof, it shall be deemed to have issued shares of Common Stock, simultaneously with the issuance of such options, rights or warrants, in an amount equal to the maximum number of shares of Common Stock deliverable upon the exercise of such options, rights or warrants so issued, and such shares of Common Stock shall be deemed to have been sold for cash within the meaning of paragraph 1 of this subdivision (d) and the corporation shall be deemed to have received for such shares the minimum price at which such shares may be purchased by the holders of such options, rights or warrants.

7. In determining the aggregate amount of cash received by the corporation from the sale of Additional Shares of Common Stock, such determination shall be made without deducting the amount of any commissions or expenses which may have been paid or incurred by the corporation for any underwriting of such stock or securities in connection with the sale thereof.

8. No reorganization of the corporation and no consolidation or merger thereof with or into any other corporation or corporations and no conveyance of all or substantially all of the assets of the corporation to any other corporation shall be made unless, as a part of such reorganization, consolidation or merger or conveyance, arrangements shall be made whereby the holders of the shares of This Series then outstanding shall thereafter be entitled to convert the same into any stock, securities or other assets given in exchange for the Common Stock of the corporation on such reorganization or in connection with such consolidation, merger or conveyance, in such amounts as would, at the time, have been given in exchange for the Common Stock then issuable upon conversion of such shares of This Series under the foregoing provisions hereof. Every right of the holder of such shares of This Series shall be continuous and preserved with respect to any stock and other securities and assets which such holder may so become entitled to receive upon conversion.

9. In lieu of issuing fractions of shares of Common Stock upon conversion of shares of This Series, the corporation shall issue fractional scrip certificates in such form calculated to the nearest 1/100th of a share as shall be approved by the Board of Directors, not entitling the holder to vote or receive dividends, but exchangeable for certificates of Common Stock when surrendered prior to the last day of the following calendar year, or such later time as may be specified by the Board of Directors, with other similar fractional scrip certificates in sufficient aggregate amount to equal one or more full shares, fractions of less than 1/100th being disregarded. The corporation, within a reasonable

time after the end of each calendar year, shall cause to be sold in such manner as the Board of Directors may determine, the number of full shares of Common Stock represented by such fractional scrip certificates at the time outstanding which expired at the end of such calendar year, and thereafter the proceeds of such sale shall be held for the pro rata benefit of such outstanding and expired fractional scrip certificates.

10. Anything herein contained to the contrary notwithstanding, an adjustment of the conversion price of the Common Stock shall be required to be made from time to time only when and as often as the issue and sale of Additional Shares of Common Stock would change the conversion price per share of Common Stock previously in effect by at least one dollar.

11. In each case where the corporation shall issue any Additional Shares of its Common Stock while any of the shares of This Series are outstanding (except shares issued upon the conversion of the shares of This Series, but including all shares of Common Stock which may be deliverable upon conversion of any convertible securities issued by the corporation after December 1, 19.., or upon the exercise of any options, rights or warrants issued by the corporation after December 1, 19..), it shall immediately file with the registrar and transfer agent for the shares of This Series written notice of the number of shares so issued and, as soon as may be and in no event later than thirty days after such issue, shall also file with such registrar and transfer agent a certificate showing:

- (i) the number of shares so issued and the date of issue;
- (ii) the price or prices at which such shares shall have been sold or be deemed to have been sold and the cash received or deemed to have been received by the corporation from the sale of such shares determined as hereinbefore provided;
- (iii) the adjusted conversion price per share which the Common Stock of the corporation shall thereafter be deemed to have for the purposes of this subdivision (d);
- (iv) the ratio in which the shares of Common Stock shall thereafter, and until a further adjustment is made, shall be issuable upon the conversion of each share of This Series.

In the event that any Additional Shares shall have been issued for property or services the corporation, at the same time that it files the certificate hereinabove provided for, shall file with the registrar and transfer agent a certified copy of the resolution of the Board of Directors with respect to the net value to the corporation of such

property or services as determined in the manner provided in paragraph 4 hereof.

12. The corporation shall give notice to the holders of record of the shares of This Series by mail, postage prepaid, at their respective addresses as the same appear on the stock transfer records of the corporation at least twenty (20) days before consummation of any transaction provided for or contemplated by paragraphs 4, 8, or 13 of this subdivision (d) or the issuance of rights to holders of the Common Stock by the corporation. The stock transfer books of the Common Stock and shares of This Series shall not be closed at any time so long as any of the shares of This Series shall remain outstanding, unless required by law and then only provided ten days' prior notice thereof shall have been given by publication in a daily newspaper published and of general circulation in the City of, State of

In no event shall any allowance or adjustment be made on account of dividends accrued and unpaid on the shares of This Series surrendered for conversion or on account of any dividends on the Common Stock issued in exchange therefor; provided, however, that dividends declared on the shares of This Series payable to holders of record of such shares on a date prior to the surrender of the certificates for such shares for conversion shall be payable to the party or parties who were the record holders of such shares on said record date; and dividends declared on the Common Stock payable to holders of record of Common Stock on a date co-incident with or subsequent to the surrender of such shares for conversion shall be payable to the person who is the holder of record of such shares of Common Stock at the date of issue thereof.

Any holder of shares of This Series desiring to convert the same into Common Stock shall surrender the certificates representing the shares of This Series so to be converted at the office of any transfer agent of the corporation duly endorsed in blank or accompanied by proper instruments of transfer in such form as the corporation may require, and shall give written notice to the corporation at the office of such transfer agent that he elects to convert the said shares of This Series and set forth in such notice the name or names in which the certificate or certificates of Common Stock are to be issued. Shares of This Series surrendered for conversion shall be cancelled and shall not be reissued.

The corporation, as soon as practicable after such surrender of certificates for shares of This Series, accompanied by the notice above prescribed, will deliver, at the office of said transfer agent to the person by whom or for whose account such certificates for shares of

This Series were so surrendered, certificates for the number of full shares of Common Stock deliverable upon such conversion accompanied by a scrip certificate for the excess fractional share, if any. Such conversion shall be deemed to have been made as of the date of such surrender of the certificates for the shares of This Series to be converted and the person or persons entitled to receive the Common Stock upon such conversion shall be treated for all purposes as the record holder or holders of such Common Stock as of the close of business on such date.

13. In case the corporation, by reclassification of its Common Stock by amendment to its Certificate of Incorporation, shall reduce the number of shares of such Common Stock outstanding, the conversion price per share of the Common Stock thereafter shall be immediately adjusted, and the adjusted conversion price per share of the Common Stock shall be determined by multiplying the number of shares of Common Stock outstanding immediately before such reduction by the then conversion price per share and the resulting product shall be divided by the reduced number of shares of Common Stock outstanding, and the quotient resulting from such division shall be the conversion price per share of the Common Stock after such adjustment, until a further adjustment of the conversion price of the Common Stock shall be required to be made by reason of a further reduction of the number of shares of such Common Stock outstanding or the issue and sale of Additional Shares of Common Stock. If, after any such reduction in the number of shares of Common Stock of the Corporation issued and outstanding by such reclassification, there shall be issued and sold any Additional Shares of Common Stock over and above the number of shares of Common Stock issued and outstanding as reduced by such reclassification, then the conversion price per share of the Common Stock shall be immediately adjusted in the manner hereinbefore provided, except that, in place of the multiplication figure of 600,000 used in paragraph 2 of this subdivision (d), there shall be used a figure equal to the number of shares of Common Stock to which 600,000 shares would have been reduced if outstanding and in place of the basic conversion price of \$70 per share used in said paragraph 2 of this subdivision (d) there shall be used the adjusted conversion price resulting from such reclassification, and in place of the divisor provided in said paragraph 2 of this subdivision (d) the divisor shall be the sum of (a) a figure equal to the number of shares of Common Stock to which the 600,000 shares would have been reduced if outstanding plus (b) the number of Additional Shares of Common Stock outstanding as reduced by such reclassification and (c) the number of Additional Shares of Common Stock issued subsequent to such reclassification.

14. The corporation shall at all times keep available out of its authorized but unissued and unreserved Common Stock for the purpose of effecting the conversion of shares of This Series and the exchange of such scrip certificates, if any, which may be issued as aforesaid, such number of shares of its Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of This Series and to effect the exchange of any such scrip certificates which shall not have expired. All shares of Common Stock issued or delivered upon conversion of the shares of This Series shall be duly and validly issued and fully paid and nonassessable. The corporation shall pay the amount of any and all taxes imposed in respect of the issue or delivery of shares of the Common Stock upon conversion of any of the shares of This Series in the name or names of the respective owners of record of the shares of This Series surrendered for conversion.

No. 343

Resolution of directors authorizing issuance of a new series of stock, and fixing the preferences and other attributes thereof.

WHEREAS, under Section of the Certificate of Incorporation of Corporation, this Corporation is permitted to issue its Class A Stock, having a par value of (\$.....) Dollars per share, in series, with such designations, preferences, and relative participating, optional, or other rights and qualifications, limitations, or restrictions as may be fixed by the Board of Directors, and

WHEREAS, the Board of Directors has heretofore authorized, under said provision of the Certificate of Incorporation, the issuance of Series A and B, with variations among the series as to the rate of dividends, premium on redemption, and conversion price, such variations having been adapted to the condition of the Corporation and the market situation at the time of issuance, and

WHEREAS, the directors deem it advisable to issue a new series of Class A Stock at this time, and have carefully investigated the relation of the condition of the Corporation to the condition of the security market, and have determined that it is for the best interests of the Corporation to give the new series, to be denominated Series C, the attributes set forth in this resolution,

THEREFORE, BE IT RESOLVED, That the Corporation issue forthwith (.....) shares of Series C, Class A Stock. The holders of Series C, Class A Stock shall be entitled to receive, out of the net earnings, a cumulative dividend at the rate of (....%) per cent per annum, when declared by the Board of Directors, payable quarterly, half-yearly, or yearly, as the directors may from time to time

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determine, when and after a dividend of (....%) per cent per annum and all accumulated dividends, if any, shall have been paid to the holders of Series A and B, Class A Stock, but before any dividends shall be set apart for or paid in any year on Class B Stock; and the holders of Series C, Class A Stock shall not participate in any additional earnings or profits.

In case of liquidation, dissolution, or winding up of the affairs of the Corporation, whether voluntary or involuntary, holders of Series C, Class A Stock shall be preferred, equally with holders of Series A and B, Class A Stock, over all other holders of stock of the Corporation, to the amount of (\$.....) Dollars per share and accumulated or accrued and unpaid dividends thereon; and

RESOLVED FURTHER, That the President and Secretary be and they hereby are authorized and directed to make and file, under the corporate seal, and to cause to be filed, such certificate or certificates as shall be requisite, to the end that the stock shall be issued as aforesaid; and

RESOLVED FURTHER, That the Secretary be and he hereby is authorized and directed to instruct Messrs. and, counsel for this Corporation, to prepare a form of stock certificate for Series C, Class A Stock, in accordance with the above resolution.

No. 344

Resolution of directors authorizing issuance of stock for cash.

WHEREAS, Corporation has offered to turn over to this Company the sum of (\$.....) Dollars, in consideration that this Company issue to the order of said Corporation (....) shares of capital stock of this Company, fully paid and nonassessable, including the shares subscribed by the incorporators, be it

RESOLVED, That the offer of said Corporation be and it hereby is accepted; that the proper officers be and they hereby are authorized and directed to execute, issue, and deliver, in the name and in behalf of this Company, and under its corporate seal, certificates of stock for (....) shares to the order of Corporation.

No. 345

Resolution of directors authorizing issuance of stock at less than par because of financial condition of the company.

WHEREAS, this corporation has been engaged in the business of since the year 19.., and

WHEREAS, the common stock of this corporation, having a par value of (\$.....) Dollars per share, has declined in value to (\$.....) Dollars per share, owing to a decline in earnings during the past (....) years, and

WHEREAS, it is necessary for this corporation, in order to meet its obligations, to sell and issue (....) shares of the common stock of this corporation, and

WHEREAS, on account of the financial condition of the corporation, it will be impossible for this corporation to sell such shares of unissued common stock at par,

THEREFORE, BE IT RESOLVED, That (....) shares of unissued common stock, having a par value of (\$.....) Dollars per share, be sold and issued for the consideration or price of (\$.....) Dollars per share, which is the fair market value thereof.

[Note. For legal principles governing power of corporation to issue shares of stock with par value for less than par, see page 431.]

No. 346

Resolution of directors advising stockholders to authorize issuance of stock at less than par and/or stock without par value for money.

RESOLVED, That the stockholders of the Corporation be and they hereby are advised to authorize the issuance of not exceeding (....) fully paid and nonassessable shares of the par value of (\$.....) Dollars each of the preferred stock of the Corporation, for money, at not less than (\$.....) Dollars for each share thereof (and/or not exceeding (....) fully paid and nonassessable shares without par value of the common stock of the Corporation, for money, at not less than (\$.....) Dollars for each share thereof).

No. 347

Resolution of directors authorizing issuance of stock for services rendered by a corporation.

WHEREAS, this Company was organized, promoted, and developed into a going concern and placed on a firm and profitable basis by the capital supplied by the Corporation, and

WHEREAS, the said Corporation, since the organization of this Company and until the present date, has supplied the bulk of the labor and office organization necessary to carry on its business, and has permitted its officers to manage and direct the affairs of this Company without

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making any charge therefor, which work, labor, and services so rendered by the said Corporation have been of inestimable value and assistance to this Company and necessary to a businesslike and profitable conduct of its business,

THEREFORE, BE IT RESOLVED, That this Company issue to the Corporation, or its assignees or nominees, in consideration of the foregoing, (....) shares of the common stock of this Company having a total par value of (\$.....) Dollars, fully paid and nonassessable; and

RESOLVED FURTHER, That the President and the Secretary be and they hereby are authorized and directed to execute and deliver certificates of stock to the Corporation, or its nominees, as aforesaid.

No. 348

Resolution of directors authorizing issuance of stock as compensation for services in organizing corporation.

WHEREAS,, of (City), (State), and, of (City), (State), have heretofore rendered valuable services to this Corporation in organizing, incorporating, and placing it upon a sound financial basis, and

WHEREAS, the said..... and have expressed their willingness to accept, as compensation for such services, shares of common stock of this Corporation, be it

RESOLVED, That the Board of Directors of this Corporation does hereby determine that the said services so rendered are worth to the Corporation the sum of (\$.....) Dollars; and

RESOLVED FURTHER, That the President and the Secretary of this Corporation be and they hereby are authorized and directed to issue to, (....) shares of fully paid capital stock of this Corporation, and to, (....) shares of fully paid capital stock of this Corporation, as compensation for services rendered by said and as aforesaid.

No. 349

Resolution of directors authorizing issuance of stock for consideration other than money.

RESOLVED, That the issuance of (....) fully paid and non-assessable shares of the par value of (\$.....) Dollars each

of the preferred stock of the Corporation (and/or (....) fully paid and nonassessable shares without par value of the common stock of the Corporation), for the following consideration, be and the same hereby is authorized:

(Here insert particular description of consideration, showing its nature and character.)

No. 350

Resolution of directors authorizing issuance of stock for patents.

WHEREAS, has offered to assign to this Corporation, for and in consideration of the issuance to him of (....) shares of the capital stock of this Corporation having a par value of (\$.....) Dollars each, fully paid and nonassessable, certain patents covering inventions relating to (*state nature of invention*), which are more particularly described as follows: United States Patent No., dated, 19.., and United States Patent No., dated, 19.., both issued to, and

WHEREAS, in the judgment of this Board of Directors, said patents are necessary for the business of this Corporation, and the fair value thereof is (\$.....) Dollars, be it

RESOLVED, That this Corporation issue to said, (....) shares of its capital stock having a par value of (\$.....) Dollars each, fully paid and nonassessable, in consideration of the assignment of said patents to this Corporation; and the President and the Treasurer are hereby authorized and directed to deliver (....) shares of capital stock to said upon the execution and delivery of the proper legal instrument or instruments necessary to transfer said patents to this Corporation.

No. 351

Resolution of directors authorizing issuance of stock for patents, drawings, and similar assets.

WHEREAS, this Company has been organized for the purpose of manufacturing, selling, and dealing in traction engines and all types and styles of internal combustion engines and other machinery and implements, and

WHEREAS, for the conduct and establishment of said business, it is necessary to secure certain patents, patent rights, blueprints, etc., and

WHEREAS, "A," of (*City*), (*State*), has represented himself as being the owner of the following patents and various serial applications for patents, as follows:

(Here insert number, date of issuance, and nature of patents.)

WHEREAS, said "A" is also the owner of certain full and complete detailed drawings or blueprints of a certain traction engine which the said "A" has developed and constructed, and

WHEREAS, the said "A" has offered to convey to this Corporation all his rights, title, and interest in and to all of the said patents, patent rights, blueprints, and any patents or serial applications or improvements upon tractors not yet protected by application, other than those specifically herein mentioned, in or to which the said "A" may have any right, title, or interest whatsoever, all in consideration of the transfer to the said "A" by this Corporation of (....) shares of the common stock of this Corporation and (....) shares of the preferred stock of this Corporation, as shown by the offer of said "A" in writing herewith filed, and

WHEREAS, the use of said patents and patent rights is necessary for the commencement and carrying on of the business of this Corporation,

NOW, THEREFORE, BE IT RESOLVED, That the said offer of the said "A" be and it hereby is accepted, and the officers of this Corporation be and they hereby are duly authorized and directed, upon the receipt from the said "A" of the said transfers of the said patents, patent rights, and the delivery of the said blueprints, to receive the same in full payment of the said (....) shares of the common stock of this Corporation and (....) shares of the preferred stock of this Corporation, and to issue and deliver said stock to the said "A."

No. 352

Resolution of directors authorizing issuance of stock in settlement of indebtedness.

WHEREAS, this corporation, under an agreement with the Company, dated, 19.., has borrowed from said Company the sum of (\$.....) Dollars for the purchase of properties for this corporation, and is now indebted to the said Company for such amount plus interest accrued thereon from the .. day of, 19.., at (....%) per cent per annum, and

WHEREAS, the Company has agreed to accept (....) shares of stock of this corporation, fully paid and nonassessable, in full payment of the principal sum of the indebtedness of this corporation to said Company, including interest accrued thereon from the .. day of, 19.., at (....%) per cent per annum,

THEREFORE, BE IT RESOLVED, That the proper officers be and they

hereby are authorized and directed to execute and deliver to the Company, or their nominee, (.) shares of the common stock of this corporation, in full payment of the aforementioned indebtedness of this corporation to the Company, and to obtain from the Company evidence of such indebtedness.

No. 353

Resolution of directors accepting note in payment for stock.

RESOLVED, That the proper officers of this Corporation be and they hereby are authorized to sell and issue (.) shares of common stock of this Corporation, at par, to , upon payment to this Corporation of (\$) Dollars in cash, the balance of the price of said stock to be evidenced by a promissory note of said , secured by the pledge of the stock so purchased, said note to be due and payable in (.) days, with interest at (. %) per cent per annum.

No. 354

Resolution of directors fixing value of no-par shares.

RESOLVED, That, in the judgment of the Board of Directors, the fair market value of the shares of stock which this Corporation is authorized to issue without par value is (\$) Dollars per share; and the proper officers of the Corporation are hereby authorized to issue and sell the unissued shares of stock without par value at said price of (\$) Dollars per share.

No. 355

Resolution of directors fixing the price or consideration to be received for remaining no-par unissued stock.

RESOLVED, That the remaining unsubscribed and unissued shares of preferred/common stock without nominal or par value, of this Corporation, amounting to (.) shares, be sold for the consideration or price of (\$) Dollars per share, which is the fair value thereof; and

RESOLVED FURTHER, That the directors be and they hereby are authorized to sell the remaining unissued shares of preferred/common stock without par value at the price above fixed, and to offer subscribers thereto the option of paying for their subscriptions in full at the time of making the subscription, or of paying in two installments as follows: (\$) Dollars to be paid at the time of making the subscription, and the balance of (\$) Dollars to be paid within (.) months from the date of subscription.

No. 356

Resolution of directors fixing the price of no-par stock and authorizing issue of stock.

RESOLVED, That the Board of Directors of this Corporation does hereby place a value of (\$.....) Dollars per share upon the common stock without par value of this Corporation, for the purpose of sale for cash or other authorized consideration; and

RESOLVED FURTHER, That an issue of the common stock without par value of this Corporation to the extent of (.....) shares be and the same hereby is authorized, and that the President and the Treasurer of the Corporation be and they hereby are authorized to accept subscriptions to the common stock of the Corporation at the price above stated.

No. 357

Resolution of directors stating part of the consideration for no-par stock to be regarded as capital.

RESOLVED, That (\$.....) Dollars of the consideration received by the Corporation for any of the shares of its capital stock without par value which it shall from time to time issue shall be capital.

No. 358

Resolution of directors stating part of the consideration received for no-par stock to be regarded as capital (another form).

RESOLVED, That Dollars (\$.....) of the consideration received for the (.....) shares of stock without par value, authorized to be issued under (this or the foregoing) resolution, shall be considered capital.

[*Note.* This resolution may be added to any resolution authorizing the issuance of stock without par value. In states which have a statute requiring allocation of the consideration paid for stock without par value to be made by the directors at the time of issuance of the stock where the consideration is cash, it is important that this resolution be coupled with the resolution authorizing the issue of stock without par value; otherwise, all the consideration will be treated as capital and none as paid-in surplus.]

No. 359

Resolution of directors approving form of registration statement and prospectus.

RESOLVED, That the forms of registration statement and related prospectus submitted to the meeting be and the same hereby are approved for initial filing of the registration statement, and that only such

changes shall be made therein as shall be approved by the Chairman of the Board of Directors of the Company and by counsel for the Company.

No. 360

Resolution of directors authorizing filing of registration statement and prospectus, and amendments thereof.

RESOLVED, That the officers of this Corporation be and they hereby are authorized to execute in the name of the Corporation and to file with the Securities and Exchange Commission, Washington, D. C., registration statement on Form, substantially in the form of such registration statement submitted to and considered at this meeting, with such changes therein as the officers executing the same may consider advisable or necessary; and that the officers of the Corporation be and they hereby are similarly authorized to sign and file a prospectus in the form of the proposed prospectus submitted to and considered at this meeting, with such changes therein as they may consider advisable and necessary, with power to the officers of the Corporation to file such amended registration statement and/or such amended prospectus as they in their discretion deem necessary or advisable in order to effect the registration with the Securities and Exchange Commission of the securities referred to in the said registration statement, Form, in accordance with the requirements of the Securities Act of 1933, as amended.

No. 361

Excerpt of minutes of directors' meeting authorizing amendment of registration statement and prospectus.

There was submitted to the meeting a proposed form of amendment to the registration statement, and a proposed amendment of prospectus appertaining to the registration of 150,000 shares of the 200,000 authorized shares of the 5% Cumulative Preferred Stock of the Corporation. Explanations with respect thereto were made by certain officers of the Corporation. Representatives of & Co., auditors for the Corporation, and Mr., Vice President of Corporation, were requested to attend the meeting, and questions were asked of them with respect to matters appertaining to such amendment of the registration statement and prospectus. After consideration thereof, upon motion duly made and seconded, it was unanimously

RESOLVED, That the proper officers of this Corporation be and they hereby are authorized, empowered, and directed for and in behalf of this Corporation to cause such amendment of the registration state-

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ment and the prospectus, in the respective forms thereof presented to the meeting, to be executed and to be duly filed with the Securities and Exchange Commission at Washington, D. C., and to do such acts and execute such documents as may be necessary and proper to effect due registration of such shares of stock.

No. 362

Resolution of directors authorizing officers to issue stock to a designated individual.

RESOLVED, That the proper officers of this company be and they hereby are authorized and instructed to issue in the name of, certificates for (.) shares of the preferred stock of this company, and to deliver the same to Trust Co., as Transfer Agent of said stock, for countersignature, and to Bank & Trust Co., as Registrar of said stock, for registration.

No. 363

Resolution of directors authorizing sale and issue of stock to persons determined by executive committee.

RESOLVED, That this corporation sell and issue (.) shares of the Preferred Stock of this corporation at par, and (.) shares of Common Stock having no par value at dollars (\$) per share, payable in cash at the time of purchase, to such persons, firms, or corporations as the Executive Committee shall determine, and the President and the Secretary of this corporation are hereby authorized to execute and deliver certificates of stock to purchasers upon receipt of full payment for shares purchased.

No. 364

Resolution of directors recommending that stockholders authorize the issuance of stock to employees.

WHEREAS, by the recent increase of capital stock of this corporation, there has become available for further subscriptions a total of (.) shares of the common stock without par value, of this corporation, and

WHEREAS, it is the belief of the Board of Directors of this corporation that its employees would be interested in acquiring a part of the capital stock, and that ownership of stock of this corporation by employees would be to the advantage of this corporation,

NOW, THEREFORE, BE IT RESOLVED, That the Board of Directors of this corporation does hereby recommend to the stockholders that they authorize the Board of Directors to set aside a total of (.)

shares of the common stock of this corporation, for sale to the employees and officers upon the following terms:

Subscriptions to said stock shall be received from any employee of the corporation from, 19.., up to and including, 19... Subscriptions to the common stock shall be on the basis of the book value of said stock as of, 19.., namely, dollars (\$.....). Payment for such stock shall be made as follows:

..... per cent (...%) of the subscription shall be payable simultaneously with the execution and delivery of such subscription, and the balance shall be payable in installments of per cent (...%) per month until the amount of the subscription shall have been fully paid in. The stock subscribed for shall not be actually issued until the full amount of such subscription shall have been paid in, and, pending the full payment of such subscription, no dividend shall be declared and paid upon the stock so subscribed for. The company, however, shall credit and pay to each subscriber interest on installments paid in at the rate of per cent (...%) per annum. Subscriptions for stock as herein provided for shall contain an agreement that, in the event that any installment shall not be paid on its due date, the corporation shall have the right to return to such subscriber any installment or installments standing to his credit, without interest, and cancel the balance of such subscription. Subscribers shall further agree that, in the event that the subscriber shall leave the employ of the corporation, whether voluntarily or involuntarily, he or she shall resell to the corporation any stock actually issued at the book value of such stock at the time when the stock is to be resold to the company.

Subscribers shall further agree that any payment standing to his or her credit at the time when he or she shall leave the employ of the corporation, whether voluntarily or involuntarily, not represented by certificates of stock actually issued, shall be repaid to him or her without interest, and that the subscription shall be canceled.

Subscribers shall further agree that, upon the death of such subscriber, if his or her heirs or legal representatives shall not wish to retain ownership of such stock or continue to pay the installments, any stock issued or installments paid shall be subject to the same conditions that apply in the case of a subscriber who leaves the employ of the corporation.

No. 365

Resolution of stockholders authorizing board of directors to set aside unissued stock for sale to employees.

RESOLVED, That the Board of Directors be and it hereby is authorized to set aside (.....) shares of the common stock with-

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out par value of this Corporation, provided for by the increase in the capital stock duly authorized by the stockholders of this Corporation on the .. day of, 19.., for sale and issuance to the employees of this Corporation and of its subsidiaries, upon the following terms:

(Here insert terms as given in preceding resolution.)

No. 366

Resolution of directors allotting shares of stock to employees.

WHEREAS, the (.....) shares of common stock of this corporation, reserved for sale to the employees of this corporation at dollars (\$.....) per share have been oversubscribed, be it

RESOLVED, That the President be and he hereby is authorized to allot the (.....) shares of common stock reserved for employees, to subscribers in the proportion that the subscription of each employee bears to the total amount of common stock subscribed for by all employees, and that the President be and he hereby is authorized to make such allotment, among employee subscribers, of shares not allotted because of fractional subscriptions resulting from this method of allotment, as in his discretion seems most beneficial to this corporation.

No. 367

Resolution of directors appointing committee to allot shares to employees as they deem best.

WHEREAS, the (.....) shares of common stock of this corporation, reserved for sale to the employees of this corporation at dollars (\$.....) per share have been oversubscribed, be it

RESOLVED, That,, and be and they hereby are appointed members of a committee to make such allotment of the shares of common stock reserved for employees of this corporation as they shall deem to be for the best interests of the corporation.

No. 368

Resolution of directors authorizing sale of treasury stock at auction.

WHEREAS, in the judgment of this Board, it is necessary and desirable for this Company to raise money for additional working capital and to meet the costs of improving the company's property, and to that end to sell shares of common stock of the Company now held in the treasury,

THEREFORE, BE IT RESOLVED, That this Company offer to sell at

public auction, as soon as possible, (.....) shares of said common stock, giving to the general public the opportunity of making bids for all or any part of such stock; and

RESOLVED FURTHER, That all persons desiring to make bids for such stock be required to deliver the same in writing to Bank, Transfer Agent of this Company, specifying the number of shares desired and the price offered, and to deposit therewith (....%) per cent of such price in lawful money of the United States, and that this Company reserves the right to accept or to reject all or any of such bids; and

RESOLVED FURTHER, That the Secretary of this Company be, and he hereby is, authorized and directed to prepare a form of circular containing the terms and conditions of said offer, and a form of bid, and to submit the same for approval at the next meeting of this Board.

No. 369

Resolution of directors adopting form of invitation for bids for treasury stock, and form of bid.

RESOLVED, That the form of invitation for bids for shares of the common stock of this Company, now held in the treasury, and the form of bid submitted at this meeting, and the terms and conditions stated therein, be and the same hereby are approved and adopted; and,

RESOLVED FURTHER, That the Secretary of this Company be, and he hereby is, authorized and directed to cause said invitation for bids and said form of bid to be printed and mailed to the stockholders of this Company and also to such other persons, firms, and corporations as the officers of the Company may deem desirable, including bankers and brokers in the Cities of,, and, and to cause appropriate notices of said invitation for bids to be published in such newspapers as the President and the Secretary may select in the Cities of,, and

No. 370

Resolution of directors approving form and terms of proposed underwriting agreement.

RESOLVED, That the form and terms of the proposed underwriting agreement with Messrs. & Co., Brothers, & Company, Incorporated, and & Co., covering the issuance and sale of 250,000 shares of Convertible Preference Stock, \$4.25 Series of 19..., as set forth in the draft thereof submitted to this meeting, directed to be marked for identification by the Secretary and filed with the records of the Corporation, is in all

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respects approved, and the officers of the Corporation are authorized at such time as shall be acceptable to such officers to enter into such agreement, with such changes therein as may be approved by said officers and by counsel, and to fix such terms as are omitted in the draft approved at this meeting, with the privilege to such officers, in their discretion, to permit additions or substitutions in the members of such underwriting group.

No. 371

Minutes of directors ratifying officers' action in closing under underwriting agreement.

The Chairman reported that the closing under the agreement with & Co., & Co., Inc., and & Co., Inc., as underwriters, relating to the Ten-Year 5% Sinking Fund Debentures due, 19.. (with common stock purchase warrants attached), had taken place that morning at the office of & Co., and that the Company had received a certified check for the proceeds of the said debentures and warrants, and had deposited with the Bank and Trust Company an amount sufficient to pay on, 19.., all of the presently outstanding 6% Sinking Fund Debentures of the Company with accrued interest.

On motion duly made, seconded, and unanimously adopted, it was

RESOLVED, That all actions of the officers of the Company in connection with the consummation of the sale to & Co., & Co., Inc., and & Co., Inc., of \$..... principal amount of Ten-Year 5% Sinking Fund Debentures of the Company, due, 19.. (with common stock purchase warrants attached), be and the same hereby are in all respects ratified, approved, adopted, and confirmed.

No. 372

Resolution of stockholders authorizing officers to enter into underwriting agreement as submitted to meeting.

RESOLVED, That the President of the Company is hereby authorized and directed, in behalf of the Company, to enter into an underwriting agreement covering the sale by the Company to & Co. and associates of \$32,000,000 in principal amount of First Mortgage Bonds, Series A, 4%, due, 19.., of the Company, and that said underwriting agreement in the form this day submitted to this meeting and all and singular the terms and provisions thereof, are hereby approved and adopted and that a copy thereof be spread of record in or following the minutes of this meeting; and

FURTHER RESOLVED, That the officers of the Company are authorized, empowered, and directed to sell and deliver said \$32,000,000 in principal amount of First Mortgage Bonds, Series A, 4%, due, 19.., of the Company upon the terms and conditions stated in said agreement, and to do all things by them deemed necessary or appropriate to carry out the terms and provisions of said underwriting agreement.

No. 373

Resolution of directors authorizing application for listing stock on stock exchange.

RESOLVED, That application be made to the Stock Exchange for the listing of, of this corporation and that be designated by the corporation to appear before the Committee on Stock List of said Exchange, with authority to make such changes in said application, or in any agreements relative thereto, as may be necessary to conform with requirements for listing.

No. 374

Resolution of directors authorizing call for redemption of all outstanding preferred stock.

WHEREAS, under Article of the Certificate of Incorporation of this Corporation, this Corporation, through its Board of Directors, from time to time upon days' notice, may redeem, on any dividend date, the whole or any part of the preferred stock from surplus at (.....%) per cent of the par value thereof, plus any accrued and unpaid dividends, and

WHEREAS, this Board of Directors deems it advisable to redeem the entire outstanding preferred stock out of surplus, be it

RESOLVED, That, pursuant to Article of the Certificate of Incorporation, all the outstanding preferred stock of this Corporation—namely, (....) shares, having a par value of (\$.....) Dollars, amounting in the aggregate to (\$.....) Dollars—be and it hereby is called for redemption on the .. day of, 19.., and

RESOLVED FURTHER, That said stock shall be redeemed at the office of this Corporation, (Street), (City), (State), by the payment of (\$.....) Dollars per share, plus accumulated, accrued, and unpaid dividends to the date of redemption thereof, upon surrender of certificates representing such shares, properly indorsed or accompanied by other proper assignment in blank; and

RESOLVED FURTHER, That if any stockholder shall fail to surrender his certificate or certificates of preferred stock on the .. day of, 19.., such stockholder shall not in any event be entitled to receive further dividends thereon, or to exercise any rights with respect thereto, except to receive from this Corporation the amount set aside for the redemption thereof without interest, and

RESOLVED FURTHER, That the Secretary be and he hereby is authorized and directed to send forthwith to each stockholder of record on the .. day of, 19.., a written notice of the redemption of the outstanding preferred stock on the .. day of, 19.., and to publish notice of such redemption as required by statute and the By-laws of this Corporation.

No. 375

Resolution of directors authorizing call for redemption of one half of each stockholder's holdings; whole share to be redeemed if division would result in fractional shares; privilege of stockholders to offer shares for earlier redemption if presented on designated days in various months.

RESOLVED:

1. That in accordance with the option accorded to the Corporation by Article, Section of the Certificate of Incorporation of this Corporation, the Board of Directors does hereby declare that fifty thousand (50,000) shares of the one hundred thousand (100,000) shares of preferred stock of this Company at present outstanding be and the same hereby are called for redemption on, 19.., together with as many additional shares as shall result from the redemption of fractional shares because of holdings of shares in odd numbers as hereinafter provided;

2. That the holders of said preferred stock to be redeemed be paid therefor at the rate of One Hundred Five (\$105) Dollars per share, together with all accrued and unpaid dividends, and no more;

3. That the shares to be redeemed shall be redeemed ratably from the holdings of the holders of the preferred stock—that is to say, one half of the holdings of each stockholder as the same shall appear of record at the close of business on, 19.., shall be redeemed; that in the case of any holding of an odd number of shares, where the redemption of one half of the holding will result in a fractional one-half share, the whole share so affected shall be redeemed;

4. That One Hundred (\$100) Dollars of the redemption price shall be charged against the Preferred Capital account and Five (\$5) Dollars against the Earned Surplus account;

5. That in accordance with Section of Article of the Certificate of Incorporation, the specified notice be given to each and every holder of the preferred stock as shall be shown by the stock records of the Corporation as of the .. day of, 19.., and that due publication of the proposed redemption be made, as provided in said Section

6. That said preferred stock to be redeemed be redeemed at the offices of the Corporation, (Street), (City), (State), on, 19.., and when offered within a reasonable time thereafter; provided that, at the option of the holder of such stock to be redeemed, such stock may be offered for earlier redemption and will be redeemed by the Corporation at One Hundred Five (\$105) Dollars per share if presented for redemption at the offices of the Corporation during the first fourteen days of either of the months of, or, 19..;

7. That from and after, 19.., or in case of earlier redemption from the date of such earlier redemption, all dividends on the said preferred stock called for redemption or redeemed shall cease to accrue, and all rights of the holders thereof as stockholders of the Corporation, except the right to receive the redemption price, shall cease and determine;

8. That the proper officers be and they hereby are authorized and directed to make and file such certificate or certificates concerning such shares as may be required by law.

No. 376

Resolution of directors authorizing call for redemption of part of outstanding preferred stock, to be chosen by lot by transfer agent; certificates to be divided into three classes according to denomination, and proportionate number of each class to be drawn for redemption.

[*Note.* The headings in boldface do not ordinarily appear in the resolution; they have been inserted here merely to facilitate use of the form.]

[Number of shares to be redeemed; time and price]

RESOLVED, That this Corporation call for redemption and redeem 25,000 shares of its Cumulative Preferred Stock, Series A, on, 19.., at the redemption price of (\$.....) Dollars per share, plus the sum of (\$.....) Dollars per share, being an amount equal to the dividends accrued thereon to said date; and

[Manner of choosing by lot]

RESOLVED, That the 25,000 shares of such Series A Preferred Stock

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to be redeemed shall be chosen by lot by "T" Trust Company, Transfer Agent of such Preferred Stock, in the following manner:

1. There shall be ascertained the total number of shares of such stock outstanding at the close of business on, 19.., represented, respectively, by: (1) certificates for 100 shares each; (2) certificates for 50 to 99 shares each, both inclusive; and (3) certificates for 1 to 49 shares each, both inclusive;

2. The number of shares to be redeemed, 25,000, shall be divided among and allotted to the three classes of certificates above specified in the proportion, as nearly as may be practicable, which the number of shares in each class bears to the total number of shares outstanding at the close of business on, 19.., and there shall be drawn separately from the certificate numbers of each such class certificates representing the number of shares allotted to it, subject to the following provisions:

If the resultant figure for the class composed of certificates for 100 shares each shall not be a multiple of 100, there shall be drawn certificates for 100 shares each for an aggregate number equal to the highest multiple of 100 contained in such resultant figure, and the excess number of shares shall be added to the number of shares to be drawn from the class represented by certificates for 50 to 99 shares each. Certificates representing 50 to 99 shares each shall be drawn by lot without consideration of the exact number of shares represented by the particular certificate drawn, until there shall have been drawn certificates for the total number of shares allotted to such class, and if the last certificate drawn represents such number of shares that the total drawn exceeds the total allotted to such class, then the number of shares available for drawing from the class represented by certificates from 1 to 49 shares each shall be reduced to the extent of such excess. Certificates for 1 to 49 shares each shall be drawn by lot without consideration of the exact number of shares represented by the particular certificate drawn, until certificates for the total number of shares allotted to such class have been drawn, and if the last certificate drawn represents such number of shares that the total drawn exceeds the amount so allotted, that number of the shares represented by such last certificate shall be redeemed as is sufficient to exhaust the total number of shares to be redeemed.

All details in connection with the drawing by lot of said 25,000 shares shall be determined, subject to the principles hereinbefore set forth, by said Transfer Agent in its uncontrolled discretion.

[Closing of transfer books]

FURTHER RESOLVED, That the stock transfer books of the Preferred

Stock of this Corporation be closed at the close of business on , 19.., and remain closed until the opening of business on , 19.., in the case of Preferred Stock not drawn for redemption, and permanently in the case of all Preferred Stock drawn for redemption, provided, however, that if the drawing shall result in the calling for redemption of less than all the shares represented by any certificate, the shares represented thereby not called for redemption may be transferred.

[Approval of notice of redemption]

FURTHER RESOLVED, That the form of notice of redemption to be mailed to each of the holders of shares of Preferred Stock, Series A, called for redemption, presented to this meeting, be and it hereby is approved, and the Secretary is hereby authorized and directed to cause a notice of redemption in substantially such form to be mailed on or before , 19.., to each such holder of record of the Preferred Stock to be redeemed.

[Place of payment of redemption price; cancellation of certificates]

FURTHER RESOLVED, That payment of the redemption price shall be made to the registered holders of the Preferred Stock called for redemption, or their assigns, upon presentation and surrender, on or after , 19.., of the certificates therefor, at the office of the Transfer Agent of such stock, "T" Trust Company, (Street), (City), (State), and that upon such payment the said certificates shall be canceled.

[Deposit of redemption funds with agent]

FURTHER RESOLVED, That the proper officers of the Corporation be and they hereby are authorized and directed to deposit funds equal to the aggregate redemption price with "T" Trust Company for the payment of the redemption price to the holders of the shares to be redeemed upon surrender of the certificates for such shares, on or before said redemption date; and upon the deposit of said money, or in any event upon said redemption date, the holders of the stock so called for redemption shall cease to be stockholders with respect to said shares and shall have no interest in or claim with respect to said shares, except only to receive the redemption price on and after , 19.., from "T" Trust Company, without interest thereon, upon surrender of the respective certificates for such stock.

[Reduction of capital]

FURTHER RESOLVED, That, upon the redemption of the 25,000 shares of Cumulative Preferred Stock, Series A, the capital of the Corporation shall be reduced by the amount of (\$.....) Dollars, being (\$.....) Dollars for each share called for redemption, and the proper officers of the Corporation are hereby authorized to execute,

file, and record a certificate in respect of such reduction pursuant to the provisions of the law of the State of

[Cancellation of redeemed stock by Registrar]

RESOLVED, That the "R" Trust Company, as Registrar of the Cumulative Preferred Stock, Series A, of this Corporation, be and it hereby is authorized and instructed to cancel upon its books the registration of the 25,000 shares of Cumulative Preferred Stock, Series A, to be redeemed on, 19..., such cancellation to be effective on that date, and the maximum number of shares which said Registrar has heretofore been authorized to register is hereby reduced by 25,000, effective, 19...

No. 377

Resolution of directors creating sinking fund to redeem preferred stock.

WHEREAS, this Corporation has heretofore issued preferred stock of the aggregate par value of (\$.....) Dollars, with the right in this Corporation to redeem the said preferred stock should it so desire, by paying the par value thereof with accrued dividends at the rate of (.....%) per cent, and

WHEREAS, this Corporation deems it expedient and advisable to create a sinking fund for the purpose of redeeming and retiring the said stock, it is

RESOLVED, That, commencing with the .. day of, 19..., (.....%) per cent of the gross earnings of the Corporation be set aside and formed into a sinking fund, to be known as the Preferred Stock Sinking Fund, to be established, kept, and maintained for the purpose of redeeming the preferred stock as aforesaid; that when there has accumulated in said fund an amount equal to (.....%) per cent of the entire amount due on the preferred stock as aforesaid, the said amount so accumulated shall be apportioned equally among the preferred stockholders, and a proportionate number of shares of preferred stock shall be redeemed and retired; and that this process of accumulation, distribution, and redemption shall continue until the entire amount of the preferred stock and accrued dividends shall have been paid in full.

No. 378

Resolution of directors redeeming part of preferred stock out of sinking fund.

WHEREAS, under Article of the Certificate of Incorporation of this Corporation, this Corporation may, through its Board of Directors,

from time to time upon days' notice, redeem, on any dividend date, the whole or any part of the preferred stock from surplus at (.....%) per cent of the par value thereof, plus any accrued and unpaid dividends, and

WHEREAS, a sinking fund has been created and maintained for the purpose of providing funds to redeem outstanding preferred stock from time to time, and

WHEREAS, there has accumulated in said sinking fund the sum of (\$.....) Dollars, be it

RESOLVED, That the Treasurer of this Corporation be and he hereby is authorized to apply the sum of (\$.....) Dollars of said sinking fund to the purchase and retirement of (.....) shares of preferred stock having a par value of (\$.....) Dollars per share, amounting in the aggregate to (\$.....) Dollars;

RESOLVED FURTHER, That said redemption shall be made at the office of the Corporation, (Street), (City), (State), on the .. day of, 19.., by the payment of (\$....) Dollars per share, plus accumulated, accrued, and unpaid dividends to the date of redemption thereof, upon the surrender of certificates representing shares to be redeemed, properly indorsed or accompanied by other proper assignment in blank; and

RESOLVED FURTHER, That each preferred stockholder shall be given an equal opportunity to offer for redemption a proportionate share of the stock held by him, and if any preferred stockholder shall fail to notify the Treasurer of this Corporation on or before the .. day of, 19.., of his desire to have his proportionate number of shares redeemed, the right of such stockholder to have his stock redeemed shall be lost, and the Treasurer shall thereupon purchase from any stockholder or stockholders an additional amount of stock for redemption to make up the full amount to be redeemed under this resolution, at the price hereinabove set forth, and no stockholder shall have the right to demand that his stock be purchased; and

RESOLVED FURTHER, That the Secretary be and he hereby is authorized and directed to mail forthwith to each stockholder of record on the .. day of, 19.., a notice of said redemption, and to publish notice of said redemption as required by statute and by the By-laws of this Corporation.

No. 379

Resolution of stockholders authorizing board of directors to purchase, hold, or transfer shares of corporation's own stock.

RESOLVED, That the Board of Directors be and it hereby is authorized to purchase, acquire, hold, or transfer shares of the capital stock

of this Corporation, from time to time, in such amounts and for such consideration as the Board shall determine, provided that no purchase shall be made which might favor any shareholder over any other, and provided further that the Board shall not purchase any shares of the capital stock of this Corporation unless, after such purchase, there shall remain an excess of assets over all the debts and liabilities of the Corporation, plus the par value of the capital stock outstanding, after the amount of the par value of the shares to be purchased has been deducted. (If stock is without par value, substitute the following: "Provided, further, that the Board of Directors shall not purchase any shares of this Corporation unless, after such purchase, there shall remain an excess of assets over all the debts and liabilities of the Corporation, plus stated capital, after the amount of stated capital in respect of the shares to be purchased has been deducted.")

No. 380

Resolution of directors prohibiting corporation from purchasing its own stock except upon consent of stockholders.

RESOLVED, That the Corporation shall be prohibited (except for retirement and for the purpose of decreasing the capital stock as authorized by law) from buying, holding, or transferring shares of its own stock, except upon the consent in writing of stockholders of the Corporation owning at least two thirds of the voting rights of the capital stock, or except upon the consent of stockholders of record owning not less than two thirds of the voting rights of the capital stock of the Corporation, given in person or by proxy at an annual meeting, or at a special meeting of the stockholders called for the purpose.

No. 381

Resolution of directors authorizing corporation to acquire its own stock according to agreement.

WHEREAS, under an agreement between, owner of record of (.....) shares of common stock without par value of this Corporation, and this Corporation, dated, 19.., this Corporation has the option to purchase the aforesaid shares of stock held by said upon his withdrawal from the active management of the Corporation's affairs, at the book value of the shares at the close of the fiscal year preceding the withdrawal of said, and

WHEREAS, withdrew from the active management of the affairs of this Corporation on the .. day of, 19.., and this Corporation, under its agreement with said, now has the right to purchase the shares of stock held by said, and

WHEREAS, the surplus of this Corporation is larger than the sum required to purchase the said shares, and, in the opinion of the Board of Directors of this Corporation, it is to the best interests of the Corporation that the shares above mentioned be purchased by the Corporation;

NOW, THEREFORE, BE IT RESOLVED, That this Corporation purchase the (.....) shares of common stock without par value of this Corporation, standing in the name of, at a price of (\$.....) Dollars per share, which was the book value of each share of stock of this Corporation on the .. day of, 19.., as shown by the certified balance sheet of the Corporation prepared at the close of the fiscal year 19...

No. 382

Resolution of directors authorizing corporation to accept its own stock in payment of debt due corporation.

WHEREAS,, owner of record of (.....) shares of fully paid common stock of this Corporation having a par value of (\$.....) Dollars each is indebted to this Corporation in the amount of (\$.....) Dollars, for merchandise purchased from this Corporation on the .. day of, 19.., and

WHEREAS, the said is unable to make payment and has offered to give this Corporation, in full settlement of his debt, (.....) shares of the common stock of this Corporation owned by him, having an aggregate par value of (\$.....) Dollars;

RESOLVED, That this Corporation accept the offer of said, and the President is hereby authorized upon receipt of the certificates of capital stock for (.....) shares of the capital stock of this Corporation, properly indorsed by the said, to deliver to said a receipt in full discharge of all claims which this Corporation has against the said on account of the purchase mentioned in the preamble of this resolution.

No. 383

Resolution of stockholders authorizing purchase of stock of undesirable associate in accordance with agreement.

WHEREAS, an agreement was entered into on, 19.., empowering a majority of the holders of the common stock of this Corporation to declare that a stockholder had ceased to be a desirable associate, and thereupon to appraise and purchase his stock at its cash value, and

WHEREAS, a majority of the holders of the common stock of this Cor-

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poration are agreed that has ceased to be a desirable associate because of his personal conduct and because of his incompetency (*or insert other reasons for undesirability*), and

WHEREAS, the said is now the holder of (.....) shares of the common stock of this Corporation, of the value of (\$.....) Dollars per share, as shown by the books of the Corporation; it is

RESOLVED, That the said (.....) shares of common stock held by the said be redeemed, in accordance with the aforesaid agreement, at (\$.....) Dollars per share, and that the proper officers of this Corporation be and they hereby are authorized and directed to do any and all things necessary and proper to carry out this resolution.

No. 384

Resolution of directors authorizing retirement of stock purchased by corporation.

WHEREAS, this Corporation holds in its treasury (.....) shares of the 8% Preferred Stock of this Corporation, of the par value of (\$.....) Dollars, acquired by purchase from time to time out of surplus funds of the Corporation, and

WHEREAS, under the laws of the State of, shares of stock so acquired may be retired by resolution of the Board of Directors, and no procedure for the reduction of the issued capital stock of the Corporation is necessary to effect such retirement;

NOW, THEREFORE, BE IT RESOLVED, That this Corporation does hereby retire the (.....) shares of the 8% Preferred Stock of this Corporation, of the par value of (\$.....) Dollars, heretofore acquired by purchase and held in the treasury of the Corporation; and

RESOLVED FURTHER, That said retired shares shall, in conformity with the statute, have the status of authorized but unissued stock of the Corporation, and shall retain the classification obtaining before such retirement, and shall be subject to sale in the same manner and upon the same terms as other authorized but unissued 8% Preferred Stock.

No. 385

Notice that temporary certificates will be exchanged for permanent certificates on and after fixed date.

....., 19..
To the Holders of Temporary Certificates Representing Class A Common Stock:

You are hereby notified that on and after , 19..,

holders of Temporary Certificates representing Class A Common Stock will be entitled to receive, upon surrender of their Temporary Certificates at the principal office of Trust Company in the City of, State of, Permanent Certificates for the number of shares of Class A Common Stock represented by the Temporary Certificates so surrendered.

The certificates of stock will be issued in the name of and to the person appearing on the books of the Corporation as the holder of the Temporary Certificates surrendered, unless the Temporary Certificates are indorsed in blank, accompanied by instructions to issue the stock certificates to and in the name of someone other than the record holder thereof, and by the necessary State and Federal transfer stamps.

No. 386

Published notice that permanent stock certificates will be issued upon surrender of temporary certificates.

..... & Co.

6½% CUMULATIVE PREFERRED STOCK

Permanent engraved stock certificates for 6½% Cumulative Preferred Stock of this Company are now ready for delivery in exchange for the outstanding temporary certificates. Stockholders should send their temporary certificates for exchange to the Transfer Agents, the Bank of, (Street), (City), (State), or the Company of, (Street), (City), (State).

Temporary certificates surrendered for exchange need not be indorsed unless it is desired that the permanent certificates be issued in a name other than that in which the temporary certificate is registered. In such case the temporary certificates should be presented in duly transferable form, together with funds to cover stamp taxes, and the signature to the indorsement or assignment must be guaranteed by a bank or trust company with a correspondent in New York City, or by a New York Stock Exchange firm.

....., 19...

..... & Co.

.....
Secretary

No. 387

Excerpt from minutes of stockholders' meeting approving form of temporary stock certificate.

The Secretary then submitted to the meeting forms of temporary certificates to represent the 6% Cumulative Preferred Stock and the Common Stock of this corporation which would be required in lieu of

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the present certificates as a result of the amendment of the Certificate of Incorporation. Copies of such temporary certificates are attached to the minutes of this meeting, marked "Exhibit B" and "Exhibit C."

On motion duly made and seconded, the following resolutions were unanimously adopted:

RESOLVED, That the proposed forms of temporary certificates to represent the 6% Cumulative Preferred Stock and the Common Stock of this corporation, presented to this meeting, be and they hereby are approved and adopted as the certificates to represent the 6% Cumulative Preferred Stock and the Common Stock of this corporation, and that specimens thereof be attached to the minutes of this meeting marked "Exhibit B" and "Exhibit C."

RESOLVED, That the Secretary of this corporation be and he hereby is authorized and directed to obtain definitive engraved certificates to represent the 6% Cumulative Preferred Stock and the Common Stock of this corporation, substantially in the form of the temporary certificates heretofore approved at this meeting.

RESOLVED, That the proper officers of this corporation be and they hereby are authorized and directed to notify the stockholders of this corporation when such definitive engraved certificates are ready for delivery, and to request the stockholders of this corporation to surrender the then outstanding certificates representing the capital stock of this corporation for exchange, share for share of the same class respectively, for such definitive engraved certificates.

RESOLVED, That pending the preparation of such definitive engraved certificates, the Secretary of this corporation be and he hereby is authorized and directed to procure a suitable supply of temporary certificates, and that the proper officers of this corporation be and they hereby are authorized to execute and to issue such temporary certificates, share for share, for the presently outstanding certificates representing the capital stock of this corporation, if and when presented to this corporation for such exchange.

No. 388

Resolution authorizing authentication and issuance of stock certificates signed by an officer who has resigned.

WHEREAS, has heretofore signed, as Secretary of this corporation, together with the President, stock certificates of this corporation, Nos. to, inclusive, for one hundred (100) shares each, which certificates are now lodged with the Trust Company, Transfer Agent, and are unissued at this date, and

WHEREAS, the resignation of the said, as Secretary, has been this day accepted to take effect immediately,

RESOLVED, That stock certificates of this corporation, Nos to, inclusive, for one hundred (100) shares each, heretofore signed by the said, as Secretary, may be hereafter authenticated and issued by the Trust Company, Transfer Agent, and Company, as Registrar, as though said were the Secretary of this corporation at the time said certificates, or any of them, may be hereafter authenticated, issued, and registered.

CHAPTER 17

RIGHTS TO SUBSCRIBE TO STOCK, STOCK PURCHASE WARRANTS, AND OPTIONS TO PURCHASE STOCK

Reason for offer to stockholders of rights to subscribe to stock—preëmptive right. When a corporation issues additional shares of stock, each existing stockholder may have the right to subscribe for such proportion of the new stock as the number of shares of the corporation owned by him bears to the total number of shares previously issued. This right is called the stockholders' "preëmptive right," and is based upon two principles: (1) the existing stockholders must be given an opportunity to keep proportionate control; and (2) the equities of the stockholders in the surplus of the corporation must be preserved. Thus, a corporation that increases its capital stock 25 per cent must allow each stockholder the right to subscribe to the new issue up to 25 per cent of his holdings. A, owning \$5,000 of an authorized issue of \$50,000 of common stock, upon a 50 per cent increase in the common stock to \$75,000, will be entitled to subscribe to \$2,500 of the new stock at the price fixed before the stock may be offered to any outsider.

The corporation may and often does offer stockholders the right to subscribe to stock even if it is not required to do so, for old stockholders frequently represent the most available market that can be found for new stock.¹

Necessity for notice of right to subscribe. Each stockholder having a preëmptive right must be given reasonable notice² of his right to subscribe and an opportunity to obtain his proportionate share in the increase of the capital stock upon the same terms as the other stockholders.³ However, the corporation does not have to give *actual* notice to each stockholder. Thus, a

¹ See *Murphy v. North American Co.*, (1939) 106 F. (2d) 74, modifying 24 F. Supp. 471, in which such an offer was involved.

² Five days' notice was held not to be reasonable in *Bennett v. Baum*, (1911) 90 Neb. 320, 133 N. W. 439.

³ *Hoyt v. Great American Ins. Co.*, (1922) 201 N. Y. App. Div. 352, 194 N. Y. Supp. 449.

stockholder who changed his address without notifying the corporation and, therefore, failed to receive an ordinarily reasonable notice could not complain that he was not given a reasonable opportunity to subscribe to his share of the stock.⁴ The stock not taken by the old stockholders may not be offered to outsiders upon terms more favorable than those upon which the stock was previously offered to the stockholders.

If the securities of the corporation are listed on an Exchange, it may be necessary to notify the Exchange of the issuance of the rights to subscribe. Registration of the stock under the Securities Act of 1933, as amended, and the Securities Exchange Act of 1934, may also be necessary.⁵

Issues of stock to which preëemptive right applies. The statutes in some states contain provisions governing the preëemptive right of stockholders. These statutes indicate the kind of issues to which the preëemptive right attaches, and in some instances provide that the certificate of incorporation may deny the preëemptive right to any issue or to any class of stock. In the absence of statutory provisions, however, reference must be made to the various decisions that have developed the doctrine of preëemptive rights, to determine whether or not such rights exist. These decisions, it must be admitted, are in many instances conflicting and confused.⁶ The generally accepted rules applicable to various situations and the cases on which these rules are based, are given below.

The rule of preëemptive right is subject to the general restriction that its application must be consistent with the object for which the stock is to be issued.⁷ Thus, the right is commonly not recognized when new stock is to be issued for property (see

⁴ Ibid.

⁵ See page 399.

⁶ For a discussion of the leading cases on the subject of preëemptive rights, see Morawetz, "The Preëemptive Right of Shareholders," 42 *Harvard Law Review* 186; Drinker, "The Preëemptive Right of Shareholders to Subscribe to New Shares," 43 *Harvard Law Review* 586; Hills, "Preëemptive Right of Preferred Stockholders to Subscribe to New Stock," 5 *N. Y. Law Review* 207; Frey, "Shareholders' Preëemptive Rights," 38 *Yale Law Journal* 563; Dwight, "The Right of Stockholders to New Stock," 18 *Yale Law Journal* 101. See also C. W. Gerstenberg, *Financial Organization and Management* (Prentice-Hall, Inc., New York, 2nd rev. ed., (1939) page 337 et seq., and 52 A. L. R. 220; 11 *N. Y. U. Law Quarterly*, (1933) page 78.

⁷ *Thom v. Baltimore Trust Co.*, (1930) 158 Md. 352, 148 A. 234; *Milwaukee Sanitarium v. Swift*, (1941) 238 Wis. 628, 300 N. W. 760, citing *Fletcher Cyc. of Corp.*, Vol. 11, p. 223, §5136; *Todd v. Maryland Casualty Co.*, (1946) 155 F. (2d) 29.

page 420), to wipe out debts and claims against the corporation,⁸ or to secure a loan.⁹

Preëemptive right upon original issue of stock. If the offer to sell stock is being made from the original authorized stock by a newly organized corporation that is in the process of selling stock, the principle of preëemptive rights does not apply. Corporations frequently sell only a part of the authorized stock upon organization, and leave the remaining unissued stock to be sold whenever the corporation is in need of additional capital. When a corporation decides to sell all or part of the remaining authorized capital stock, will it be compelled to give the old stockholders the right to subscribe to the stock it proposes to issue? In some cases, the courts have held that the right of old stockholders to subscribe to new shares in preference to outsiders does not exist as to the original authorized capital stock and applies only to an increase of authorized capital.¹⁰ Thus, the issuance to the general manager, four years after incorporation, of voting stock that was part of the originally authorized capital stock did not violate the preëemptive rights of existing stockholders.¹¹ In other states, the courts have held that, if a part of the authorized capital stock of a corporation remains unissued, in the absence of a statute to the contrary, each stockholder has a right to purchase such proportion of it, when issuance and sale are directed, as his holdings bear to the stock then outstanding.¹²

⁸ *Milwaukee Sanitarium v. Swift*, (1941) 238 Wis. 628, 300 N. W. 760, citing *Fletcher Cyc. of Corp.*, Vol. 11, p. 223, §5136.

⁹ *Todd v. Maryland Casualty Co.*, (1946) 155 F. (2d) 29.

¹⁰ *Archer v. Hesse*, (1914) 164 N. Y. App. Div. 493, 150 N. Y. Supp. 296; *Schwab v. Schwab-Wilson Mach. Corporation*, (1936) 13 Cal. App. (2d) 1, 55 P. (2d) 1268; *Yasik v. Wachtel*, (1941) 25 Del. Ch. 247, 17 A. (2d) 309.

¹¹ *Yasik v. Wachtel*, *supra* (Note 10).

¹² *Titus v. Paul State Bank*, (1919) 32 Idaho 23, 179 P. 514; *Curry v. Scott*, (1867) 54 Pa. St. 270. See also *Rowland v. Times Pub. Co.*, (1948) 160 Fla. 465, 35 So. (2d) 399; *Levy v. Sattler*, (1919) 169 Wis. 308, 172 N. W. 738; *Glenn v. Kittanning*, (1918) 259 Pa. 510, 103 A. 340; *Thurmond v. Paragon Colliery Co.*, (1918) 82 W. Va. 49, 95 S. E. 816; *Kingston v. Home Life Ins. Co.*, (1917) 11 Del. Ch. 258, 101 A. 898, *aff'd* 104 A. 25; *Snelling v. Richard*, (1909) 166 F. 635; *Crosby v. Stratton*, (1902) 17 Colo. App. 212, 68 P. 130; *Arkansas Val. Agr. Soc. v. Eichholtz*, (1891) 45 Kan. 164, 25 P. 613.

It has been stated in *Drinker*, "The Preëemptive Right of Shareholders to Subscribe to New Shares," 43 *Harvard Law Review* 586, that the "proper test is not whether the shares were original or subsequently authorized, but whether they are a part of the capital with which it was contemplated to launch the enterprise, in which all, whether joining first or last, might properly count on obtaining and keeping a proportionate part." See also *Federal Reserve Life Ins. Co. v. Gregory*, (1931) 132 Kan. 129, 294 P. 859.

There are still other cases which hold that while ordinarily no preëmptive right exists in respect to an original issue of stock, circumstances may create such a right. For example, it has been held that the right exists when the stock is issued a long time after the corporation has commenced business,¹³ and the proceeds of the issue are to be used for the purposes of business expansion.¹⁴

Preëmptive right upon increase of authorized stock. Preëmptive rights generally arise upon an increase in the authorized amount of capital stock. It is a general rule that the additional shares of stock authorized by the increase may not be issued before a reasonable opportunity to take a proportionate amount of such shares is first offered to all existing stockholders.¹⁵ The rule, however, has some exceptions. It is generally held that preëmptive rights exist only in regard to an increased issue of voting, participating common, or preferred stock.¹⁶ This is on the theory that holders of shares of the original issue of non-voting, nonparticipating stock who have no control and no interest in the corporate surplus, cannot be affected by a failure to give them the right to subscribe to shares of a new issue of the same class in proportion to their holdings in the original issue.¹⁷ It has also been held that the preëmptive right does not apply in favor of stockholders of a corporation that absorbs another corporation, when new shares are issued to stockholders of the corporation that is absorbed as part of the amalgamation process.¹⁸

Preëmptive right upon issuance of treasury stock. The decisions of the courts recognize the fact that shares that have been acquired by the corporation out of surplus, with a view to their subsequent reissue, may be reissued by the directors, in good

¹³ *Luther v. C. J. Luther Co.*, (1903) 118 Wis. 112, 94 N. W. 69. See also *Ross Transport v. Crothers*, (1946) 185 Md. 573, 45 A. (2d) 267.

¹⁴ *Dunlay v. Ave. M Garage & Repair Co.*, (1930) 253 N. Y. 274, 170 N. E. 917, aff'g 237 N. Y. Supp. 762, 227 N. Y. App. Div. 804, discussed in 29 *Michigan Law Review* 107.

¹⁵ *Albrecht, Maguire & Co. v. General Plastics*, (1939) 256 N. Y. App. Div. 134, 9 N. Y. Supp. (2d) 415.

¹⁶ *Stokes v. Continental Trust Co.*, (1906) 186 N. Y. 285, 78 N. E. 1090.

¹⁷ *General Investment Co. v. Bethlehem Steel Corporation*, (1917) 88 N. J. Eq. 237, 102 A. 252; *Yoakam v. Providence Biltmore Hotel Co.*, (1929) 34 F. (2d) 533.

¹⁸ *Bonnet v. First Nat. Bank*, (1900) 24 Tex. Civ. App. 613, 60 S. W. 325; *Bingham v. Savings Investment & Trust Co.*, (1928) 101 N. J. Eq. 413, 140 A. 321; *Thom v. Baltimore Trust Co.*, (1930) 158 Md. 352, 148 A. 234, 30 *Columbia Law Review* 569 (1930); *Musson v. New York & Queens Electric L. & P. Co.*, (1931) 138 N. Y. Misc. 881, 247 N. Y. Supp. 406.

faith and for value, without first being offered to existing stockholders.¹⁹ The directors, however, may not obtain any undue advantage for themselves by the issuance of treasury shares;²⁰ they must give the other stockholders an equal opportunity to subscribe to the stock.²¹

The statutes in some states specifically deny the preëemptive right upon the issuance of treasury shares.

Preëemptive rights upon issuance of stock for property or services. The general rule is that no preëemptive rights exist in stock issued for services or for property instead of for cash.²² Thus, if the directors have power to issue additional shares for property or services rendered, they can issue the shares for that purpose without giving the stockholders an opportunity to subscribe to them.²³ This rule, which has been criticized by leading authorities,²⁴ is defended on the ground of practical necessity.²⁵ The issuance of stock for property must be made at a fair value, of course, and cannot be employed as a means of granting voting control to a particular stockholder.²⁶ The statutes in some states specifically deny the preëemptive right where stock is issued for a consideration other than cash.

Determining persons in whom preëemptive right is vested. The preëemptive right is generally vested in those who are stockholders of record at the time the corporation determines to in-

¹⁹ Crosby v. Stratton, (1902) 17 Colo. App. 212, 68 P. 130; Thurmond v. Paragon Colliery Co., (1918) 82 W. Va. 49, 95 S. E. 816; Borg et al. v. International Silver Co., (1926) 11 F. (2d) 143, aff'd 11 F. (2d) 147. See Upton v. Southern Produce Co., (1926) 147 Va. 937, 133 S. E. 576. Contra, Dunn v. Acme Auto & Garage Co., (1918) 168 Wis. 128, 169 N. W. 297.

²⁰ Hammer v. Werner, (1933) 265 N. Y. Supp. 172, 239 N. Y. App. 38. See also "The Legal Status of Treasury Shares," 85 *Univ. of Pa. Law Rev.* 622 (1937).

²¹ Kullgren v. Navy Gas & Supply Co., (1943) 110 Colo. 454, 135 P. (2d) 1007, citing Fosgate Co. v. Boston Market Terminal Co., (1931) 275 Mass. 99, 175 N. E. 86.

²² Stokes v. Continental Trust Co., (1906) 186 N. Y. 285, 78 N. E. 1090; Meredith v. New Jersey Zinc & Iron Co., (1897) 55 N. J. Eq. 211, 37 A. 539, aff'd 56 N. J. Eq. 454, 41 A. 1116; Thom v. Baltimore Trust Co., (1930) 158 Md. 352, 148 A. 234; Branch & Co. v. Riverside & Dan River Cotton Mills, (1924) 139 Va. 291, 123 S. E. 542. See also Wildes v. Rural Homestead Co., (1896) 54 N. J. Eq. 668, 35 A. 896.

²³ Milwaukee Sanitarium v. Swift, (1941) 238 Wis. 628, 300 N. W. 760; People ex rel. N. Y. Trust Co. v. Graves, (1942) 265 N. Y. App. Div. 94, 37 N. Y. Supp. (2d) 900.

²⁴ Frey, "Shareholders' Preëemptive Rights," 38 *Yale Law Journal* 563 (1929).

²⁵ Drinker, "The Preëemptive Right of Shareholders to Subscribe to New Shares," 43 *Harvard Law Review* 586 (1930).

²⁶ Witherbee v. Bowles, (1911) 201 N. Y. 427, 95 N. E. 27.

crease the stock in the manner required by law.²⁷ In some states, the statutes provide for closing of the transfer books by the directors a certain number of days prior to the date of allotment of preëemptive rights. In other states, the statutes provide that the by-laws may fix a date or authorize the directors to fix a date not more than a certain number of days before the rights are to be allotted, after which time persons registered as stockholders will not be entitled to participate in the allotment. This date is known as the record date. The purpose of these statutes is to determine who is entitled, as stockholders of record, to preëemptive rights on the date allotment is made. After the date fixed and before the allotment, transfers of shares do not affect the determination of the persons entitled to the rights as stockholders of record.

Holders of convertible scrip or bonds must exercise their conversion privilege before the time of the increase of stock in order to be entitled to exercise preëemptive rights in the new stock.²⁸

Who can exercise preëemptive rights. As between buyer and seller of stock, the buyer is entitled to the rights offered after sale of the stock although the transfer may not be recorded on the books of the corporation.²⁹ When an increase in the authorized capital is made between the time a contract for the sale of stock is entered into and the time it is executed, the preëemptive right is vested in the purchaser. The seller is not obligated to advance his own money to exercise the right, and he incurs no liability to his buyer if the right is lost because he has failed to do so; if the buyer does not want to lose the right, he must supply the seller with the funds necessary to exercise it.³⁰ The holder of an option or an executory contract to purchase stock does not have a preëemptive right.³¹

Assignees of stock to which preëemptive rights are attached are entitled to exercise the rights, unless they have been reserved by the assignors.³² The warrant for rights to subscribe may be issued to the assignor as a stockholder of record. As between

²⁷ *Real Estate Trust Co. v. Bird*, (1899) 90 Md. 229, 44 A. 1048.

²⁸ *Wall v. Utah Copper Co.*, (1905) 70 N. J. Eq. 17, 62 A. 533; *Pratt v. American Bell Tel. Co.*, (1886) 141 Mass. 225, 5 N. E. 307; *Van Slyke v. Norris*, (1924) 159 Minn. 63, 198 N. W. 409.

²⁹ *Hornblower v. Austin*, (1934) 112 Pa. Super. 90, 170 A. 358.

³⁰ *Currie v. White*, (1871) 45 N. Y. 822.

³¹ *Van Slyke v. Norris*, (1924) 159 Minn. 63, 198 N. W. 409. See also *Levy v. Sattler*, (1919) 169 Wis. 308, 172 N. W. 738.

³² See *Baltimore, etc. Co. v. Hambleton*, (1893) 77 Md. 341, 26 A. 279; *Schmidt v. Pritchard*, (1907) 135 Iowa 240, 112 N. W. 801.

pledgor and pledgee of stock, the pledgor is entitled to exercise preëemptive rights.³³

Shares of corporate stock may be presently owned by stockholders whose ownership is not absolute, but may be for life only. Such stockholders are called "tenants for life" of the shares, and the persons in whom the absolute ownership of the shares will be vested upon the termination of the life tenancy are called "remaindermen" of the shares. It is generally held that the entire value of the preëemptive rights attached to the shares inures to the benefit of the remainderman.³⁴ Sometimes a departure is made from this rule.³⁵

Stockholders who have not paid for their shares in full, or who are in default for non-payment of calls, are nevertheless entitled to exercise the preëemptive rights attached to their stock.³⁶ Those who are not in a position to take and pay for the stock to which they are entitled may sell the rights.³⁷ The buyer may then exercise the existing stockholder's preëemptive rights.

Time within which preëemptive rights must be exercised; other requirements. The time within which a stockholder must exercise his preëemptive right is generally fixed in the resolution authorizing the increase of capital stock. A majority of the stockholders have a right to fix the time to suit themselves and the interests of the corporation, but every stockholder must be treated alike and must be given a reasonable opportunity to subscribe.³⁸ Thus, extension of time cannot be given to one stockholder without the consent of the others.³⁹ If a stockholder fails to exercise his right within the time fixed, he is deemed to have waived his right, provided the time was reasonable.⁴⁰ If no time is fixed, the stockholder must assert his right to sub-

³³ *Murdock v. Murdock*, (1931) 304 Pa. 565, 156 A. 303.

³⁴ *In re Merrill's Estate*, (1928) 196 Wis. 351, 220 N. W. 215. See *Hayes v. St. Louis Union Trust Co.*, (1927) 317 Mo. 1028, 298 S. W. 91, and *Plainfield Trust Co. v. Bowlby*, (1930) 107 N. J. Eq. 68, 151 A. 545.

³⁵ See *Holbrook v. Holbrook*, (1907) 74 N. H. 201, 66 A. 124.

³⁶ *Reese v. Bank of Montgomery County*, (1855) 31 Pa. St. 78. See also *Elec. Co. v. Edison, etc. Co.*, (1901) 200 Pa. 516, 50 A. 164.

³⁷ *Stokes v. Continental Trust Co.*, (1906) 186 N. Y. 285, 78 N. E. 1090; *Schramme v. Cowin*, (1923) 205 N. Y. App. Div. 20, 199 N. Y. Supp. 98.

³⁸ *Hoyt v. Great American Ins. Co.*, (1922) 201 N. Y. App. Div. 352, 194 N. Y. Supp. 449.

³⁹ *Tarlow v. Archbell*, (1943) 47 N. Y. Supp. (2d) 3.

⁴⁰ *Noble v. Great Am. Ins. Co.*, (1922) 200 N. Y. App. Div. 773, 194 N. Y. Supp. 60.

scribe within a reasonable time; otherwise it is forfeited.⁴¹ If the stockholder does not exercise his right within a fixed or reasonable time, he cannot contest the sale of the stock to someone else.⁴² Whether the time fixed by the corporation for subscribing to the stock is a reasonable length of time is a question of fact.⁴³

The board of directors may impose reasonable conditions upon the exercise of the preëmptive right.⁴⁴ For example, the board may require the stockholder to pay a deposit on the new stock at the time he subscribes for it. Failure to make the payment will result in a loss of the right to subscribe.⁴⁵

Price at which corporation must offer shares of new stock to old stockholders. The general rule is that the corporation is not required to offer shares of a new issue of capital stock to its stockholders, pursuant to their preëmptive rights, at par, if the stock is worth more than par.⁴⁶ However, some cases hold that although stock is worth more than par, it must be offered to the shareholders at par.⁴⁷ In any event, the corporation cannot dispose of the stock to outsiders at a price lower than that at which it was offered to the existing stockholders.⁴⁸

Waiver of preëmptive right. A stockholder who is vested with a right to subscribe for shares of an issue of increased capital stock may waive his preëmptive right, either by agreement

⁴¹ Crosby v. Stratton, (1902) 17 Colo. App. 212, 68 P. 130; Seaman v. Ironwood Amusement Corporation, (1938) 283 Mich. 220, 278 N. W. 51.

⁴² Sommer v. Armor Gas & Oil Co., (1911) 71 N. Y. Misc. 211, 128 N. Y. Supp. 382.

⁴³ See Jones v. Morrison, (1883) 31 Minn. 140, 16 N. W. 854, in which it was held that a resolution of January 3rd, giving stockholders the right to subscribe on written application on or before January 14th, was a mere mockery so far as the plaintiff was concerned, since he was in Europe at the time of the adoption of the resolution. The complaining stockholder was one of a few stockholders and owned about 36% of the stock. See also Hoyt v. Great Am. Ins. Co., (1922) 201 N. Y. App. Div. 352, 194 N. Y. Supp. 449, in which it was held that reasonable opportunity to subscribe had been given where the increase of stock was authorized on October 24th, and an offer was made on November 4th to subscribe and pay for stock on or before December 16th, although the stockholder's address of record was in Japan. The court held that all the corporation was required to do was to act in a reasonable manner and to do what it reasonably could to afford its old stockholders an opportunity to share in the increase, and that it had performed its obligations by notifying the stockholder's agent in the state.

⁴⁴ People ex rel. New York Trust Co. v. Graves, (1942) 265 N. Y. App. Div. 94, 37 N. Y. Supp. (2d) 900.

⁴⁵ Sewall v. Eastern, etc. Co., (1851) 63 Mass. 5.

⁴⁶ Stokes v. Continental Trust Co., (1906) 186 N. Y. 285, 78 N. E. 1090.

⁴⁷ Hammond v. Edison Illuminating Co., (1902) 131 Mich. 79, 90 N. W. 1040.

⁴⁸ Stokes v. Continental Trust Co., footnote 46.

with the corporation or pursuant to a provision in the articles of incorporation.⁴⁹ For example, if a stockholder agrees never to acquire a majority of the shares, he waives his preëemptive right if its exercise would result in his getting a controlling share of the corporation.⁵⁰

No waiver of the preëemptive rights attached to shares of stock is effective against a transferee of the shares who has not had notice of the waiver.⁵¹ To make sure that the transferee receives notice of the waiver, the corporation should include a statement of the waiver in the stock certificate issued to the transferee to replace the certificate held by the transferor.

Stock Purchase Warrants

Nature of stock purchase warrants. A stock purchase warrant is an instrument granting to the owner of the warrant the right to purchase a fixed number of shares of stock of the corporation at some future time, at a fixed cash price. Stock purchasable under a warrant is generally common stock.⁵² The warrant may be issued independently of any sale of other securities. Usually, however, stock purchase warrants are created and issued in connection with the issuance and sale of shares of stock or other securities such as bonds and debentures. Warrants that are issued in connection with other securities may be either detachable or non-detachable. If detachable, the warrant may pass from hand to hand,⁵³ and it may be exercised without pres-

⁴⁹ See *Hoyt v. Shenango Valley Steel Co.*, (1903) 207 Pa. 208, 56 A. 422, and *Public Bancorporation v. Atlantic City Wimsett Thrift Co.*, (1932) 110 N. J. Eq. 23, 158 A. 729; *Milwaukee Sanatorium v. Lynch*, (1941) 238 Wis. 628, 300 N. W. 760, following *Johnson v. Bradley Knitting Co.*, (1938) 228 Wis. 566, 280 N. W. 688, comment, 6 *Univ. of Chicago Law Review* (Dec. 1938) 104; 14 *Notre Dame Lawyer* (Nov. 1938) 23; 30 *Marquette Law Review* (May, 1946) 23.

An amendment of the articles of incorporation to deny the preëemptive right of stockholders was upheld in *Albrecht, Maguire & Co. v. General Plastics*, (1939) 256 N. Y. App. Div. 134, 9 N. Y. Supp. (2d) 415. It was held, however, that the amendment was not binding on a stockholder who voted against the amendment. See also *Heller Investment Co. v. Southern Title & Trust Co.*, (1936) 17 Cal. App. (2d) 202, 61 P. (2d) 807.

⁵⁰ *Heylandt Sales Co. v. Welding Gas Products Co.*, (1943) 180 Tenn. 437, 175 S. W. (2d) 557.

⁵¹ *Real Estate Trust Co. v. Bird*, (1899) 90 Md. 229, 44 A. 1048.

⁵² See *Tripp v. North Butte Mining Co.*, (1938) 100 F. (2d) 188.

⁵³ In *Garner and Forsythe*, "Stock Purchase Warrants and 'Rights,'" 4 *Southern California Law Review* 375 (1931), it was stated that, although a stock purchase warrant is not a negotiable instrument, some of the qualities of a negotiable instrument may be secured by the insertion of a provision in the warrant making title transferable.

entation of the security to which it was attached on original issue. If non-detachable, the warrant is exercisable only upon presentation of the security to which it is attached. In some cases, a warrant is non-detachable until a fixed date, and detachable after that date.

Purpose of stock purchase warrants. The primary purpose of a corporation in issuing stock purchase warrants is to enhance the marketability of the security which it accompanies by giving it a speculative value. The warrant generally accompanies preferred stock, bonds, or other securities that are more or less non-speculative. It entitles its holder to purchase common stock at some future time at a fixed price. If the value of the common stock is higher than the price fixed in the warrant during the period in which it is exercisable, the holder of the preferred security is in a position to make a profit, either by selling the warrant separately, if it is detachable, or by exercising his right to purchase the common stock. The popularity of the stock purchase warrant and the frequency of its use depend upon whether or not the public is in a speculative mood. If market conditions do not warrant a belief in the probable rise in value of common stock, a stock purchase warrant attached to a security will not promote its salability.

Stock purchase warrants have sometimes been used to assure control of the corporation to its existing management. The managers are given warrants to purchase stock at a given price, and are thus placed in a position to acquire sufficient stock to retain control at any time that such control is threatened by the joining of forces of other stockholders.

Stock purchase warrant distinguished from right to subscribe. The term "warrant" is sometimes loosely used to indicate either a stock purchase warrant or a right of stockholders to subscribe to additional issues of stock. The distinction between a stock purchase warrant and the right to subscribe to stock should, however, be kept clearly in mind. A stock purchase warrant creates a *future* right to acquire stock of the corporation at a favorable price. A right to subscribe grants a *present* privilege of purchas-

For a discussion of the nature of stock purchase warrants, and the relation of the stockholder's preëmptive right to the creation and issuance of such warrants, see Garner and Forsythe, "Stock Purchase Warrants and 'Rights,'" 4 *Southern California Law Review* 269-292, 375-392. See also Berle, "Convertible Bonds and Stock Purchase Warrants," 36 *Yale Law Journal* 649-666.

ing additional stock proposed to be issued and represents an interest in the property of the corporation.⁵⁴

Stock purchase warrant distinguished from convertible stock. The chief distinction between a stock purchase warrant and stock that may be converted into some other form of security is the manner in which the conversion privilege is exercised. In the case of convertible stock, the stock itself is surrendered, and some other stock is received in exchange. The corporation decreases the outstanding stock of one class and increases that of another class. In the case of a stock purchase warrant, the warrant is likewise surrendered, but it must be accompanied by a cash payment for the purchase of the stock called for by the warrant.

Authority for issuance of stock purchase warrants. Generally, the power to issue stock purchase warrants is vested by statute solely in the board of directors, and consent of the stockholders is not required unless the corporation charter so provides. If no provision is contained in the statute or in the charter authorizing issuance of stock purchase warrants, authority for their creation and issuance would seem to rest with the body having power to authorize creation and issuance of the stock purchasable upon exercise of the warrant.

Procedure when stock purchase warrants are issued with other securities. When the stock purchase warrants are issued in connection with some other security, issuance of the warrants is usually authorized at the same time and in the same manner as is the issuance of the security which the warrant is to accompany. The resolution authorizing the issuance of the securities with the warrants generally empowers the officers of the corporation to execute an indenture, setting forth the form of the warrants and the terms and conditions upon which they are to be issued and exercised. The indenture is in the form of an agreement between the corporation and some bank or trust company as trustee for the warrant holders, and sets forth all the rights and obligations of the warrant holders, the corporation, and the trustee. While it is customary to have a warrant agreement, such an agreement is not necessary. In some instances, the terms and conditions under which the warrants are issued are set forth in the warrant itself.

Protection of holders of stock purchase warrants. To protect

⁵⁴ For a discussion of the legal principles concerning rights to subscribe, see page 476.

holders of stock purchase warrants against possible dilution, change, or destruction of their privilege of purchasing stock at a fixed price through acts of the corporation, provision is generally included in the warrant or in the agreement under which it is issued for adjustment of the terms of the warrant in the event of such dilution, change, or destruction. These protective provisions generally cover the following acts of the corporation that may affect the privilege of the stock purchase warrant holder: (1) the sale of the stock purchasable upon exercise of the warrant at a price lower than that fixed in the warrant; (2) the grant of options to acquire the stock purchasable upon exercise of the warrant at a price lower than that fixed in the warrant; (3) the issuance of stock convertible into shares purchasable upon exercise of the warrant at a price lower than that fixed in the warrant; (4) the issuance of stock with the right to participate in dividends with the stock purchasable upon exercise of the warrant; (5) a split-up or combination of shares of stock purchasable upon exercise of the warrant; (6) the payment of stock dividends in stock purchasable upon exercise of the warrant; (7) an offer of rights to subscribe to the stock purchasable upon exercise of the warrant; (8) redemption of stock to which the warrant is attached; and (9) reclassification of stock, sale of assets, merger, consolidation, reorganization, or dissolution.

Options to Purchase Stock

Nature of options to purchase stock. An option to purchase stock is a contract, under the terms of which one party, known as the optionor, agrees with another party, known as the optionee, that the latter shall have the privilege of purchasing certain shares of stock belonging to the optionor, at a fixed price and within a limited period of time. It is sufficient if the contract, while not specifically stating the price, prescribes a method which will necessarily result in the determination of the price.⁵⁵ An option at a stated price "on terms to be agreed upon" has been upheld.⁵⁶ An option must be exercised within the time fixed, or, if no time is fixed, within a reasonable time.⁵⁷

The distinguishing characteristic of an option⁵⁸ is that it im-

⁵⁵ *R. F. Robinson Co. v. Drew*, (1928) 83 N. H. 459, 144 A. 67.

⁵⁶ *Morris v. Ballard*, (1926) 16 F. (2d) 175.

⁵⁷ *West Texas Utilities Co. v. Ellis*, (1937) (Tex. Civ. App.) 102 S. W. (2d) 234, rev'd on other grounds, 126 S. W. (2d) 13.

⁵⁸ For a definition of options, see *Jones v. Vereen*, (1935) 52 Ga. App. 157, 182 S. E. 627; *Anthis v. Sandlin*, (1931) 149 Okla. 126, 299 P. 458; *Mitzlaff v. Midland*

poses no binding obligation upon the person holding the option.⁵⁹ The option is merely a continuing offer which the optionee may accept within the time fixed and which the optionor may not withdraw until expiration of the time limit;⁶⁰ it is not a contract for the sale of the stock.⁶¹ If an optionee elects not to comply with the terms of an option, the optionor may not compel compliance even if some payment on the option has been made.⁶²

Essential elements of an option to purchase stock. Two distinct elements are embraced in the option: an offer to sell, which does not become a contract unless and until it is accepted according to its terms,⁶³ and a completed contract to leave the offer open for a specified time.⁶⁴ To make an option binding upon the optionor and irrevocable during the option period, all the essential elements of an ordinary contract must be present:⁶⁵ (1) the offer of the optionor to grant the option to purchase must be accepted by the optionee;⁶⁶ (2) the option must be supported by a consideration (discussed below); (3) the parties must be competent to contract, and their assent must have been free from fraud, duress, undue influence, and mistake; (4) the object of

Lumber Co., (1930) 338 Ill. 575, 170 N. E. 695; Northside Lumber & Bldg. Co. v. Neal, (1929) (Tex. Civ. App.) 23 S. W. (2d) 858; Axe v. Tolbert, (1914) 179 Mich. 556, 146 N. W. 418.

For a general discussion of the subject of options, see James, "The Law of Option Contracts," *Dominion Law Reports*, (1930) Part 1, pp. 1-26.

⁵⁹ See *Suburban Imp. Co. v. Scott Lumber Co.*, (1932) 59 F. (2d) 711, cert. denied 53 S. Ct. 123; *Oleson v. Bergwell*, (1939) 204 Minn. 450, 283 N. W. 770. In the final analysis, whether an agreement is a sale or an option is determined by the intent of the parties. *Thompson v. Sweet*, (1932) 91 Colo. 552, 17 P. (2d) 308; *McHenry v. Mitchell*, (1908) 219 Pa. 297, 68 A. 729.

⁶⁰ *Moresi v. Burleigh*, (1930) 170 La. 270, 127 So. 624; *Postel v. Hagist*, (1928) 251 Ill. App. 454.

⁶¹ *Smith v. Tomlin*, (1936) 102 Ind. App. 103, 1 N. E. (2d) 297; *Keller v. Reed*, (1932) 347 Ill. 645, 180 N. E. 459; *Jacobson v. Barnes*, (1930) 158 Wash. 691, 291 P. 1109; *Lewis v. Bollinger*, (1921) 115 N. Y. Misc. 221, 187 N. Y. Supp. 563.

⁶² *Bruce v. Mieir*, (1932) 120 Cal. App. 287, 7 P. (2d) 1037.

⁶³ *Russ v. Tuttle*, (1910) 158 Cal. 226, 110 P. 813. See also *Price v. Town of Ruston*, (1932) 19 La. App. 356, 139 So. 55; *Kingston v. Anderson*, (1940) 3 Wash. (2d) 21, 99 P. (2d) 630.

⁶⁴ *Bayfield v. Defenbacher*, (1932) 266 Ill. App. 385; *Behrman v. Max*, (1931) 102 Fla. 1094, 137 So. 120; *Spitzli v. Guth*, (1920) 112 N. Y. Misc. 630, 183 N. Y. Supp. 743; *First Nat. Bank of Hastings v. Corporation Securities Co.*, (1915) 128 Minn. 341, 150 N. W. 1084. See also *In re Cheda's Estate*, (1922) 58 Cal. App. 433, 209 P. 70; *Couch v. McCoy*, (1905) 138 F. 696; *Johnson v. Kruse*, (1939) 205 Minn. 237, 285 N. W. 715.

⁶⁵ *Jones v. Vereen*, (1935) 52 Ga. App. 157, 182 S. E. 627; *Gillen v. Bayfield*, (1931) 329 Mo. 681, 46 S. W. (2d) 571; *Monahan v. Allen*, (1913) 47 Mont. 75, 130 P. 768; *Frissell v. Nichols*, (1927) 94 Fla. 403, 114 So. 431.

⁶⁶ See footnote 65.

the contract must be legal; and (5) the contract must be in the form required by law.

The same legal principles which govern options to purchase other property are also applicable to options to purchase stock. The supporting cases in the footnotes are therefore not limited to those involving options to purchase stock.

Necessity of consideration for option to purchase stock. An option that is supported by a consideration is a binding, enforceable contract, and the option cannot be withdrawn during the time agreed upon for its duration.⁶⁷ An option that is not supported by a consideration is a mere offer that may be revoked at any time prior to acceptance.⁶⁸ Even if no consideration is given for the option, it is a continuing offer that remains open for the time fixed, unless sooner revoked by notice to the optionee;⁶⁹ if it is not revoked before acceptance, it becomes a valid and binding contract between the parties as soon as proper tender of performance is made by the optionee.⁷⁰

Options to purchase stock given to other stockholders, corporation, or officers. Ordinarily a stockholder has the right to dispose of his shares as he sees fit. He may give an option for the purchase of his stock just as he may give an option for the purchase of any other property. There is no reason, therefore, why stockholders may not mutually contract with each other that, whenever any of them wishes to sell stock, the other stockholders or the corporation may have the exclusive right or option to purchase it during a limited time after notice of the wish to sell. Such an agreement has been held binding and enforceable by several courts.⁷¹

⁶⁷ *Copple v. Aigeltinger et al.*, (1914) 167 Cal. 706, 140 P. 1073; *Larned v. Wentworth*, (1901) 114 Ga. 208, 39 S. E. 855; *Leadbetter v. Price*, (1921) 103 Ore. 222, 202 P. 104; *Baker v. Mulrooney*, (1920) 265 F. 529; *Prior v. Hilton & Dodge Lumber Co.*, (1913) 141 Ga. 117, 80 S. E. 559; *Baker v. Shaw*, (1912) 68 Wash. 99, 122 P. 611.

⁶⁸ *Ankeney v. Brenton*, (1931) 214 Iowa 357, 238 N. W. 71; *Thomas v. Birch*, (1918) 178 Cal. 483, 173 P. 1102; *Real Estate Co. of Pittsburgh v. Rudolph*, (1930) 301 Pa. 502, 153 A. 438; *Brinley v. Nevins*, (1914) 162 N. Y. App. Div. 744, 147 N. Y. Supp. 985; *Friendly v. Elwert*, (1911) 57 Ore. 599, 112 P. 1085.

⁶⁹ *Hersh v. Garau*, (1933) 218 Cal. 460, 23 P. (2d) 1022.

⁷⁰ *Ibid.*

⁷¹ *Model Clothing House v. Dickinson*, (1920) 146 Minn. 367, 178 N. W. 957, citing *Farmers' Mercantile & Supply Co. v. Laun*, (1911) 146 Wis. 252, 131 N. W. 366; *Weiland v. Hogan*, (1913) 177 Mich. 626, 143 N. W. 599; *New England Trust Co. v. Abbott*, (1894) 162 Mass. 148, 38 N. E. 432; *Nicholson v. Franklin Brewing Co.*, (1910) 82 Ohio 94, 91 N. E. 991; *Fitzsimmons v. Lindsay*, (1903) 205 Pa. 79, 54 A. 488; *Moses v. Soule*, (1909) 63 N. Y. Misc. 203, 118 N. Y. Supp. 410; *Id.*,

A corporation may give an option to purchase stock to its officers in consideration for their services.⁷²

Price at which corporation must offer shares of new stock to old stockholders. The general rule is that the corporation is not required to offer shares of a new issue of capital stock to its stockholders, pursuant to their preëmptive rights, at par, if the stock is worth more than par.⁷³ However, some cases hold that although stock is worth more than par, it must be offered to the shareholders at par.⁷⁴ In any event, the corporation cannot dispose of the stock to outsiders at a price lower than that at which it was offered to the existing stockholders.⁷⁵

136 N. Y. App. Div. 904, 120 N. Y. Supp. 1136; *Doss v. Yingling*, (1930) 95 Ind. App. 494, 172 N. E. 801.

⁷² *McQuillen v. National Cash Register Co.*, (1939) 27 F. Supp. 639; *Wyles v. Campbell*, (1948) 77 F. Supp. 343.

⁷³ *Stokes v. Continental Trust Co.*, (1906) 186 N. Y. 285, 78 N. E. 1090; *McClanahan v. Heidelberg Brewing Co.*, (1947) 303 Ky. 739, 199 S. W. (2d) 127.

⁷⁴ *Hammond v. Edison Illuminating Co.*, (1902) 131 Mich. 79, 90 N. W. 1040.

⁷⁵ *Stokes v. Continental Trust Co.*, *supra* (Note 73).

CHAPTER 18

RESOLUTIONS RELATING TO RIGHTS TO SUBSCRIBE TO STOCK, STOCK PURCHASE WARRANTS, AND OPTIONS TO PURCHASE STOCK

No. 389

Resolution of directors authorizing offer of rights to subscribe for stock, subject to effectiveness of registration statement.

RESOLVED, That, subject to the taking effect on or before, 19.., of the Registration Statement, No., of Company, as amended on, 19.., and as it may be further amended, which Registration Statement was filed on, 19.., with the Securities and Exchange Commission under the Securities Act of 1933, as amended,

First. That the holders of record of the capital stock of Company as of the close of business, 19.., be offered the right to subscribe for one additional share of capital stock without par value for each four shares of such capital stock without par value held of record as of the close of business on, 19.., such subscriptions to be on the following terms and subject to the following conditions:

a. Written subscriptions for the shares to which stockholders are entitled to subscribe must be filed with the Trust Company, Subscription Agent, on or before three o'clock P.M., the .. day of, 19.., and be accompanied by payment therefor at the rate of (\$.....) Dollars per share for each share subscribed.

b. No subscription for fractional shares will be received.

Second. That the forms of transferable subscription warrants for capital stock and transferable fractional subscription warrants for capital stock, presented to this meeting and ordered filed with the records of the Company, be and they hereby are approved and that such warrants be issued to each stockholder of Company of record as of the close of business, 19.., evidencing the right of subscription of such stockholder, on the terms and conditions hereinbefore authorized.

Third. That any or all of said shares of stock to which holders of subscription warrants are entitled to subscribe, which are not subscribed and paid for in accordance with the provisions thereof and the foregoing provisions of these resolutions, may be offered for subscription by the directors of Company to such persons and at such times and at such prices, not less than (\$.....) Dollars per share, as said directors may determine.

Fourth. That the issue of the shares of stock of Company subscribed upon said rights, or otherwise subscribed in accordance with the foregoing provisions of these resolutions, be and the same hereby is authorized, and upon the payment for the same, the President or a Vice President, and the Secretary or Assistant Secretary or the Treasurer or the Assistant Treasurer of Company be and they hereby are authorized to execute and deliver, or cause the delivery of, stock certificates therefor, to the persons entitled to receive the same.

No. 390

Resolution of directors authorizing issuance of stock after increase, offer to stockholders of rights to subscribe subject to effectiveness of registration statement, appointment of subscription agent, and delivery of prospectus.

[Issuance of stock after increase]

RESOLVED, That upon the filing in the office of the Secretary of State, of the State of, of the Certificate of increase of the number of shares, without par value, pursuant to Section of the Corporation Law, authorized by the stockholders of this Company on, 19..., this Company issue a maximum of (.....) shares of common stock, without par value.

[Offer of rights to subscribe after effectiveness of registration statement]

FURTHER RESOLVED, That on or after the effective date of the Registration Statement of this Company, this Company offer to holders of record of common stock, without par value, at the close of business on, 19..., the right to subscribe, until 3 o'clock P.M. (Eastern Standard Time) on, 19..., to common stock, without par value, in the ratio of one (1) share for each four (4) shares held of record at the close of business on, 19..., at the price of (\$.....) Dollars per share, payable in New York funds to the order of Trust Company of, as Agent of the Company, at its main office, (Street), (City), (State), or at its London office, (Street), London, England.

[Mailing of rights; fractional shares]

FURTHER RESOLVED, That transferable rights evidencing such subscription rights and to be surrendered to the said Agent upon the exercise thereof, be mailed on or about, 19.., to the holders of common stock of record as of that date; that rights in respect of fractional shares be issued entitling the holder upon surrender thereof, and of other fractional rights together aggregating one or more full shares, to subscribe to the number of full shares which such fractional share rights shall together aggregate, no subscriptions to be made for fractional shares.

[Approval of form of rights]

FURTHER RESOLVED, That the form of rights and rights in respect of fractional shares submitted to this meeting be and the same are hereby approved, subject to such changes as may be advised by counsel, or as may be requested by the Trust Company of, as Transfer Agent, or the New York Stock Exchange.

[Date to determine rights]

FURTHER RESOLVED, That in lieu of closing the transfer books of the Company,, 19.., is hereby designated as a record date for the determination of the common stockholders entitled to the right to subscribe to the aforesaid additional shares of common stock, without par value, within the time and upon the basis and terms in these resolutions set forth.

[Letter and prospectus to be sent to stockholders]

FURTHER RESOLVED, That upon the effective date of the Registration Statement filed with the Securities and Exchange Commission, or as soon thereafter as practicable, a letter substantially in form presented to this meeting, together with a Prospectus substantially in form presented to this meeting, be sent to all holders of common stock and to all holders of preferred stock with warrants for the purchase of common stock attached, of record as of the close of business on date upon which the said Registration Statement becomes effective; and that said notices and Prospectus be continued to be sent to each holder of common stock or preferred stock with warrants for the purchase of common stock attached, who shall become such until the close of business, 19..

[Listing of additional stock on Exchange]

FURTHER RESOLVED, That an application be made to the New York Stock Exchange for the listing of the aforesaid (....) shares of additional common stock, without par value, and the aforesaid subscription rights of this Company, and that,, and,

or any one of them, be and they are hereby designated to appear before the said Committee on Stock List of said New York Stock Exchange with authority to make such changes in said application or any agreements relative thereto as may be necessary to conform with requirements for listing.

[Appointment of subscription agent]

FURTHER RESOLVED, That Trust Company of be and it hereby is designated the Agent of this Company (1) for the purpose of issuing and mailing as soon as practicable after, 19.., but not later than, 19.., to the holders of common stock of record at the close of business on that date, the subscription rights referred to in the foregoing resolutions, together with a notice and Letter of Transmittal substantially in the form presented to this meeting, (2) for the purpose of splitting, grouping, and transferring subscription rights and rights in respect of fractional shares (including the splitting of full share subscription rights into fractional shares subscription rights) after the original issuance thereof and until the right of the said holders of common stock to subscribe has expired, and (3) for the purpose of the acceptance of the aforesaid subscription rights for exercise of the subscription privilege, and to accept payment for the shares of common stock to be issued upon the exercise of such rights and as such Agent, in behalf of this Company, to requisition the Transfer Department of Trust Company of for the required common stock in such names and denominations as may be necessary; to deliver such certificates for shares of common stock called for by the rights so exercised and upon receipt of such payment, to deposit the funds so received to the credit of said Company in its banking account with said Trust Company of, and to notify the Treasurer of this Company accordingly.

[Issuance and delivery of stock certificates by transfer agent]

FURTHER RESOLVED, That upon the exercise of said subscription rights for common stock, Trust Company of, as Transfer Agent of this Company, shall issue, upon requisition of the Subscription Agent, and cause to be registered, and shall deliver certificates for common stock to such Agent in respect of the rights so exercised.

[Delivery of prospectus with stock certificate to other than registered holders of rights]

FURTHER RESOLVED, That Trust Company of, as Subscription Agent of this Company, shall deliver a copy of the Prospectus with certificates for common stock when said

certificates are issued to someone other than the registered holders of the subscription rights surrendered.

[Subscription agent to act on advice of officers and counsel]

FURTHER RESOLVED, That Trust Company of, in carrying out its duties as such Subscription Agent in accordance with these resolutions, be and it hereby is authorized and directed to act upon the instructions of the President or Vice President, or the Secretary or Treasurer of this Company, and to rely upon the advice of counsel for this Company.

[Countersignature of certificates by Transfer Agent]

FURTHER RESOLVED, That Trust Company of, as Transfer Agent, is hereby authorized to record, countersign, and deliver to Trust Company, as Registrar, for countersignature as an original issue, in accordance with the resolutions of its appointment as Transfer Agent of the common stock of this Company, certificates for (....) shares of common stock, without par value, in addition to the number of shares specified in resolutions heretofore adopted appointing said Trust Company of as Transfer Agent, provided, however, that at the present time said Transfer Agent shall record, countersign, and deliver to said Trust Company, as Registrar, for countersignature as an original issue not in excess of (....) shares, the balance of said shares, to wit, (....), to be issued upon further instructions of proper officers of this Company pursuant to resolutions duly adopted by the Board of Directors of this Company.

[Countersignature by Transfer Agent of shares not purchased pursuant to subscription rights]

FURTHER RESOLVED, That Trust Company of, as Transfer Agent, is hereby authorized to record, countersign, and deliver to Trust Company, as Registrar, for countersignature as an original issue, certificates for such shares of the shares of common stock offered for subscription (the number of which will depend upon the number of holders of common stock at the close of business on, 19.., and which in no event will exceed (....) shares) as shall not be purchased pursuant to the exercise of the subscription privilege, hereinbefore referred to, in such names and for such number of shares as the President or Vice President of this Company may in writing direct, duly attested by the Secretary or Assistant Secretary, under the seal of this Company.

No. 391

Resolution of directors authorizing offer to stockholders of additional common stock at fixed price.

RESOLVED, First: That the (....) shares of common stock

without par value of this Company, heretofore authorized, be offered to stockholders of record at the close of business on, 19.., for subscription pro rata according to their respective stockholdings on or before, 19.., at the price of (\$.....) Dollars a share, payable in cash or in New York funds at the time of subscription, or at the option of the subscriber, (....%) per cent thereof at the time of subscription, and the remaining (....%) per cent on or before the .. day of, 19...

Second: That the Board of Directors be and hereby is authorized and directed to cause proper transfers and subscription warrants to be prepared in accordance with this resolution and sent by mail as soon as practicable after, 19.., to stockholders of record at the close of business on that date.

Third: That the Board of Directors be and hereby is authorized to cause scrip certificates to be issued for fractional shares of new stock, containing provisions for exchange of such scrip certificates for certificates for full shares, and such other terms and conditions as to voting powers and dividend rates as the Board may deem advisable.

Fourth: That the Board of Directors be and hereby is authorized to do and cause to be done all such acts and things, and to adopt all such rules and regulations, as may seem necessary or proper for the issuance of the common stock without par value in substantially the manner above provided, and for the prompt retirement of such scrip certificates as may be issued.

No. 392

Resolution of directors offering to sell all remaining unissued stock to stockholders.

RESOLVED, That all the unissued authorized capital stock of this Corporation, consisting of (....) shares of common stock having a par value of (\$.....) Dollars each, be offered to the stockholders of record at the close of business on the .. day of, 19.., for subscription pro rata according to their respective stockholdings on the date aforementioned, at par, payable in cash at the time of subscription, this offer to remain open until and including the .. day of, 19..; and that the President be and he hereby is authorized to sell at par, any of the said stock remaining unsold after the .. day of, 19...

No. 393

Resolution appointing subscription agent to receive warrants evidencing rights to subscribe for stock.

RESOLVED, That the Trust Company be and it

hereby is appointed Subscription Agent: (1) to receive Subscription Warrants evidencing the right to subscribe for one or more shares of the capital stock of this Company, in the form presented to and approved at this meeting, when accompanied by the subscription price of (\$.....) Dollars per share up to 3:00 P.M., E.S.T., on, 19.., on the offering of (....) shares of capital stock without par value of this Company, to be made in accordance with the resolutions of this Board as adopted on, 19..; (2) upon receipt of subscriptions in proper form, to requisition, when and as necessary, from the Trust Company, as Transfer Agent for said capital stock, the shares of capital stock to be delivered under the terms of said Warrants; (3) upon receipt of certificates for said shares of capital stock, to make delivery to or upon the order of the respective subscribers; (4) to surrender said Subscription Warrants to this Company for cancellation, and to remit to this Company the subscription price so received; and be it further

RESOLVED, That the Trust Company, as Transfer Agent, be and it hereby is authorized and directed to countersign, issue, and record said shares of capital stock upon requisitions therefor, as hereinbefore provided; and be it further

RESOLVED, That, a Vice President, be and he hereby is authorized, in behalf of the Company, to furnish the Trust Company with such instructions and directions as may be necessary to carry out the purposes and intent of these resolutions.

No. 394

Resolution authorizing execution of underwriting agreement for stock not purchased by holders of warrants for rights to subscribe.

RESOLVED, That, President of Company, be and he hereby is authorized and directed, for and in behalf of Company, to execute the underwriting agreement in the form presented to this meeting and ordered filed with the records of the Company, addressed to & Co. and The Company, under the terms of which & Co., The Company,, Inc., & Co., and and Company, agree to purchase, upon the terms and conditions therein stated, the shares of capital stock of Company not purchased by the holders of subscription warrants evidencing the right to subscribe for such capital stock issued to the stockholders of Company, as heretofore authorized at this meeting.

No. 395

Resolution of stockholders waiving their preëmptive right to subscribe to increased stock and authorizing sale to president.

WHEREAS, the capital stock of this corporation was increased from (.....) shares of common stock without par value to (.....) shares of common stock without par value by authority of the stockholders given at a special meeting held on the .. day of, 19.., and none of said (.....) new shares of common stock without par value has been issued; and

WHEREAS,, President of this corporation, has submitted an offer to this corporation to purchase all of said (.....) shares of unissued common stock for the price of (\$.....) Dollars per share, payable in cash,

THEREFORE, BE IT RESOLVED, That the stockholders of this corporation do hereby waive their preëmptive right to subscribe in proportion to their respective holdings of the capital stock of this corporation to the (.....) shares of unissued common stock without par value made available by the increase in the capital stock duly authorized at a special meeting of the stockholders held on the .. day of, 19.., and they do hereby authorize the Board of Directors to accept the offer of and to issue to said (.....) shares of common stock without par value, and the certificate or certificates evidencing the same, upon full payment therefor.

STOCK PURCHASE WARRANTS

No. 396

Resolution of directors authorizing creation of stock purchase warrants and reserving stock for issuance upon exercise of warrants.

RESOLVED, That this Company create an issue of Common Stock Purchase Warrants, covering the right to purchase shares of Common Stock of this Company, all as set forth in the form of Common Stock Purchase Warrant hereafter adopted by this Board of Directors at this meeting.

RESOLVED, That there be and hereby is authorized the issue of such Common Stock Purchase Warrants in temporary form covering the right to purchase (.....) shares of Common Stock of this Company; that the President, or a Vice-president, be and hereby is authorized to sign, for and in behalf of this Company, temporary warrants issuable on the transfer thereof or in exchange or substitution

therefor; and that the proper officers be and hereby are authorized to cause to be delivered with and attached to the temporary certificates for (.....) shares of \$...... Cumulative Dividend Preferred Stock (heretofore authorized at this meeting to be issued and delivered) temporary Common Stock Purchase Warrants covering the right to purchase an equivalent number of shares of Common Stock of this Company, and thereafter, upon the transfer, exchange, or substitution of temporary certificates for any of said shares of Preferred Stock, to cause to be delivered therewith and attached thereto temporary Common Stock Purchase Warrants for an equivalent number of shares of Common Stock.

RESOLVED, That of the authorized but unissued shares of Common Stock of this Company, there be and hereby are reserved for sale to holders of said Common Stock Purchase Warrants, or their assigns, (.....) shares thereof, which shall be used only for issuance upon exercise of the said warrants.

No. 397

Resolution of directors determining rights of holders and terms and conditions of stock purchase warrants.

WHEREAS, this Company has agreed, in connection with the issuance and sale to and Company, of (.....) 7% Cumulative Preferred Shares, to deliver to said and Company, Common Share Purchase Warrants, granting rights to purchase (.....) Common shares without par value of this Company, and

WHEREAS, the form of the said warrants should be determined, and the rights of the holders thereof, and the terms and conditions of the said Common Share Purchase Warrants should be fixed,

NOW, THEREFORE, BE IT RESOLVED, That Common Share Purchase Warrants conferring rights to purchase (.....) Common shares without par value of this Company be issued and delivered in connection with the sale to and Company of (.....) 7% Cumulative Preferred Shares, and that the terms, limitations, and conditions under which said warrants shall be issued, and the rights of the bearers thereof, and the form thereof, shall be as follows:

(Here follows a full description of the stock purchase warrants.)

RESOLVED FURTHER, That the warrants conferring rights to purchase one hundred (100) shares shall be numbered W1 to W, and that the warrants conferring rights to purchase less than one hundred (100) shares shall be numbered WO1 to WO

RESOLVED FURTHER, That the price for which the (.....) Common shares without par value of this Company shall be sold upon the exercise of the warrants heretofore authorized shall be as follows:

(Here follow the prices.)

AND RESOLVED FURTHER, That this Company sell or cause to be sold to the bearers of said warrants, upon the exercise thereof, Common shares without par value of this Company for such price, and in accordance with the provisions of the warrants and the terms, limitations, and conditions thereof.

No. 398

Resolution of directors authorizing execution of agreement appointing warrant agent.

RESOLVED, That this Corporation enter into an agreement with the President and directors of the Company, a copy of which agreement has been exhibited to this meeting, whereby this Corporation shall and does hereby appoint said President and directors of the Company, Warrant Agent for Common Share Purchase Warrants conferring rights to purchase (.....) Common shares without par value of this Corporation; and that the President and Secretary of this Corporation be and they hereby are authorized to execute said agreement with said Warrant Agent for and in behalf of this Corporation, in the form as presented to said meeting, or with such modifications thereof as may be accepted by the said President and Secretary, and to affix the corporate seal of the Corporation thereto; and authority is hereby given to said President and Secretary to modify said agreement in such manner and in such particulars as to them may seem necessary or advisable.

AND RESOLVED FURTHER, That all of said warrants shall be subject to said agreement, and that the rights of the bearers thereof shall be as expressed in said warrants and said agreement.

No. 399

Resolution of directors reserving common shares to satisfy rights of holders of stock purchase warrants.

WHEREAS, the Company has heretofore authorized the issuance, in connection with the sale of (.....) 7% Cumulative Preferred Shares, of Common Share Purchase Warrants conferring rights to purchase (.....) Common shares without par value of this Company, and

WHEREAS, this Company, in said warrants and the agreement con-

cerning the same, covenanted and agreed to reserve and set aside (.....) Common shares without par value of this Company, for the purpose of satisfying the rights of the warrant bearers,

NOW, THEREFORE, BE IT RESOLVED, That (.....) Common shares without par value of the Company be and they hereby are appropriated, reserved, and irrevocably set aside until the .. day of, 19.., for the purpose of satisfying the rights of the bearers of said warrants by the sale to them of said Common shares in accordance with the terms and provisions thereof; and that as and when said warrant rights are exercised by the bearers thereof, and the price for said Common shares paid, as provided in said warrants, the Company shall issue, out of said (.....) Common shares, certificates for Common shares in satisfaction of said warrants.

No. 400

Resolution of directors authorizing issuance of stock upon exercise of stock purchase warrants, and fixing consideration for shares to be issued.

WHEREAS, (.....) shares of common stock are authorized by the amended Certificate of Incorporation of this Company,

WHEREAS, (.....) shares of common stock have heretofore been authorized to be issued,

WHEREAS, (.....) shares of common stock have heretofore been reserved for sale to holders of Common Stock Purchase Warrants,

NOW, THEREFORE, BE IT RESOLVED, That there be and hereby is authorized the issue of (.....) shares of common stock.

RESOLVED, That said (.....) shares of common stock be issued at any time or from time to time on or after, 19.., to or on the order of the persons purchasing the same at (\$.....) Dollars per share under the purchase privilege contained in the Common Stock Purchase Warrants of this Company now outstanding upon receipt of full payment of such purchase price.

No. 401

Resolution of directors authorizing extension of time to exercise stock purchase warrants and reduction of subscription price.

RESOLVED, by the Board of Directors of the Corporation, a corporation of the State of, that the life of Stock Purchase Warrants outstanding under the Trust Agreement entered into between this Corporation and the Trust Com-

pany, as Trustee, dated, 19.., be and hereby is extended from, 19.., to, 19.., inclusive, and that during such extended life, the price of \$42.50 to be paid for each share of Class A Common Stock purchasable with such warrants be and hereby is reduced to \$30 per share.

RESOLVED FURTHER, That the said Trust Agreement be and hereby is amended by changing to “..... .., 19..,” the date therein of “..... .., 19..,” which limits the life of the Stock Purchase Warrants provided therein, and further by changing to “\$30” the amount therein of “\$42.50,” which limits the price to be paid for each share of Class A Common Stock purchasable in connection with said warrants.

RESOLVED FURTHER, That upon the exercise at any time by any holder of any such warrant of any right hereby created, such holder thereby waives any right, conferred in Section of the said Trust Agreement, or in any other section thereof, to any adjustment in price to be paid for any stock purchasable in connection with any such warrant.

RESOLVED FURTHER, That except as hereinbefore provided, the said Trust Agreement shall remain unchanged and in full force and effect.

RESOLVED FURTHER, That the proper officers of this Corporation be and they hereby are authorized and instructed to do for and in the name of this Corporation all acts and things necessary to carry this resolution into effect.

OPTION TO PURCHASE STOCK

No. 402

Resolution of directors giving an option to purchase stock of corporation.

WHEREAS, by appropriate action, the Capital Stock of this Corporation is being increased from (\$.....) Dollars to (\$.....) Dollars, to consist of (\$.....) Dollars Common Capital Stock (being the present authorized Capital Stock; viz., (\$.....) Dollars and (\$....) Dollars of the new stock) and (\$....) Dollars (....%) per cent Cumulative Preferred Stock (being the balance of the new stock), and

WHEREAS, all the stockholders of this Corporation have duly waived in writing their rights to subscribe to any part of said (\$.....) Dollars of stock not yet issued, and

WHEREAS, “A” has asked this Board of Directors to grant him an

option to purchase all of the said unissued stock for cash, at par, to continue for a period of (....) years from this date, and

WHEREAS, in the opinion of this Board, it is for the best interests of this Corporation to grant him such option,

NOW, THEREFORE, BE IT RESOLVED, That, in consideration of the payment of (\$.....) Dollars on account of such option (receipt of which is hereby acknowledged by this Corporation), an option is hereby given, for a period of (....) years from the date hereof, to "A," his heirs, and assigns, to purchase for cash, at par, the entire amount of (\$.....) Dollars of the unissued stock of this Corporation, or any part thereof, with the understanding that such payment of (\$.....) Dollars, already made by him, shall be applied upon the purchase price of any stock purchased by him, his heirs, or assigns, under the terms of this option.

No. 403

Extract from minutes of directors' meeting, approving option by corporation to employee to purchase stock.

The Secretary then submitted and read an option agreement with "X," giving "X" the right and option to purchase five thousand (5,000) shares of the common stock of this Corporation at (\$.....) Dollars per share at any time on or before , 19...

After consideration and upon motion duly made, seconded, and unanimously carried, it was

RESOLVED, That the option agreement with "X," submitted to this meeting, be and the same hereby is authorized and approved, and

RESOLVED, That the Vice President and Secretary of this Corporation be and they hereby are authorized and directed to execute the option agreement with "X" in substantially the form submitted to this meeting, and

RESOLVED, That a copy of the said option agreement be inserted in the minute book following the minutes of this meeting.

No. 404

Resolution of directors authorizing exercise, in part, of option to purchase stock.

WHEREAS, a certain option agreement was executed under date of , 19.., by and between "A," "X" Corporation, and "B," Trustee, by which said "A" granted to "X" Corporation an option to purchase all or any part of fifty thousand (50,000) shares of the

common stock of "Y" Corporation pursuant to the terms and conditions therein in said agreement set forth, and

WHEREAS, in the opinion of this Board it is desirable that "X" Corporation exercise at this time a part of said option and acquire a part of said common stock of "Y" Corporation,

NOW, THEREFORE, BE IT RESOLVED, That "X" Corporation exercise at this time its option with respect to fifteen thousand (15,000) shares of said "Y" Corporation common stock, in accordance with the terms of the aforesaid option, reserving to itself the right from time to time to exercise said option as to the remainder of said fifty thousand (50,000) shares as provided in the aforesaid agreement.

RESOLVED FURTHER, That a certified copy of these resolutions be transmitted to "A" and to "B," Trustee.

RESOLVED FURTHER, That said "B," Trustee, be, and he hereby is, authorized and empowered, upon transfer and delivery to "X" Corporation of fifteen thousand (15,000) shares of the common stock of "Y" Corporation, to transfer and deliver to said "A" nine thousand (9,000) shares of the common stock of "X" Corporation as payment in full therefor.

RESOLVED FURTHER, That the executive officers of the Corporation, or any of them, be, and they hereby are, authorized and empowered to do and perform all such acts and things as may be necessary or appropriate to carry into effect these resolutions.

No. 405

Resolution of directors authorizing extension of time for exercise of option to purchase stock.

WHEREAS, this Corporation entered into an agreement dated, 19.., with of the City of, State of, under the terms of which this Corporation granted to the said an option to purchase (....) shares of the preferred stock of this Corporation on or before, 19.., at a price of (\$.....) Dollars per share, and

WHEREAS, the said has notified this Corporation by letter dated, 19.., that he will be unable to exercise the said option within the time specified in the said option agreement, and

WHEREAS, the said has requested that the time within which he may exercise the option aforesaid be extended to, 19.., and has indicated his willingness to pay, im-

mediately upon the granting of said extension, an additional sum of (\$.....) Dollars as consideration for the granting of said extension, and

WHEREAS, the Board of Directors of this Corporation deems it advisable to grant the said request for an extension of time to exercise the option aforesaid for the consideration offered, be it

RESOLVED, That the time within which may exercise the option to purchase (....) shares of preferred stock of this Corporation at a price of (\$.....) Dollars per share, granted to him under the agreement between this Corporation and the said dated, 19.., be and the same hereby is extended to and including, 19.., provided that the said shall pay to this Corporation on or before, 19.., an additional sum of (\$.....) Dollars as consideration for the extension of time herein provided, and

RESOLVED FURTHER, That the proper officers of this Corporation be and they hereby are directed to do all things and to execute any and all instruments necessary and proper to carry out the foregoing resolution.

CHAPTER 19

CALLS FOR PAYMENT OF STOCK AND ASSESSMENTS

Meaning of a "call." Strictly speaking, a "call" is a demand upon a shareholder for the balance of the purchase price of his shares, or some part of such balance.¹ The term "call" has, however, been applied to the resolution calling for payment, to the notice or demand for payment, and sometimes to the time when payment is due. The words "call" and "assessment" are frequently used interchangeably, for "assessment" also means that a fixed payment is required of the shareholder. "Call," however, is generally understood to apply to unpaid subscriptions, while "assessment" is used to designate demands for additional contributions on stock that is already fully paid.

Necessity for calls for payment of stock. The time when stock must be paid for is generally determined by the provisions of the contract between the corporation and the purchaser of the stock. Usually the subscription contract, or contract of purchase, fixes the time of payment or indicates that payment shall be made in such installments as shall from time to time be called by the directors. Generally, in the absence of any indication in the agreement as to when payments are due, it is understood that they are due on call.² In some jurisdictions, however, if the subscription contract does not fix the time for payment of the subscription, or provide that it is to be paid when called for by the company, the subscription becomes due and payable at once.³ It has been held that a subscriber may agree to pay his subscription at certain times and in certain amounts, subject to statute or charter limitations.⁴

A call for payment must be made before the corporation can

¹ *Germania Iron Min. Co. v. King*, (1896) 94 Wis. 439, 69 N. W. 181; *Campbell v. American Alkali Co.*, (1903) 125 F. 207; *Wall v. Basin Mining Co.*, (1909) 16 Idaho 313, 101 P. 733; *Newman v. Sexton*, (1910) 156 Ill. App. 517.

² *San Bernardino County Sav. Bank v. Denman*, (1921) 186 Cal. 710, 200 P. 606.

³ *Harris v. Gateway Land Co.*, (1900) 128 Ala. 652, 29 So. 611; *Hawkins v. Donnerberg*, (1901) 40 Ore. 97, 66 P. 691, 908; *In re Phoenix Hardware Co.*, (1918) 249 F. 410.

⁴ *Wark Co. v. Beach Hotel Corporation*, (1931) 113 Conn. 119, 154 A. 252.

bring an action against the subscriber for the amount due.⁵ A subscriber may, however, waive the necessity for a call and pay for his stock in full or in part at any time.⁶ Some cases, however, hold that the subscriber may pay in full for his stock before payment is due only if the corporation is willing to accept payment.⁷ If the subscription contract indicates when specific payments must be made, the subscriber must pay the installments as they fall due; it is not necessary for the corporation to call for payment.⁸

Who has authority to make calls. A call, in order to be valid, must be made by proper authority in compliance with any express provisions contained in the statute, charter, by-laws, or subscription contract.⁹ The statute, charter, and by-laws usually confer the power of making calls for unpaid subscriptions upon the board of directors. If the statute does not expressly make it the duty of the directors to make calls, the power to make calls may be given to the stockholders. The board of directors must make the calls for payment in the absence of a provision conferring the power on others.¹⁰ If the call is made without proper authority, it is invalid, unless it has been ratified by those who had authority in the first place to make the call.

Calls by directors. Where the directors have authority to make calls, a call must be made by a properly constituted board of directors at a regular meeting or at a special meeting regularly called.¹¹ However, if all the directors are personally present and participate in making the call, the fact that notice of the meeting has not been given as provided in the by-laws is immaterial.¹²

⁵ *Glenn v. Marbury*, (1892) 145 U. S. 499, 12 S. Ct. 914. See also *South Milwaukee Co. v. Murphy*, (1902) 112 Wis. 614, 88 N. W. 583; *Handley Inv. Co. v. Trenholme*, (1916) 91 Wash. 146, 157 P. 472; *Coast Amusements v. Stineman et al.*, (1931) 115 Cal. App. 746, 2 P. (2d) 447; *Carpenter v. Griffith Mortgage Corp.*, (1934) 20 Del. Ch. 132, 172 A. 447.

⁶ *Marsh v. Burroughs*, (1871) 1 Woods (U. S.) 463. See also *Wark Co. v. Beach Hotel Corporation*, (1931) 113 Conn. 119, 154 A. 252.

⁷ *San Bernardino County Sav. Bank v. Denman*, (1921) 186 Cal. 710, 200 P. 606.

⁸ *Myrtle Point Mill & Lumber Co. v. Clarke*, (1922) 102 Ore. 533, 203 P. 588; *Commonwealth Bonding & Casualty Ins. Co. v. Hill et al.*, (1916) (Tex. Civ. App.) 184 S. W. 247; *Columbus Institute of Milwaukee v. Conohan*, (1916) 164 Wis. 219, 159 N. W. 720; *U. S. Grant Hotel Co. v. Kehias*, (1929) 255 Ill. App. 101.

⁹ *New Jersey Midland R. Co. v. Strait*, (1872) 35 N. J. L. 322; *Wood v. Universal Adding Machine Co.*, (1911) 166 Ill. App. 346.

¹⁰ *Budd v. Multnomah St. Ry. Co.*, (1887) 15 Ore. 413, 15 P. 659; *Carpenter v. Griffith Mortgage Corp.*, (1934) 20 Del. Ch. 132, 172 A. 447.

¹¹ *Cheney v. Canfield*, (1910) 158 Cal. 342, 111 P. 92.

¹² *Minneapolis Times Co. v. Nimocks*, (1893) 53 Minn. 381, 55 N. W. 546.

Whoever has authority to make calls has the right to determine whether a call is advisable; the action of directors who have authority to make a call cannot be questioned by the stockholders, if the call has been made in good faith and for corporate purposes.¹³ The directors, of course, have no power to make calls at times and for purposes in violation of the agreement entered into with subscribers.¹⁴

If there is an express or implied condition that all capital stock must be subscribed for before calls for unpaid subscriptions are made, the directors cannot make a valid call for payment until that condition has been met, unless the subscriber has waived the condition precedent or is estopped from insisting that the condition be fulfilled.¹⁵

Amount of call. The body which has authority to make calls for payment of stock has the power to determine the amount for which the call shall be made, subject to such limitations as are set forth in the general laws, the charter, the by-laws, or the contract between the corporation and the shareholder. In order to be valid, the call must be uniform and in ratable amounts, and any call which requires some shareholders to pay a higher rate than others is unjust and void.¹⁶ However, the corporation has the right to call against the stock of certain stockholders for such an amount of their subscriptions as will produce enough to make their payments equal to the payments already made by other stockholders; no inequality results from such action.¹⁷

Resolution authorizing call for payment. The resolution authorizing a call for payment of stock should be carefully framed, for it lays the foundation for recovery of payment if the stockholder does not respond to the call. The following information should be included in the resolution:

1. The stockholders to whom the call applies. (The corporation can look only to the list of stockholders as their names appear upon its books, to determine who is liable to call.)¹⁸

¹³ *Nashua Savings Bank v. Anglo-American L. M. & A. Co.*, (1903) 189 U. S. 221, 23 S. Ct. 517, aff'g 108 F. 764; *Budd v. Multnomah St. Ry. Co.*, (1887) 15 Ore. 413, 15 P. 659; *Visalia & T. R. Co. v. Hyde*, (1895) 110 Cal. 632, 43 P. 10; *Wark Co. v. Beach Hotel Corporation*, (1931) 113 Conn. 119, 154 A. 252.

¹⁴ *Roberts v. Mobile & O. R. Co.*, (1856) 32 Miss. 373.

¹⁵ See *Huxtable v. Shumate*, (1922) 79 Ind. App. 293, 134 N. E. 896; *Hendrix v. Academy of Music*, (1884) 73 Ga. 437.

¹⁶ *Great Western Tel. Co. v. Burnham*, (1891) 79 Wis. 47, 47 N. W. 373; *Germania Iron Min. Co. v. King*, (1896) 94 Wis. 439, 69 N. W. 181; *Geary St., P. & O. R. Co. v. Rolph*, (1922) 189 Cal. 59, 207 P. 539.

¹⁷ *Imperial Land & Stock Co. v. Oster*, (1917) 34 Cal. App. 776, 168 P. 1159.

¹⁸ *Prudential Petroleum Co. v. Peck*, (1933) 132 Cal. App. 4, 22 P. (2d) 559.

2. The amount or percentage of the subscription required to be paid.
3. The time when payment is due.
4. The person to whom payment should be made.
5. The place at which payment is to be made.
6. Directions that notice of the call be given by the proper officer of the corporation.

From a legal standpoint, all of this information may not be necessary. All that is required is that there shall be some act or resolution which evidences or shows a clear official intent to render due and payable a part or all of the unpaid subscription,¹⁹ and that the terms of the call shall be definite.²⁰ The call need not show for what purpose it is being made,²¹ unless that information is specifically required by statute, charter, by-laws, or agreement. The call may be valid, even though the resolution does not name the place at which or the person to whom payment is to be made, if the notice of the call gives this information.²² A call that did not name the time, place, or person to whom payment was to be made was held to be valid; the call was held to be payable on demand, to the treasurer, at the corporation's place of business.²³

For effect of transfer of stock upon liability for calls and assessments, see page 535.

Notice of the call. In some states, notice of the call must be given to the subscribers; in others, notice does not appear to be necessary in order to bring an action against subscribers for payment,²⁴ unless especially required by the statute, charter, by-laws, or subscription contract. The weight of authority, however, requires that notice be given.

The notice of the call need not necessarily follow any particular form, unless a special form is required by statute, charter, by-laws, or contract. It should, however, contain all the infor-

¹⁹ *Budd v. Multnomah St. Ry. Co.*, (1887) 15 Ore. 413, 15 P. 659.

²⁰ *North Milwaukee Town Site Co. No. 2 v. Bishop*, (1899) 103 Wis. 492, 79 N. W. 785.

²¹ *Budd v. Multnomah St. Ry. Co.*, *supra* (Note 19).

²² *American Pastoral Co. v. Gurney*, (1894) 61 F. 41.

²³ *Western Imp. Co. v. Des Moines Nat. Bank*, (1897) 103 Iowa 455, 72 N. W. 657.

²⁴ *Germania Iron Min. Co. v. King*, (1896) 94 Wis. 439, 69 N. W. 181. In this case, notice of the call was held to be necessary under the statute. See also *Peoria Inv. Corp. v. Hoagland*, (1939) 300 Ill. App. 54, 20 N. E. (2d) 627, in which it was held that the statute requiring demand for payment did not apply to subscriptions included in the statement of incorporation, unless the stock was payable in installments.

mation required by the statute, charter, by-laws, or agreement, and should also indicate to the recipient that a call has been made and that payment is required. A good plan to follow is to have the notice contain the same information that appears in the resolution authorizing the call. The length of notice to be given depends upon statutory, charter, by-law, or contract requirements. If no provision is made for the length of notice to be given, reasonable notice is sufficient.²⁵

Importance of observing formalities in making calls for payment. All statutory, charter, by-law, and contract provisions concerning the necessity for calls, formalities of making calls, and giving notice of calls should be followed. To be sure, the courts have at times overlooked irregularities and informalities in calls where there has been a substantial compliance with statutory requirements and the call has otherwise been adequate;²⁶ but to avoid legal entanglements, a corporation should adhere scrupulously to all requirements. A subscriber may, by his acts or by express agreement, waive formalities in making the call, in notice of the call, or may even waive the call itself.²⁷

Remedies of corporation on failure to respond to call for payment. The statutes in most states contain some provision indicating the remedies available to the corporation upon failure of a subscriber to respond to a call for payment of his stock. Following are the most common remedies:

1. The corporation may bring an action at law against the delinquent subscriber to recover the amount of the unpaid call.

2. The corporation may sell at public auction such part of the shares as will pay the call due, plus expenses.

3. The corporation may sell the shares, apply the proceeds to the payment of the installment called for, plus expenses, and refund the excess to the original owner.

4. If the proceeds of a sale are insufficient to pay the installment due, plus expenses, the corporation may sue the delinquent stockholder for the remainder.

5. The corporation may declare the stock and all previous payments made thereon to be forfeited to the corporation.

6. The corporation may be given the right to purchase the shares through its secretary, its president, or any director, for the

²⁵ *Fairchild County Turnpike Co. v. Thorp*, (1839) 13 Conn. 173.

²⁶ *Macon & A. R. Co. v. Vason*, (1876) 57 Ga. 314.

²⁷ *Graebner v. Post*, (1903) 119 Wis. 392, 96 N. W. 783. See also *Gowans v. Rockport Irr. Co.*, (1930) 77 Utah 198, 293 P. 4.

amount of the assessment, plus costs, if no bidder offers the amount of the assessment and costs.

In some states, the statutes permit the corporation to determine by its by-laws the manner of selling shares or forfeiting them for failure to pay calls. Remedies for nonpayment of calls may also be included in the corporate charter²⁸ or in the subscription contract.

The statutes generally require that notice be given to the subscribers of the proposed sale or forfeiture of their shares.

Right of corporation to sue for payment of call. A corporation generally has the privilege to sue for the amount called, even though the statute or the charter may give the corporation a special remedy, such as the right to sell or to forfeit the shares.²⁹ The statutory provision is merely cumulative and does not deprive the corporation of the remedy by action to recover unpaid subscriptions.³⁰ After resorting to the remedy of forfeiture, however, the corporation cannot sue at law,³¹ unless the right to do so is given by the statute.³²

Forfeiture of shares for nonpayment. The right to forfeit or to sell shares of a subscriber for nonpayment is not an inherent power of the corporation; it must have the power delegated to it by statute or by its charter. Without such power, a majority of the stockholders cannot pass a by-law permitting the corporation to forfeit shares;³³ stockholders who have not assented to such a by-law will not be bound by it.³⁴ A subscriber, however, may

²⁸ *Bessette v. St. Albans Co-operative Creamery*, (1935) 107 Vt. 103, 176 A. 307.

²⁹ *Nashua Savings Bank v. Anglo-American Land, Mtge. & Agency Co.*, (1903) 189 U. S. 221, 23 S. Ct. 517; *Imperial Land & Stock Co. v. Oster*, (1917) 34 Cal. App. 776, 168 P. 1159.

³⁰ *Campbell v. American Alkali Co.*, (1903) 125 F. 207; *Troy & B. R. R. Co. v. Tibbits*, (1854) 18 Barb. (N. Y.) 297; *Mills v. Stewart*, (1869) 41 N. Y. 384; *State ex rel. Havner v. Associated Packing Co.*, (1929) 210 Iowa 754, 227 N. W. 627; *Ohio Valley Industrial Corp. v. H. L. Seabright Co.*, (1931) 111 W. Va. 55, 160 S. E. 300.

³¹ *Buffalo & N. Y. City R. R. Co. v. Dudley*, (1856) 14 N. Y. 336.

³² *Mandel v. Swan Land & Cattle Co.*, (1895) 154 Ill. 177, 40 N. E. 462.

³³ Provisions for such forfeiture cannot be included in the by-laws unless they are authorized by the general corporation law or the corporate charter. *Monroe Dairy Ass'n v. Webb*, (1899) 40 N. Y. App. Div. 49, 57 N. Y. Supp. 572. It would seem, however, that, by the unanimous vote of the stockholders, a by-law may be adopted, giving the corporation the right to forfeit or sell the shares of defaulting stockholders. If the corporation is expressly empowered to adopt such a by-law, no question concerning its validity can arise so long as the by-law provision is general in its application and affects all delinquent stockholders alike. *Budd v. Multnomah St. Ry. Co.*, (1887) 15 Ore. 415, 15 P. 659.

³⁴ *In re Election of Directors of Long Island R. Co.*, (1837) 19 Wend. (N. Y.) 37.

make a contract providing that default in any payment shall forfeit previous payments, unless there is a statute, a charter, or a by-law provision prohibiting such a contract.³⁵

Forfeitures are not favored by the law, and the provisions of the statute, charter, by-laws, or contract governing forfeitures are strictly construed.³⁶ Those seeking to enforce a forfeiture must strictly observe all requirements that are necessary to enable them to exercise this strong power.³⁷

If there are no provisions as to the details to be followed in enforcing a forfeiture of stock, the only requirement is that the method adopted be reasonable and just.³⁸ The statutes generally indicate the notice that must be given to delinquent subscribers before the corporation can forfeit the shares or apply the remedies permitted by statute. The statutory provision as to notice must be followed with strictness.³⁹

Any action concerning the forfeiture of stock should be taken by a properly constituted board of directors, at a meeting called as required by statute, charter, or by-laws. The record of the meeting, as well as the notice of forfeiture to be sent to subscribers, should be checked against the requirements of the statute, charter and by-laws to see that the procedure prescribed has been correctly followed.⁴⁰

After forfeiture or sale of shares, the delinquent stockholder is divested of title to the stock. His liability for further payments to the corporation ceases and he is also relieved from liability to creditors for the amount unpaid, even though the debt was contracted with the creditor before the forfeiture.⁴¹ If the stockholder has been discharged intentionally in order to defraud creditors, the forfeiture is of no effect and the stockholder is not relieved from liability.⁴²

³⁵ *Denman v. County Club Realty Co.*, (1920) 143 Ark. 502, 220 S. W. 824.

³⁶ *Matter of N. Y. & Westchester Town Site Co.*, (1911) 145 N. Y. App. Div. 623, 130 N. Y. Supp. 414.

³⁷ *Jent v. Friggeri*, (1935) 141 Kan. 144, 40 P. (2d) 343; *Jensen v. Northwestern Underwriters Assn.*, (1916) 35 N. D. 223, 159 N. W. 611.

³⁸ *Crissey v. Cook*, (1903) 67 Kan. 20, 72 P. 541.

³⁹ *Nashua Savings Bank v. Anglo-American Land, Mtge. & Agency Co.*, (1903) 189 U. S. 221, 23 S. Ct. 517.

⁴⁰ It is not essential that the resolution show that stock of a particular subscriber is being forfeited, if proper notice is given to the subscriber. *Crissey v. Cook*, (1903) 67 Kan. 20, 72 P. 541.

⁴¹ *Mills v. Stewart*, (1862) 62 Barb. (N. Y.) 444, aff'd in 41 N. Y. 384; *American Well & Prospecting Co. v. Blakemore*, (1920) 184 Cal. 343, 193 P. 779.

⁴² *American Well & Prospecting Co. v. Blakemore*, *supra* (Note 41).

Meaning of assessments. As indicated on page 506, the words "call" and "assessment" are frequently used interchangeably. Strictly speaking, however, the word "assessment" means a demand upon stockholders for payment above the par value or contract price in the case of no par value shares.

Power to make assessments on fully paid stock. A corporation in the sale and issuance of its stock assumes a contractual relation with the shareholder.⁴³ One of the carefully guarded rights of the stockholder under the contract is that no demand for payment shall be made by the corporation above the par value or price contracted to be paid for the shares of stock. In some states, the statutes specifically provide that stock for which the agreed consideration has been paid shall be nonassessable.⁴⁴ In others, the assessment is indirectly prohibited, that is, the corporation is given the power to make assessments upon stock, not exceeding in the whole the balance remaining unpaid under the contract of subscription.

Stockholders who have paid in full for their shares may not be called upon to pay an additional assessment unless (1) the statute or articles of incorporation⁴⁵ authorize an assessment upon fully paid stock,⁴⁶ or (2) unless an express and valid agreement for the assessment is made with the stockholder.⁴⁷

Assessments under statutory or charter provisions. The statutes that permit assessment of fully paid stock vary in the several states. Assessments made under these statutes must conform to the requirement of the law,⁴⁸ for the courts strictly

⁴³ *Peters v. United States Mortg. Co.*, (1921) 13 Del. Ch. 11, 114 A. 598.

⁴⁴ See *Moore v. Los Lugos Gold Mines*, (1933) 172 Wash. 570, 21 P. (2d) 253, for nonassessability because of constitutional prohibition.

⁴⁵ See *Simons v. Groesbeck*, (1934) 268 Mich. 495, 256 N. W. 496, and *Melville v. Rhodes*, (1925) 136 Wash. 220, 239 P. 560, in which the right to levy an assessment on fully paid stock was recognized where authorized by the articles of incorporation. See also *Good v. Starker*, (1932) 207 Wis. 567, 242 N. W. 204.

A corporation may amend its articles to provide for the power of assessment. *Wilson v. Cherokee Drift Mining Co.*, (1939) 14 Cal. 56, 92 P. (2d) 802.

⁴⁶ *Central Wisconsin Trust Co. v. Barter et al.*, (1912) 194 F. 835, aff'g 185 F. 192; *Huxtable v. Berg*, (1917) 98 Wash. 616, 168 P. 187; *Schueth v. Farmers' Union Milling & Grain Co.*, (1927) 116 Neb. 14, 215 N. W. 458; *Forsyth v. Selma Mines Co.*, (1921) 58 Utah 142, 197 P. 586; *Moore v. Los Lugos Gold Mines*, (1933) 172 Wash. 570, 21 P. (2d) 253.

⁴⁷ *Harris v. Northern Blue Grass Land Co.*, (1911) 185 F. 192; *Johnson v. Tennessee Oil, etc. Co.*, (1908) 74 N. J. Eq. 32, 69 A. 788; *Milton v. Bergstrom*, (1916) 71 Fla. 197, 70 So. 1008; *Big Creek Ditch Co. v. Hulick*, (1929) 130 Ore. 408, 280 P. 492, 495. See also *Child v. Idaho Hewer Mines*, (1930) 155 Wash. 280, 284 P. 80. For a review of cases, see 39 *Yale Law Journal* 580 (1929).

⁴⁸ *Herbert Kraft Co. v. Bank of Orland*, (1901) 133 Cal. 64, 65 P. 143; *Corcoran*

construe the provisions of the statute. Thus, the assessment must be made for the purpose described in the statute.⁴⁹ If the assessment is for a proper purpose, the directors' motive in levying it is immaterial.⁵⁰ If the statute fixes the maximum that may be called for, the assessment should be within the limit prescribed.⁵¹

The assessment, in order to be valid, must be authorized by those given the power by the statute or the certificate of incorporation to levy assessments and must be made in the manner prescribed. An improperly levied assessment may be declared void by the court.⁵²

The directors are generally authorized to make assessments.⁵³ If the directors are empowered to levy an assessment, they must do so at a legal meeting, properly called.⁵⁴ As in the case of calls for unpaid subscriptions, an assessment on full paid stock must be uniform; an assessment upon certain shareholders and not upon others is invalid.⁵⁵

Assessments pursuant to agreements with stockholders. Even in the absence of a statutory or charter provision authorizing assessments upon fully paid stock, the stockholders may agree to pay an assessment on fully paid stock for the benefit of the corporation. If the voluntary assessment is supported by a valid consideration, the corporation can enforce the agreement

v. Sonora Min. & Mill. Co., (1902) 8 Idaho 651, 71 P. 127; *Brown v. St. Paul Consolidated Oil Co.*, (1929) 101 Cal. App. 263, 281 P. 646. See also *Rancho La Sierra v. Bixby*, (1936) 12 Cal. App. 342, 55 P. (2d) 527; *Schroeter v. Bartlett Syndicate Bldg. Corporation*, (1936) 8 Cal. 12, 63 P. (2d) 824.

⁴⁹ *Glenn v. California Trona Co.*, (1918) 38 Cal. App. 601, 177 P. 178; *Kehlor v. Chesley Finance Corp.*, (1932) 123 Cal. App. 4, 10 P. (2d) 801.

⁵⁰ *Clark v. Oceano Beach Resort Co.*, (1930) 106 Cal. App. 574, 289 P. 946.

⁵¹ See, however, *Forsyth v. Selma Mines Co.*, (1921) 58 Utah 142, 197 P. 586, in which a provision of the statute that "no assessment shall exceed 10 per cent of the outstanding capital stock of the corporation unless the corporation is unable to meet its obligations or satisfy the claims of its creditors, in which case the assessment may be made for the full amount unpaid upon its capital stock, or for any less amount that may be sufficient to meet such obligations or claims," was held not to apply to assessments on full paid stock but only to calls or assessments on unpaid subscriptions.

⁵² *Koshaba v. Koshaba*, (1942) 56 Cal. App. (2d) 302, 132 P. (2d) 854.

⁵³ See *La Plante v. Hopper*, (1932) 127 Cal. App. 146, 15 P. (2d) 525.

⁵⁴ *Cheney v. Canfield*, (1910) 158 Cal. 342, 111 P. 92. See also *Farbstein v. Pacific Oil Tool Co.*, (1932) 127 Cal. App. 157, 15 P. (2d) 766, holding assessment made by de facto directors valid.

⁵⁵ *Herbert Kraft Co. v. Bank of Orland*, *supra* (Note 48); *Seyberth v. American Commander Min. & Mill. Co.*, (1926) 42 Idaho 254, 245 P. 392; *Omaha Law Library Ass'n v. Connell*, (1898) 55 Neb. 396, 75 N. W. 837.

of the assenting stockholders.⁵⁶ When stockholders voluntarily pay an assessment, although the stock is fully paid and nonassessable, they cannot later recover payment from the corporation or its officers.⁵⁷

The consent of the stockholder to an assessment may sometimes be given indirectly. For example, if the corporation passes a by-law providing for an assessment, and a stockholder, with knowledge of that by-law and with full acquiescence, purchases shares of stock, he will be deemed to have agreed to the provisions of the by-law with regard to the assessment.⁵⁸ Of course, if the stockholder received his stock before the passage of the by-law fixing the assessment, it cannot be said that he consented to the assessment if he did not concur in the passage of the by-law.⁵⁹

Formalities in the levy of an assessment. The directors or stockholders, whichever body is authorized to levy the assessment, should do so by resolution properly proposed, seconded, and voted upon. A complete record should be kept of the action taken. If the certificate of incorporation authorizes the levy of an assessment only upon the vote of a certain percentage of the stockholders, the record should show that the required number of stockholders voted in favor of the assessment. An assessment on fully paid shares has been held unenforceable because a proper record of the transaction was not made.⁶⁰ Notice of the

⁵⁶ *Harris v. Northern Blue Grass Land Co.*, (1911) 185 F. 192, aff'd in *Central Wisconsin Trust Co. v. Barter*, (1912) 194 F. 835; *Johnson v. Tennessee Oil, etc., Co.*, (1908) 74 N. J. Eq. 32, 69 A. 788; *Milton v. Bergstrom*, (1916) 71 Fla. 197, 70 So. 1008; *Dalton v. National Life, Health & Accident Ins. Co.*, (1928) 9 La. App. 528, 119 So. 439. See also *Good v. Derr*, (1931) 46 F. (2d) 411; also Arthur S. Dewing, *Corporate Promotions and Reorganizations* (Cambridge, Mass., Harvard University Press, 1914), p. 193, for an illustration of legal difficulties involved in assessing full paid stock.

⁵⁷ *Speckert v. Bunker Hill Arizona Mining Co.*, (1940) 6 Wash. (2d) 39, 106 P. (2d) 602.

⁵⁸ *Blue Mt. Forest Ass'n v. Borrowe*, (1901) 71 N. H. 69, 51 A. 670; *Jonas v. Frost*, (1919) 32 Idaho 214, 179 P. 949; *Big Creek Ditch Co. v. Hulick*, (1929) 130 Ore. 401, 280 P. 492.

⁵⁹ *Sullivan County Club v. Butler*, (1899) 26 N. Y. Misc. 306, 56 N. Y. Supp. 1.

⁶⁰ *Corcoran v. Sonora Min. & Mill. Co.*, (1902) 8 Idaho 651, 71 P. 127, in which it was held that, in order to levy an assessment and sell the stock of a stockholder for failure to pay an assessment, every requirement of the statute must be followed. Where the statute requires a complete record of every transaction, oral evidence was not admissible to prove the records of a corporation in a suit brought to set aside a sale of stock of a stockholder for nonpayment of assessments. Merely reciting in the record that an assessment was levied was not sufficient.

assessment should be given to stockholders in strict conformity with the requirements of the statute or the charter.⁶¹ In some states, publication of notice is required in addition to service upon the individual stockholders. In others, power to assess must be stated on the face of the stock certificate.

Enforcement of assessments on fully paid stock. The principles concerning the enforcement of assessments on fully paid stock are similar to those applying to enforcement of calls on unpaid subscriptions.⁶² Stockholders become liable for the payment of valid assessments and the corporation may bring an action against them to enforce the liability. The corporation has no right to forfeit or to sell the shares of stockholders who have failed to pay a valid assessment, unless the statute or charter expressly so provides.⁶³ Where forfeiture and sales are permitted by statute or by charter, the provisions as to notice of the forfeiture or sale and the requirements as to the manner of conducting the sale must be pursued in exact conformance to the law.⁶⁴

Power of corporation to assess stock marked "nonassessable." Many corporations issue stock that bears upon its face the words "fully paid and nonassessable." Such a provision becomes a part of the contract between the corporation and the stockholder, and, as between these two parties, the agreement may be relied upon and enforced.⁶⁵ But where the necessity arises to collect the assets of the corporation for the purpose of discharging its liabilities, the stockholders are obliged to pay whatever remains unpaid on their stock, despite the fact that the stock is marked "nonassessable."⁶⁶

In some states the statute gives the corporation the power to levy an assessment against capital stock fully paid up, for the purpose of paying expenses, conducting the business, or paying debts. The fact that the certificates bear upon their face the words "full paid and nonassessable" renders the shares repre-

⁶¹ See *Wilson v. Cherokee Drift Mining Co.*, (1939) 14 Cal. 56, 92 P. (2d) 802.

⁶² See page 510.

⁶³ *Williams v. Lowe*, (1876) 4 Neb. 382, aff'd in 94 U. S. 650.

⁶⁴ See *Newhall v. Hunsaker*, (1918) 38 Cal. App. 399, 176 P. 380; *Clark v. Oceano Beach Resort Co.*, (1930) 106 Cal. App. 475, 289 P. 946.

⁶⁵ *Wall v. Basin Mining Co.*, (1909) 16 Idaho 313, 101 P. 733; *Whicher v. Delaware Mines Corp.*, (1932) 52 Idaho 304, 15 P. (2d) 610; *A. C. Frost & Co. v. Coeur D'Alene Mines Corporation*, (1939) 60 Idaho 491, 92 P. (2d) 1057.

⁶⁶ *Upton, Assignee v. Burnham*, (1873) 3 Biss. (U. S.) 520; *Norton v. Lamb*, (1936) 144 Kan. 665, 62 P. (2d) 1311; *Strong v. Frerichs*, (1938) (Mo. App.) 116 S. W. (2d) 533.

sented by the certificates nonassessable even under such a statute.⁶⁷ An agreement between the stockholder and the corporation that the stock shall be nonassessable may be evidenced by the certificate of incorporation describing the stock to be issued, or by a provision in the by-laws, in the certificates of stock, in the subscription contract, or in the contract of sale. However, where a statute prohibits a distinction or preference between shares, unless such preference or distinction is stated in the articles of incorporation, a contract between a corporation and one of its stockholders that the shares held by such stockholder shall be nonassessable is void if the same freedom from liability to assessment is not accorded to all the stockholders.⁶⁸

⁶⁷ *Wall v. Basin Mining Co.*, supra (Note 65).

⁶⁸ *Martin v. Palmer Union Oil Co.*, (1920) 184 Cal. 386, 193 P. 950, overruling *Lum v. American Wheel & Vehicle Co.*, (1913) 165 Cal. 657, 133 P. 303.

CHAPTER 20

FORMS RELATING TO CALLS FOR PAYMENT OF STOCK, AND ASSESSMENTS

No. 406

Resolution of directors fixing time of payment of subscriptions already obtained.

WHEREAS, various subscriptions to the common stock of this corporation do not fix the time for payment thereof but provide that payments shall be made thereon at such time or times and in such manner as called for by the Board of Directors; be it

RESOLVED, That all subscriptions to the common stock of this corporation, heretofore obtained, for which the time for payment has not been fixed, shall be payable in money in the following installments and at the following times—to wit:

..... (....%) per cent, or (\$....) Dollars per share on the .. day of, 19...

..... (....%) per cent, or (\$....) Dollars per share on the .. day of, 19...

RESOLVED FURTHER, That the Secretary be, and he hereby is, directed to send notice of this resolution to each subscriber whose subscription does not indicate the time of payment.

No. 407

Resolution of directors fixing terms of payment of subscriptions to be obtained in the future.

RESOLVED, That all future subscriptions to the authorized capital stock of this corporation at present unissued shall be payable in money as follows: twenty (20%) per cent at the time of signing the subscription, twenty (20%) per cent in one month, twenty (20%) per cent in two months, twenty (20%) per cent in three months, and twenty (20%) per cent in four months from the date of the subscription.

No. 408

Resolution of directors calling for full payment of stock subscribed by incorporators.

RESOLVED, That an assessment of one hundred (100%) per cent be levied upon the shares of stock subscribed by the incorporators, and unpaid, as evidenced by the certificate of incorporation.

No. 409

Resolution of directors authorizing call for entire amount remaining unpaid on subscriptions.

RESOLVED, That a call be, and the same hereby is, made upon all unpaid subscriptions to the stock of this company for the entire amount remaining unpaid thereon, and that the same is hereby ordered to be paid to the Treasurer of the company, on or before the .. day of, 19.., at the (City) office of the company.

RESOLVED FURTHER, That the Secretary be, and he hereby is, directed to mail a written notice at least days before the time for such payment to each stockholder subject to this call.

No. 410

Resolution of stockholders authorizing call for entire amount of unpaid subscriptions, in anticipation of judgment rendered against corporation.

WHEREAS, a judgment for (\$.....) Dollars was obtained by the Company against this Corporation in the Court on, 19.., and

WHEREAS, an appeal from said judgment has been taken by this Corporation to the Court, and

WHEREAS, the outcome of said appeal is uncertain, and it is possible that the judgment rendered against this Corporation may be affirmed, and the Corporation may be required to pay an amount aggregating between (\$.....) Dollars and (\$.....) Dollars, and

WHEREAS, to avoid additional expense it is deemed best to be prepared to meet such contingency,

BE IT RESOLVED, That a call be, and it hereby is, levied upon all unpaid subscriptions to the stock of this Corporation for the entire amount remaining unpaid thereon, and that the same is hereby ordered to be paid into the Corporation's treasury on or before, 19...

RESOLVED FURTHER, That the Secretary of this Corporation be, and

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he hereby is, authorized and directed forthwith to notify each and every subscriber to the stock of this Corporation, whose stock has not been fully paid for, of the aforesaid call, by sending notice thereof to such subscribers personally or by registered mail.

No. 411

Resolution of directors making call for payment of subscriptions in quarterly installments.

RESOLVED, That, for the purpose of providing funds for the building of additional plants, and for working capital, a call of (\$.....) Dollars upon each share of the preferred stock of the company, not credited as fully paid, be and it hereby is made, said call to be payable at the office of the company in four installments as follows: First installment, (\$.....) Dollars per share, payable on the .. day of, 19..; second installment, (\$.....) Dollars per share, payable on the .. day of, 19..; third installment, (\$.....) Dollars per share, payable on the .. day of, 19..; and fourth installment, (\$.....) Dollars per share, payable on the .. day of, 19...

RESOLVED FURTHER, That the Secretary be and he hereby is directed to give notice of this call immediately to the registered holders of the preferred stock subject to the call.

No. 412

Resolution of directors preliminary to forfeiture of shares for failure to pay call.

RESOLVED, That the Secretary be, and he hereby is, directed to send a notice to Mr., in accordance with (*insert here statutory, charter, or by-law requirement, designating the statute or article number of the certificate or by-laws*) requiring him to pay the call due on his shares with interest, and stating that, unless such call and interest are paid on or before the .. day of, 19.., his shares will be forfeited without further notice.

No. 413

Resolution of directors calling for unpaid subscription and authorizing forfeiture of previous payments upon failure to meet the call.

WHEREAS, of the City of, State of, did heretofore subscribe for (.....) shares, of the par value of (\$.....) Dollars each, of the capital stock of Company, the amount of his said subscription being (\$.....) Dollars; and

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WHEREAS, the said has heretofore paid on account of his said subscription the sum of (\$.....) Dollars, but declines and neglects to pay the balance thereof—to wit: the sum of (\$.....) Dollars although the same is past due and payable,

THEREFORE, BE IT RESOLVED, That the said be, and he hereby is, required to pay said unpaid balance on his said subscription on or before the .. day of, 19.., and that in the event that he shall decline or neglect to pay said balance on or before said date, said (....) shares of stock, subscribed for by him as aforesaid, and his said payment of (\$.....) Dollars thereon, be forfeited to the use of the said Company; and that a notice in writing be served upon him by depositing the same in the post office in the City of, State of, properly directed to him at (Street), (City), (State), stating that he is required to make payment of said balance on or before the .. day of, 19.., at the office of the Company, (Street), in the City of, State of, and that if he fails to make the same as aforesaid, said (....) shares of stock and the said payment of (\$.....) Dollars thereon will be forfeited for the use of the Company.

No. 414

Resolution of directors authorizing forfeiture for nonpayment of calls, public sale of shares forfeited, and collection of deficiency.

WHEREAS, sundry persons in whose names the stock of this corporation stands are delinquent in the payment of calls ordered thereon; and

WHEREAS, at the meeting of stockholders held on the .. day of, 19.., the following resolution was adopted, viz.:

RESOLVED, That the directors be, and they hereby are, requested to take prompt and efficient measures for the collection of unpaid calls upon the capital stock of this corporation, and, so far as they think expedient, to sell all such shares as are not paid on or before the .. day of, 19..,

THEREFORE, BE IT RESOLVED, That all stock on which calls shall remain unpaid on the .. day of, 19.., shall be, and hereby is, forfeited to the use of this corporation.

RESOLVED FURTHER, That the Treasurer be, and he hereby is, directed to issue a circular to be mailed to each delinquent stockholder, giving immediate notice of the above vote, and that all stock forfeited to the corporation by virtue of the foregoing resolution be brought to

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a public sale under the direction of the Treasurer, and sold at such times and places as he shall think expedient, and the Treasurer is hereby directed to enforce the collection of any deficiency that may remain unpaid on assessments after such sale by a suit at law.

RESOLVED FURTHER, That the minimum price of the stock be fixed at (\$.....) Dollars per share and that, if no offer is made at that price or more, the stock shall be bought in for the corporation.

No. 415

Resolution of directors authorizing sale at auction of shares forfeited for failure to pay call and publication of notice of sale.

WHEREAS, the persons named in the following list, holding the number of shares set against their names respectively, have neglected or refused to pay the calls due thereon, and

WHEREAS, proper notice was given on the .. day of, 19.., to each stockholder named in the following list requiring him to pay the call due on his shares and stating that, unless such call were paid on or before the .. day of, 19.., his shares would be forfeited, be it

RESOLVED, That the Treasurer be, and he hereby is, ordered, authorized, and directed to sell all such shares at auction, to the highest bidder, at the office of, in the City of, on the .. day of, 19.., ato'clock,M., for the non-payment of the call due thereon.

RESOLVED FURTHER, That the Treasurer be, and he hereby is, directed to publish notice of the time and place of such sale and of the sum due on each delinquent stockholder's shares, for three weeks successively, once in each week before the sale, in the (*name of newspaper*), and to mail a copy of such notice to each delinquent stockholder at his last-known post-office address, at least (....) days before such sale.

(Here follows list of delinquent stockholders and number of shares held by each.)

No. 416

Resolution of directors authorizing president to settle unpaid subscription with subscriber.

WHEREAS, on the .. day of, 19.., subscribed to (....) shares of common stock of this corporation and agreed to pay therefor (\$.....) Dollars upon the following terms: (\$.....) Dollars on the .. day of, 19.., and (\$.....) Dollars on the .. day of, 19..; and

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WHEREAS, the said, on the .. day of, 19.., made a payment of (\$.....) Dollars in accordance with the subscription agreement, and defaulted in the payment due on the .. day of, 19..; and

WHEREAS, it is the opinion of this Board of Directors that said is financially unable to make the payment of (\$.....) Dollars, and it would be to the disadvantage of this corporation to forfeit the stock of said because of his close relationship with certain valuable customers of this corporation,

THEREFORE, BE IT RESOLVED, That the President be, and he hereby is, authorized to negotiate with the said for settlement of the claim of this corporation for the unpaid balance of (\$.....) Dollars due on the subscription of said, upon the best possible terms, and to accept any sum offered by said, provided it be not less than (\$.....) Dollars, in full payment of his subscription to the aforesaid shares.

No. 417

Resolution of directors authorizing application of debt of corporation to unpaid subscription of creditor.

WHEREAS, this Company is indebted to the Company in the sum of (\$.....) Dollars for money expended, material furnished, and labor performed in the construction and operation of this Company's line of railroad, as shown by an itemized statement of account rendered on the .. day of, 19.., by the Company to this Company and now on file with the Secretary of this Company, and

WHEREAS, the said Company is a subscriber to (.....) shares of the common stock of this Company which stand on the books of this Company in the name of, trustee, and

WHEREAS, the books of this Company and the Treasurer's account show that only (\$.....) Dollars in cash have been paid to the Treasurer of this Company upon the said stock subscription, and that there is owing upon the said subscription (\$.....) Dollars, and

WHEREAS, the Company has consented to permit the sum of (\$.....) Dollars of their claim to be applied in payment of the balance due on said stock so that said stock shall stand in the name of the owner full paid and nonassessable,

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THEREFORE, BE IT RESOLVED, That (\$.....) Dollars of the amount owed by this Company to the Company be applied to the payment of the balance due upon the (....) shares of common stock subscribed for by the Company, and the said stock is hereby declared to be full paid and nonassessable, and this Company hereby acknowledges having received full value for the full amount of the par value of said stock.

No. 418

Waiver by stockholders of notice of calls.

We, the undersigned, being all the subscribers to the Capital Stock with which this Corporation begins business, do hereby waive days' notice of the time and place of the payment of our subscription to such stock, and we do also waive all the requirements of the laws of the State of as to notice of call and payment, and we agree to pay any part or all of the same to the Treasurer of the Corporation on demand, and at such time and in such amounts as the Corporation, by its Board of Directors, may direct.
Dated....., 19...

.....
.....
.....

No. 419

Notice of call.

....., 19...
To.....

You are hereby notified that a call of (\$.....) Dollars per share on all the shares of the Common Stock of the Corporation, payable on the .. day of .., 19..., was made by a resolution of the Board of Directors of the said Corporation, duly passed on the .. day of .., 19...

The amount due upon your subscription dated the .. day of .., 19..., is (\$.....) Dollars, which you will please pay to the Company's Treasurer, at No., City of .., State of .., on or before the .. day of .., 19...

When sending your check please forward this notice together with the form of receipt attached hereto.

By order of the Board of Directors.

.....
Secretary

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RECEIPT FOR PAYMENT OF CALL
of \$..... per Share of
Common Stock due
....., 19...
..... CORPORATION

RECEIVED, from, the sum of (\$.....)
Dollars, being the amount due on (.....) shares of common
stock in the above Corporation.

.....
Treasurer

No. 420

Notice to shareholders of postponement of due date of installments
on subscriptions.

..... COMPANY
..... STREET
..... CITY, STATE
....., 19...

To Our Shareholders:

On account of the extraordinary financial condition existing at the
present time, and for the convenience of prospective subscribers to the
stock of Company, the Board of Directors, at a
meeting held today, decided to defer the date when payment of the
second, third, and fourth installments will become due, to
...,, and, respectively.

The first payment, however, will be payable on, in
accordance with the original announcement.

Very truly yours,

.....
President

No. 421

Notice of sale or forfeiture of stock upon failure to pay installments
as provided in subscription contract.

To.....
.....
(Address)

You are hereby notified that you have been in default for more than
..... (....) days in the payment of the installment of
(\$.....) Dollars, due under contract of, 19..., in
which you subscribed to (....) shares of the capital stock of
the Corporation.

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Pursuant to the provisions of the law of the State of, a public sale of the said (.....) shares of stock will be held on, 19.., at o'clock in the noon, at the principal office of the said Corporation at (Street), (City), (State). Said shares will be sold to the highest bidder for cash, but no bids will be accepted for an amount less than the balance due on said shares under the terms of the said subscription contract, plus the costs and expenses of sale. If insufficient or no bid is made, your entire interest in the said shares, including amounts paid on account thereof, will be forfeited to the said Corporation as liquidated damages.

..... .., 19.. Corporation
By
Secretary

No. 422

Notice of forfeiture of payments made upon stock subscription for nonpayment of call (where sale is not required).

..... .., 19...
To.....
.....
(Address)

You are hereby notified that the Board of Directors of the Corporation, at a meeting held on the .. day of, 19.., duly passed a resolution forfeiting your rights to the subscription for (.....) shares of the common stock of this Corporation, and, under the terms of such subscription, all payments heretofore made, because of your failure to pay the call of (\$....) Dollars per share due thereon on the .. day of, 19...
.....
Secretary

No. 423

Notice of forfeiture of stock for nonpayment of call.

..... .., 19...
To.....
.....
(Address)

You are hereby notified that the Board of Directors of the Corporation, at a meeting held on the .. day of, 19.., duly passed a resolution forfeiting the

(....) shares of common stock having a par value of (\$....) Dollars each, represented by Certificate No., of which you are the record owner, because of your failure to pay the call of (\$....) Dollars per share due thereon on the .. day of, 19...

By order of the Board of Directors, said (....) shares of common stock will be sold at public auction to the highest bidder at the office of the Corporation, (Street), City of, State of, or as many shares as will pay (\$....) Dollars, which is the aggregate amount due on said shares, and also the costs of advertising and expenses of sale.

.....
Secretary

No. 424

Public notice of sale of stock for nonpayment of call.

Public notice is hereby given that (....) shares of the capital stock of Corporation will be sold at public auction by the Directors of said Corporation at the office of said Corporation, (Street), City of, State of, on the .. day of, 19.., at o'clock in the noon.

Said sale will be made pursuant to the statutes of the State of, and the By-laws of said Corporation, in such case made and provided, because of the nonpayment by, subscriber for said stock, of a call for the payment of an installment on the same for (....) days after said installment was due and payable, due notice thereof having been given.

..... Corporation
By
Secretary

Dated at,, 19...

FORMS RELATING TO ASSESSMENTS

No. 425

Resolution of directors authorizing assessment upon fully paid stock, under statute.

WHEREAS, this corporation has become indebted to various persons, firms, and corporations, to the amount of approximately (\$....) Dollars, as shown by the balance sheet of the corporation on the .. day of, 19..; and

WHEREAS, current assets, as shown by the balance sheet on the date

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mentioned, are insufficient to meet the outstanding indebtedness of the corporation, and an increase in operating revenues sufficient to provide funds for paying said debts out of current earnings is not expected during the next six months; and

WHEREAS, this corporation has the power, under the laws of the State of, to levy and collect an assessment upon the fully paid capital stock for the purpose of paying debts, if more than one fourth of the capital stock of this corporation has been subscribed; and

WHEREAS, all of the authorized capital stock of this corporation is issued and outstanding and has been fully paid;

NOW, THEREFORE, BE IT RESOLVED, That for the purpose of paying said indebtedness, an assessment of (\$....) Dollars per share upon all of the fully paid capital stock of this corporation, issued and outstanding, be, and the same hereby is, levied, and that said assessment shall be payable to, Treasurer of this corporation, at the office of the corporation, (Street), City of, State of, on or before the .. day of, 19...; and

RESOLVED FURTHER, That if said assessment remains unpaid upon any stock on the .. day of, 19..., such stock shall be declared delinquent and shall be advertised for sale at public auction, and, unless payment is made before said .. day of, 19..., shall be sold on the .. day of, 19..., at o'clock in the noon, to pay said delinquent assessment, together with the costs of advertising and expenses of sale; and

RESOLVED FURTHER, That the Secretary be, and he hereby is, authorized and directed to give notice of this assessment, as well as notice of delinquency and notice of the sale of delinquent stock, as required by the provisions of the statutes of the State of

No. 426

Resolution of stockholders levying assessment on fully paid shares to cover deficiency.

RESOLVED, That, in order to pay the existing deficiency caused by the insufficiency of receipts to meet disbursements on account of the property and business of the Corporation, an assessment of (\$....) Dollars shall be, and hereby is, levied upon each of the shares of the stock of the Corporation, making the total sum of (\$....) Dollars, said assessment to be payable to the treasurer within (....) days after notice thereof to each stockholder, with the results in case of nonpayment specified in Article of the By-laws of the Corporation.

No. 427

Resolution of directors authorizing postponement of sale of stock upon which assessment is unpaid.

WHEREAS, an assessment of (\$....) Dollars per share upon the fully paid capital stock, issued and outstanding, of this Corporation was levied by resolution of the Board of Directors, passed at a meeting held on the .. day of, 19..; and

WHEREAS, notice of said assessment was mailed to each stockholder, addressed to his last-known place of residence, and was published in the (*insert name and place of publication*) as required by law; and

WHEREAS, certain stockholders are still delinquent in the payment of the assessment; and

WHEREAS, the .. day of, 19.., was fixed by the Board of Directors as the date for the sale of all stock delinquent in the payment of said assessment; and

WHEREAS, it is the desire of this Board of Directors to postpone the date of the sale of said delinquent stock in order to extend the time for payment on delinquent stock;

NOW, THEREFORE, BE IT RESOLVED, That the date of the sale of stock upon which assessments are unpaid be, and the same hereby is, postponed from the .. day of, 19.., to the .. day of, 19.., at o'clock in thenoon; and

RESOLVED FURTHER, That the Secretary be, and he hereby is, authorized and directed to prepare and publish notice of the postponement of the sale of delinquent stock, as required by the provisions of the statutes of the State of

No. 428

Resolution of directors waiving statutory proceedings for collection of delinquent assessments, and electing to proceed by action.

WHEREAS, an assessment of (\$....) Dollars per share upon the fully paid capital stock, issued and outstanding, of this Corporation was levied by resolution of the Board of Directors, passed at a meeting held on the .. day of, 19..; and

WHEREAS, the following stockholders have defaulted in the payment of said assessment, and the stock held by them became delinquent on the .. day of, 19.., in the amounts set opposite their respective names:

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<i>Name</i>	<i>Amount</i>
.....
.....
.....
.....

AND WHEREAS, under the laws of the State of, this Corporation has the power at any time prior to the date set for the sale of delinquent stock to waive further proceedings under (*insert the section of the statute providing for sale of delinquent stock*) for the collection of delinquent assessments and may elect to proceed by action to recover the amount of the assessment, and the costs and expenses already incurred;

THEREFORE, BE IT RESOLVED, That this Board of Directors hereby elects to waive further proceedings under the section of the statute aforementioned, for the collection of delinquent assessments, and does hereby elect to proceed to recover by action the amount of all such delinquent assessments, and the costs and expenses already incurred; and

RESOLVED, FURTHER, That the President be, and he hereby is, directed to take all steps necessary to enforce such delinquent assessments by action.

No. 429

Resolution of directors reducing assessment on fully paid shares.

RESOLVED, That this Board hereby waives the collection of one half of the assessment of (....%) per cent upon the capital stock of the Corporation, duly levied on the .. day of, 19.., and hereby reduces the amount of said assessment to (....%) per cent of said capital stock—to wit: (\$....) Dollars per share, and the Treasurer, the Secretary, and the President are hereby authorized and directed to collect and receipt for said (\$....) Dollars per share of assessment in full satisfaction thereof.

No. 430

Notice of levy of assessment upon fully paid stock and sale upon failure to pay.

..... CORPORATION
..... STREET
..... CITY,..... STATE
....., 19...

NOTICE is hereby given that, at a meeting of the board of directors held on the .. day of, 19.., an assessment of

(\$....) Dollars per share was levied upon the shares of the corporation, payable to, at (Street), (City), (State). Any shares upon which this assessment remains unpaid on the .. day of, 19.., will be delinquent, and unless payment is made in the meantime, the said shares, or so many of said shares as may be necessary, will be sold at (Street), (City), (State), on the .. day of, 19.., at o'clock of such day, to pay the delinquent assessment, together with the costs of advertising and expenses of sale.

.....
Secretary
.....
(Address)

No. 431

Notice of sale of stock for nonpayment of assessment.

..... CORPORATION
..... STREET
..... CITY, STATE

....., 19...

There is delinquent upon the following-described stock, on account of the assessment levied on the .. day of, 19.. (and assessments levied previous thereto, if any), the several amounts set opposite the names of the respective shareholders of the..... Corporation, as follows:

<i>Names</i>	<i>Number of Certificate</i>	<i>Number of Shares</i>	<i>Amount</i>
.....
.....
.....
.....

And, in accordance with law and an order of the Board of Directors, made on the .. day of, 19.., so many shares of each parcel of such stock as may be necessary will be sold at (Street), (City), (State), on the .. day of, 19.., at o'clock of such day, to pay delinquent assessments thereon, together with costs of advertising and expenses of the sale.

.....
Secretary

532 FORMS—CALLS FOR PAYMENT AND ASSESSMENTS

No. 432

Notice of postponement of sale of stock for nonpayment of assessments.

..... CORPORATION
 STREET
 CITY, STATE

....., 19...

By order of the Board of Directors, the date of the sale of stock for delinquent assessment has been postponed from the .. day of .., 19.., to the .. day of .., 19.., at o'clock in the noon.

.....
 Secretary

No. 433

Affidavit of secretary upon sale of stock for failure to pay assessment.

State of }
 County of } ss.:

....., being duly sworn, deposes and says that he is the Secretary of Corporation, a corporation organized and existing under the laws of the State of .., and having its principal office at (Street), (City), (State).

That, on the .. day of .., 19.., a notice of sale of delinquent stock, a copy of which is annexed hereto and made a part of this affidavit, was duly served upon the stockholders hereinbelow named, by mailing to each of them at his last-known post-office address, a true copy thereof, and that, as appears from the affidavit of .., annexed hereto, said notice was duly published as required by law.

That, pursuant to said notice of sale, and at the time and place designated therein, your deponent caused to be sold through .., a licensed auctioneer, the following shares of stock of said Corporation, represented by the certificates hereinafter set forth:

<i>Certificate No.</i>	<i>No. of Shares</i>	<i>Standing in the Name of</i>
.....
.....
.....

CHAPTER 21

TRANSFER OF STOCK

Right of stockholder to transfer his stock. A stockholder has the right to transfer his shares of stock without interference by the corporation.¹ This right is based upon the inherent power of a person to dispose of his property.² It is a continuing right, existing from the time the subscription to the stock is made until the corporation is dissolved. A stockholder can sell his stock to another stockholder or to a stranger; he does not need to know the character or responsibility of the buyer.³ This is true even if the stockholder is a majority holder.⁴ In the matter of transferring stock, majority holders, whether one or a group, have no fiduciary duty to the other stockholders.⁵ A stockholder who is a director has the same right as other stockholders to transfer his stock, provided, of course, that the transfer is not fraudulent or in breach of any trust. The mere fact that the sale will be harmful to the corporation does not prevent the director from transferring his stock.⁶ However, a transfer must be made in good faith to be effective.

Stockholders can transfer their stock when the corporation is in the hands of a receiver or in the process of liquidation.⁷ The

¹ *Farmers' Loan & Trust Co. v. Chicago, P. & S. R. Co.*, (1896) 163 U. S. 31, 16 S. Ct. 917; *Board of Commissioners of Tippecanoe Co. v. Reynolds*, (1873) 44 Ind. 509, 515. See also *Trisconi v. Winship*, (1891) 43 La. Ann. 45, 9 So. 29, and *Sterling Midland Co. v. Chicago-Williamsville C. Co.*, (1929) 336 Ill. 586, 168 N. E. 655, rev'g 253 Ill. App. 36.

² *Howe et al. v. Roberts*, (1923) 209 Ala. 80, 95 So. 344; *Hague v. DeLong*, (1937) 282 Mich. 330, 276 N. W. 467; *Gerdes v. Reynolds*, (1941) 28 N. Y. Supp. (2d) 622.

³ *Gerdes v. Reynolds*, supra (Note 2); *Levy v. American Beverage Corp.*, (1942) 265 N. Y. App. Div. 208, 38 N. Y. Supp. (2d) 517; *Curtis v. Beckett*, (1943) 114 Ind. App. 221, 50 N. E. (2d) 920.

⁴ *Gerdes v. Reynolds*, supra (Note 2); *Roby v. Dunnett*, (1937) 88 F. (2d) 68.

⁵ *Gerdes v. Reynolds*, supra (Note 2); *Levy v. American Beverage Corp.*, supra (Note 3).

⁶ *Insurance Agency Co. v. Blossom*, (1921) (Mo. App.) 231 S. W. 636.

⁷ *People v. California Safe Deposit & Trust Co.*, (1912) 18 Cal. App. 732, 124 P. 558; *Hollingsworth v. Multa Trina Ditch Co. et al.*, (1931) 51 F. (2d) 649; *Curtis v. Beckett*, (1943) supra (Note 3).

transfer carries with it any rights that might accrue to the original owner.⁸ Although shares cannot be transferred after dissolution, the stockholder may assign his right to share in the assets of the corporation.⁹ The treasurer of a corporation has been permitted to sign certificates after dissolution when the transfer was recorded on the corporate books before dissolution.¹⁰

Although the right to dispose of property is recognized by the courts, reasonable restrictions on that right have been upheld where the restrictions were imposed (1) by the certificate of incorporation, the by-laws, the contract of subscription, or any other contract between the corporation and the stockholder or among the stockholders themselves; (2) directly by statute; or (3) by the corporation under power given to it by statute.

Transfer of subscriptions to stock. A subscriber who has become a stockholder by the corporation's acceptance of his subscription has the right to transfer his subscription even before any payment has been made on the contract, whether or not a certificate has been issued to him, unless the statute, the charter, or the agreement between the subscriber and the corporation provides to the contrary.¹¹ In order to make the assignment effective, it must be accepted by the corporation and recorded upon its books. Until such acceptance and recording, the original subscriber continues liable for all calls made for the unpaid subscription.¹²

Usually, if the transfer is made by an original subscriber who is an incorporator and signer of the articles of incorporation, immediately after the corporation has received its charter, the acceptance by the corporation of the transferee as a subscriber in place of the original subscriber is voted toward the close of the meeting of the incorporators and is recorded in the minutes of the meeting.¹³ The acceptance may take place at any directors' meeting. It is not essential, however, that the acceptance of a

⁸ Ibid.

⁹ *James v. Woodruff*, (1844) 10 Paige (N. Y.) 541, aff'd, 2 Denio (N. Y.) 574.

¹⁰ *Sewall v. Chamberlain*, (1860) 16 Gray (Mass.) 581.

¹¹ *Roosevelt v. Hamblin*, (1908) 199 Mass. 127, 85 N. E. 98.

¹² *Butts v. King*, (1924) 101 Conn. 291, 125 A. 654. See also *Webster v. Upton*, (1875) 91 U. S. 384; *Sigua Iron Co. v. Brown*, (1902) 171 N. Y. 488, 64 N. E. 194; *Geary St. P. & O. R. Co. v. Bradbury Estate Co.*, (1918) 179 Cal. 46, 175 P. 457; *Campbell v. American Alkali Co.*, (1903) 125 F. 207.

¹³ The minutes simply state: The Secretary presented the following transfers of subscriptions (here follows in columnar form, From, To, No. of shares). Upon motion duly seconded, and unanimously carried, the transfers were approved and ordered to be filed as part of the minutes of this meeting.

transferee in place of the original subscriber be made by formal action of the corporation expressed in voting or otherwise. It may be implied from the acts and course of conduct of the corporation, and the continuing recognition of the substitution of the transferee in place of the original subscriber.¹⁴

Stockholders who have not paid in full for their stock have a right to sell and transfer their shares. The one restriction on such a sale is that a shareholder in an insolvent corporation, with actual or implied knowledge of such insolvency, is not permitted to sell his shares to an insolvent or irresponsible person in order to escape liability on the stock.¹⁵

Effect of transfer of stock upon liability for calls and assessments. A person who makes an absolute transfer of his stock in good faith is relieved of further liability for calls upon an unpaid subscription, provided the transfer is duly recorded on the books of the corporation.¹⁶ In most states it is held, either under common or statutory law, that the transferee of the stock is liable for all calls made after the transfer, but not for those made prior thereto.¹⁷ The law of the state in which the corporation is organized governs, and not the law of the state in which the transferee resides.¹⁸ Under common law, the liability of the transferee is based on "novation," that is, on a substitution of the transferee for the transferor as the debtor of the corporation for the balance unpaid on the stock.¹⁹ The date of the call, not the date when it becomes payable, determines liability as between the transferor and transferee.²⁰

A stockholder must act in good faith in order to be relieved of liability for calls by a transfer of his shares of stock.²¹ If the transfer is made for the sole purpose of avoiding liability, the transferor remains liable; such a transfer is fraudulent and void.²²

¹⁴ *Butts v. King*, supra (Note 12).

¹⁵ *Banta v. Hubbell*, (1912) 167 Mo. App. 38, 150 S. W. 1089.

¹⁶ *Webster v. Upton*, (1875) 91 U. S. 384; *Shaw v. Green*, (1937) 128 Tex. 596, 99 S. W. (2d) 889. See also "Liabilities of Transferor and Transferee of Shares for Calls and Assessments," 86 *Univ. of Pa. Law Rev.* 878 (1938).

¹⁷ *Geary St. P. & O. R. Co. v. Bradbury Estate Co.*, (1918) 179 Cal. 46, 175 P. 457; *Sigua Iron Co. v. Brown*, (1902) 171 N. Y. 488, 64 N. E. 194.

¹⁸ *Black v. Zacharie*, (1845) 44 U. S. 527; *Priest v. Glenn*, (1892) 51 F. 400; *McConey v. Belton Oil & Gas Co.*, (1906) 97 Minn. 190, 106 N. W. 900.

¹⁹ *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, (1888) 86 Tenn. 252, 6 S. W. 340; *Campbell v. American Alkali Co.*, (1903) 125 F. 207.

²⁰ *Campbell v. American Alkali Co.*, supra (Note 19).

²¹ *Rochester & K. F. Land Co. v. Raymond*, (1899) 158 N. Y. 576, 53 N. E. 507.

²² *National Bank v. Case*, (1878) 99 U. S. 628; *Bowden v. Johnson*, (1882) 107

The transferor also remains liable unless the transferee accepts the transfer.²³ It has been held that the transferor remains liable after transfer to a minor.²⁴ A transferee has the right to assume that stock issued as fully paid is as represented, and is not subject to call, unless he has knowledge that the stock is watered.²⁵

If paid-up stock is assessable,²⁶ the transferee is liable for assessments on the stock made after its transfer.²⁷ Generally, however, the statutes provide that a transferee is not liable for an assessment unless the power of assessment is stated on the face of the stock certificate.²⁸ If the transferee fails to have the stock transferred on the corporate record, he is liable to the transferor for any assessments the latter is compelled to pay after transfer.²⁹ A pledgee who has the stock transferred on the books to his name is liable.³⁰ A transfer of shares may be made even if there are unpaid assessments against the stock.³¹

Contractual restrictions on transfer of stock. Provisions in the charter or by-laws of the corporation, or in the stock certificates themselves, restricting the transfer of stock are enforceable as contracts between the corporation and the stockholder.³² The right of a stockholder to alienate his property is, however, a matter of public policy, and a stockholder is not free to contract away his privilege to any extent that he chooses. The restrictions agreed upon by the stockholder must be reasonable in order to be binding, and they are strictly construed.³³ Absolute restrictions upon the sale or transfer of stock, as distinguished from

U. S. 251. See also "Liabilities of Transferor and Transferee of Shares for Calls and Assessments," 86 *Univ. of Pa. Law Rev.* 878 (1938).

²³ *Russell v. Easterbrook*, (1898) 71 Conn. 50, 40 A. 905.

²⁴ *Hood v. North Carolina Bank & Trust Co.*, (1936) 209 N. C. 367, 184 S. E. 51.

²⁵ See page 428.

²⁶ See page 513.

²⁷ *Libby v. Tobey*, (1890) 82 Me. 397, 19 A. 904; *Porter v. Gibson*, (1945) 25 Cal. (2d) 506, 154 P. (2d) 703.

²⁸ *Wilson v. Cherokee Drift Mining Co.*, (1939) 14 Cal. (2d) 56, 92 P. (2d) 802.

²⁹ *Gaffney v. People's Trust Co.*, (1920) 191 N. Y. App. Div. 697, 182 N. Y. Supp. 451, aff'd (1921) 231 N. Y. 577, 132 N. E. 895; *Bell, Secretary of Banking, v. O'Connor's Executors, No. 2*, (1940) 40 Pa. D. & C. 353.

³⁰ *Gruetzmacher v. Quevli*, (1929) 208 Iowa 537, 226 N. W. 5.

³¹ *Craig v. Hesperia Land & Water Co.*, (1896) 113 Cal. 7, 45 P. 10.

³² *Vannucci v. Pedrini*, (1932) 217 Cal. 138, 17 P. (2d) 706; *Lawson v. Household Finance Corp.*, (1929) 17 Del. Ch. 1, 147 A. 312; *New England Trust Co. v. Abbott*, (1894) 162 Mass. 148, 38 N. E. 432; *Penthouse Properties, Inc. v. 1158 Fifth Avenue*, (1939) 256 N. Y. App. Div. 685, 11 N. Y. Supp. 417.

³³ *McDonald v. Farley & Loetscher Mfg. Co.*, (1939) 226 Iowa 53, 283 N. W. 261.

reasonable conditions precedent to transfer, will not be enforced.³⁴

A distinction is sometimes drawn between restrictions imposed by charter and restrictions imposed upon an unwilling minority of stockholders through the by-laws. A provision that no stock shall be sold or transferred to a competitor was declared invalid as a provision in the by-laws, although the court held that such a by-law might have been valid if expressly authorized by the charter.³⁵ Where, however, the by-law restriction has been adopted by the unanimous vote of stockholders, a reasonable restriction is usually upheld, particularly where the question arises among the original stockholders.³⁶ Even if a restriction is void when considered strictly as a by-law, it may be enforced as an agreement entered into between the interested parties.³⁷

Restriction requiring stockholders to give corporation option to purchase. A very common contractual restriction on the transfer of stock is one requiring a stockholder to give to the corporation or to the other stockholders a first option to purchase his stock if the stockholder desires to sell it. It has been held that such a provision is not an invalid restraint upon the alienation of corporate stock,³⁸ and that it is not invalid as against public policy.³⁹ If for some reason the stock is issued in the name of a person other than the true owner, a restriction of this kind does not prevent a transfer of the stock to the true owner.⁴⁰ Nor does it prevent the stockholder from disposing of his stock by will.⁴¹

The courts differ as to the validity of a by-law providing that stockholders must offer their stock to the corporation and other

³⁴ *In re Laun*, (1911) 146 Wis. 252, 131 N. W. 366.

³⁵ *Kretzer v. Cole Bros. Lightning Rod Co. et al.*, (1916) 193 Mo. App. 99, 181 S. W. 1066.

³⁶ *Weiland v. Hogan*, (1913) 177 Mich. 626, 143 N. W. 599.

³⁷ *Ibid.*; see also *Townsend v. Tattnall Bank*, (1948) (Ga.) 46 S. E. (2d) 607.

³⁸ See *Model Clothing House v. Dickinson*, (1920) 146 Minn. 367, 178 N. W. 957; *Wright v. Iredell Tel. Co.*, (1921) 182 N. C. 308, 108 S. E. 744; *Lawson v. Household Finance Corp.*, (1929) 17 Del. Ch. 1, 147 A. 312; *Albert E. Touchet, Inc. v. Touchet*, (1928) 264 Mass. 499, 163 N. E. 184; *McDonald v. Farley & Loetscher Mfg. Co.*, (1939) 226 Iowa 53, 283 N. W. 261, discussed in 52 *Harvard Law Rev.* 850 (1939), and in 23 *Minnesota Law Rev.* 834 (1939); *Peets v. Manhasset Civil Engineers*, (1946) 68 N. Y. Supp. (2d) 338; *First National Bank of Canton v. Shanks*, (1947) (Ohio Ct. Com. Pleas) 73 N. E. (2d) 93, and cases there cited.

³⁹ *Wright v. Iredell Tel. Co.*, (1921) 182 N. C. 308, 108 S. E. 744.

⁴⁰ *State ex rel. Cabral v. Strudwick Funeral Home*, (1941) (La. App.) 4 So. (2d) 760.

⁴¹ *Stern v. Stern*, (1945) 146 F. (2d) 870.

stockholders before selling it to outsiders, where the statute and the charter make no provision for the passage of such a by-law. Some courts have held a by-law passed for this purpose to be invalid,⁴² while others have held it to be valid.⁴³ In many cases, the courts have not considered whether the by-law is technically valid, but have decided the question on the ground that the terms of the by-law, printed on the face of the certificate, became a contract between the corporation and the subscriber for its stock.⁴⁴ An amendment of the by-laws to make all subsequent transfers subject to the restriction has no force unless printed on the face of the certificate.⁴⁵ The provisions of a consent decree supersede by-law restrictions on the transfer of stock.⁴⁶

A sale or transfer of stock which has been made in violation of a valid provision giving the corporation a prior option to purchase is void.⁴⁷ It has been held that directors may waive a provision of the by-laws requiring that stock be offered to the corporation before sale.⁴⁸ When the by-law requirement is not observed over a period of years, a transfer without complying with it is valid on the ground that the requirement is waived.⁴⁹

Contractual restrictions held to be valid. The following contractual restrictions have been declared valid:

A by-law provision that all shares of stock are freely assignable, but that no owner shall sell to one who is not a stockholder without first offering the stock for sale to other stockholders.⁵⁰

A by-law provision requiring stockholders to offer their stock to other stockholders at par value plus 10 per cent before selling to third persons.^{50a}

A provision in the stock certificate, or the charter, that shares

⁴² *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, (1893) 118 Mo. 447, 24 S. W. 129, cited in *First National Bank of Canton v. Shanks*, (1947) (Ohio Ct. Com. Pleas) 73 N. E. (2d) 93.

⁴³ *Sterling Loan and Investment Co. v. Litel*, (1924) 75 Colo. 34, 223 P. 753, citing *Nicholson v. Franklin Brewing Co.*, (1910) 82 Ohio St. 94, 91 N. E. 991; *Cook Ry. Signal Co. v. Buck*, (1915) 59 Colo. 368, 149 P. 95.

⁴⁴ *Hassel v. Pohle*, (1925) 214 N. Y. App. Div. 654, 212 N. Y. Supp. 561; *New England Trust Co. v. Abbott*, (1894) 162 Mass. 148, 38 N. E. 432. See also *First National Bank of Canton v. Shanks*, *supra* (Note 42).

⁴⁵ *Peets v. Manhasset Civil Engineers*, (1946) 68 N. Y. Supp. (2d) 338.

⁴⁶ *Weber v. Lane*, (1946) 315 Mich. 678, 24 N. W. (2d) 418.

⁴⁷ *Hassel v. Pohle*, (1925) 214 N. Y. App. Div. 654, 212 N. Y. Supp. 561.

⁴⁸ *Blabon v. Hay et al.*, (1929) 269 Mass. 401, 169 N. E. 268.

⁴⁹ *Elliott v. Lindquist*, (1947) 356 Pa. 385, 52 A. (2d) 180; *Pomeroy v. Westaway*, (1947) 189 N. Y. Misc. 307, 70 N. Y. Supp. (2d) 449.

⁵⁰ *Rychwalski v. Milwaukee Candy Co.*, (1931) 205 Wis. 193, 236 N. W. 131.

^{50a} *Evans v. Dennis*, (1948) 203 Ga. 232, 46 S. E. (2d) 122.

will not be transferred until all debts to the corporation from the record holder are paid.⁵¹

A contract between stockholders whereby they take out life insurance payable to a trust fund, so that if one dies, the stock shall be turned over to the surviving stockholders, or to the corporation, and paid for out of the insurance.⁵²

Contractual restrictions held invalid. The following contractual restrictions have been declared invalid:

A by-law giving directors the right to refuse a transfer by one stockholder to another.⁵³

A by-law giving directors power to refuse a transfer because they object to the transferee, or for any other reason.⁵⁴

A provision in the certificate that stock may be transferred only to some person approved by the directors.⁵⁵

A by-law prohibiting the transfer of certificates of stock except to the corporation.⁵⁶

An agreement that no stockholder could buy or sell any share of stock in the corporation without the written consent of all the stockholders unless the sale was made between the stockholders themselves.⁵⁷

A by-law declaring invalid a sale of stock to a competitor.⁵⁸

A by-law authorizing directors and officers to refuse a transfer if they believed the transfer was sought in furtherance of a fraudulent scheme.^{58a}

Necessity for stating restriction on certificate of stock. Under the Uniform Stock Transfer Act (adopted in all the states), no restriction upon the transfer of stock is recognized unless the restriction is stated on the certificate of stock.⁵⁹ Thus,

⁵¹ *Jennings v. Bank of California*, (1889) 79 Cal. 323, 21 P. 852; *Elson v. Schmidt*, (1941) 140 Neb. 646, 1 N. W. (2d) 314.

⁵² *Bohnsack v. Detroit Trust Co.*, (1940) 292 Mich. 167, 290 N. W. 367; *Greater New York Carpet House, Inc. v. Herschmann*, (1940) 258 N. Y. App. Div. 649, 17 N. Y. Supp. (2d) 483.

⁵³ *Morris v. Hussong Dyeing Mach. Co.*, (1913) 81 N. J. Eq. 256, 86 A. 1026.

⁵⁴ *Petre v. Bruce*, (1928) 157 Tenn. 131, 7 S. W. (2d) 43.

⁵⁵ *Douglas v. Aurora Daily News Co.*, (1911) 160 Ill. App. 506.

⁵⁶ *Herring et ux. v. Ruskin Co-op. Ass'n*, (1899) (Tenn. Ch. App.) 52 S. W. 327.

⁵⁷ *People ex rel. Malcolm v. Lake Sand Corp.*, (1929) 251 Ill. App. 499.

⁵⁸ *Kretzer v. Cole Bros. Lightning Rod Co. et al.*, (1916) 193 Mo. App. 99, 181 S. W. 1066. See page 537.

^{58a} *Pelton v. Nevada Oil Co.*, (1948) (Tex.) 209 S. W. (2d) 645.

⁵⁹ See Trelease, "Stock Liens and Transfer Restrictions Under the Uniform Stock Transfer Act," 10 *Rocky Mountain Law Review* 117 (1938). See also *Weber v. Lane*, (1946) 315 Mich. 678, 24 N. W. (2d) 418.

In *Doss v. Yingling*, (1930) 95 Ind. App. 494, 172 N. E. 801, a restriction was

a resolution passed by the board of directors placing restrictions on transfers, which are not printed on the certificates, will not be enforced. Such a resolution does not justify the corporation in refusing to transfer on its books stock purchased in violation of the resolution. This rule applies whether or not the resolution is reasonable.⁶⁰

Effect of contractual restrictions on transferees. Valid restrictions on the transfer of stock are binding not only as between the corporation and the original stockholders, but also as against transferees with notice.⁶¹ The restrictions are also binding on pledgees who accept stock as security with knowledge of the restrictions.⁶² A provision in the stock certificate that shares will not be transferred until all debts due to the corporation from the record holder have been paid was held to be binding not only on the record holder, but also on his assignee.⁶³ A consent decree that restricts the transfer of stock is binding on the owner's assignee; the assignee is not entitled to a new certificate that does not include the condition imposed by the consent decree.⁶⁴

An agreement between the original stockholders, restricting the sale of stock to them, is not binding on the corporation when the certificate of incorporation, the by-laws, and the certificates of stock are all silent as to the restriction. Under such circumstances, a transferee of treasury shares is not bound by the restriction, even if he knew about the agreement.⁶⁵

Lien of corporation on shares of stock. A corporation has no lien on its shares of stock merely because the stockholder is indebted to the corporation, in the absence of statutory, charter, or by-law provision creating this lien.⁶⁶ In some states a by-law

held binding on the president of the corporation, although it was not printed on a certificate that he acquired after adoption of the Uniform Stock Transfer Act.

⁶⁰ *Age Pub. Co. v. Becker*, (1943) 110 Colo. 319, 134 P. (2d) 205.

⁶¹ *Warner & Swasey Co. v. Rusterholz*, (1941) 41 F. Supp. 498; *Citizens State Bank of Houston v. O'Leary*, (1943) 140 Tex. 345, 167 S. W. (2d) 719. See also *Musler v. Homestead B. & L. Ass'n of St. Louis*, (1934) (Mo. App.) 66 S. W. (2d) 152.

A reasonable restraint on alienation, inserted in the by-laws, is also valid against an undisclosed principal for whom the stock was purchased by an agent. *Barrett v. King*, (1902) 181 Mass. 476, 63 N. E. 934.

⁶² *First National Bank of Canton v. Shanks*, (1947) (Ohio Ct. Com. Pleas), 73 N. E. (2d) 93. See also *Musler v. Homestead B. & L. Ass'n of St. Louis*, *supra* (Note 61).

⁶³ *Jennings v. Bank of California*, (1889) 79 Cal. 323, 21 P. 852.

⁶⁴ *Kund v. Fort Bedford Inn Co.*, (1942) 46 Pa. D. & C. 394.

⁶⁵ *Peets v. Manhasset Civil Engineers*, (1946) 68 N. Y. Supp. (2d) 338.

⁶⁶ *Gemmell v. Davis*, (1892) 75 Md. 546, 23 A. 1032; *Boyd v. Redd*, (1897) 120

attempting to create a lien in favor of the corporation is invalid, unless the statutes or articles of incorporation give express authority to adopt such a by-law.⁶⁷ Stock may, however, be impressed with a lien in favor of the corporation by statute or contract, for debts owing to it.⁶⁸ Under the Uniform Stock Transfer Act, no lien can exist in favor of the corporation unless the right of the corporation to a lien is noted on the stock certificate.

If the owner of the stock transfers it to a bona fide holder who has no notice of the lien of the corporation, the corporation cannot refuse to transfer the stock to the name of the transferee.⁶⁹ The courts are not in agreement as to what constitutes notice to the transferee. It has been held that the purchaser of shares is chargeable with notice of liens created under the statute or charter, but not with those arising under the by-laws of the corporation or under the custom of dealing between the corporation and its stockholders.⁷⁰ Notice of a lien imposed by a by-law must appear on the face of the certificate.⁷¹ A notation on the face of the stock certificate of the existence of a lien has been held sufficient notice to a purchaser to put him on inquiry.⁷²

When stock is sold or pledged, but the transferee does not have the transfer recorded on the corporation's records before the indebtedness of the record holder to the corporation accrues, the corporation's lien is valid. It is superior to the rights of the purchaser or pledgee.⁷³

N. C. 335, 27 S. E. 35; *Central Sav. Bank v. Smith*, (1908) 43 Colo. 90, 95 P. 307; *Damron v. Denny*, (1919) 149 Ga. 280, 99 S. E. 851; *Iowa-Missouri Grain Co. v. Powers*, (1923) (Iowa) 191 N. W. 363.

⁶⁷ *McKinney v. Mechanics' Trust and Savings Bank*, (1927) 222 Ky. 264, 300 S. W. 631.

⁶⁸ *Sproul v. Standard Plate Glass Co.*, (1902) 201 Pa. 103, 50 A. 1003; *First State Bank of Montgomery v. First Nat. Bank of Navosota*, (1912) (Tex. Civ. App.) 145 S. W. 691; *Bank v. Merchants' Grocer Co.*, (1916) 123 Ark. 403, 185 S. W. 806; *United Cigarette Mach. Co. v. Brown*, (1916) 119 Va. 813, 89 S. E. 850.

⁶⁹ See *Kress v. Tooker-Jordan Corporation*, (1930) 103 Cal. App. 275, 284 P. 685.

A provision on the face of the certificate of stock that the stock is transferable only on the books of the company in accordance with the by-law is not sufficient notice to a transferee of the existence of the lien imposed by the by-laws. *Chandler v. Blanke Tea & Coffee Co.*, (1914) 183 Mo. App. 91, 165 S. W. 819.

Actual knowledge of one provision of the by-laws which bears no relation to the by-law imposing the lien does not constitute constructive notice of the by-law. *Iowa-Missouri Grain Co. v. Powers*, (1924) 198 Iowa 208, 196 N. W. 979.

⁷⁰ *Bankers' Trust Co. of St. Louis v. McCloy*, (1913) 109 Ark. 160, 159 S. W. 205.

⁷¹ *Bank of Culloden v. Bank of Forsyth*, (1904) 120 Ga. 575, 48 S. E. 226.

⁷² *Bank of Culloden v. Bank of Forsyth*, (1904) 120 Ga. 575, 48 S. E. 226.

⁷³ *Benson Lumber Co. v. Thornton*, (1932) 185 Minn. 230, 240 N. W. 651.

Restrictions on rights of indebted stockholder to transfer his shares. Even if a lien is created in favor of the corporation, the stockholder has a right to assign his shares subject to the lien.⁷⁴ Limitations on the right of an indebted stockholder to transfer his stock have been upheld as contractual restrictions, where such restriction was provided in the charter⁷⁵ or by-laws of the corporation.⁷⁶ The statutes in some states also specifically provide such restriction. A bona fide purchaser of the stock, without notice of the restriction, has been held not to be bound by it.⁷⁷ Regardless of the restriction, the transfer of stock may be made to the executor or representative of a deceased stockholder.⁷⁸ However, the corporation can refuse to consent to a transfer from the name of the representative while the stockholder's indebtedness remains unpaid.⁷⁹

Statutory restrictions on transfers. Limitations upon the power of a stockholder to transfer his stock may be imposed by statute. The statutes may also authorize the corporation to place restrictions upon the power to transfer. The power to restrict the right of alienation, however, must be given to the corporation in express terms,⁸⁰ and such restrictions will be strictly construed. The most usual restriction is that the stockholder may not transfer his stock if the corporation is in a failing condition.⁸¹

Persons who become stockholders before passage of a statute restricting the transfer of stock are not bound by the restriction, for the power to transfer is an existing right that cannot be subsequently impaired.⁸²

Method of transferring stock. Any means by which one person is divested of ownership of stock and another person acquires such ownership is a transfer of the stock.⁸³ In the

⁷⁴ *Milner v. Brewer-Monaghan Mercantile Co.*, (1916) (Tex. Civ. App.) 188 S. W. 49.

⁷⁵ *Gibbs v. Long Island Bank*, (1894) 83 Hun. (N. Y.) 92, 31 N. Y. Supp. 406.

⁷⁶ *Costello v. Portsmouth Brewing Co.*, (1898) 69 N. H. 405, 43 A. 640.

⁷⁷ *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, (1893) 118 Mo. 447, 24 S. W. 129.

⁷⁸ *London, Paris & American Bank v. Aronstein*, (1902) 117 F. 601.

⁷⁹ *In re Starbuck's Executrix*, (1929) 251 N. Y. 439, 167 N. E. 580, reversing order *In re Starbuck*, 228 N. Y. Supp. 174, 223 App. Div. 844.

⁸⁰ *Howe v. Roberts*, (1923) 209 Ala. 80, 95 So. 344.

⁸¹ See *Nesmith v. Washington Bank*, (1828) 6 Pick (Mass.) 324, and *Madison Bank v. Price*, (1909) 79 Kan. 289, 100 P. 280.

⁸² *In re W. W. Mills Co.*, (1908) 162 F. 42, 54.

⁸³ *Wallach v. Stein*, (1927) 103 N. J. Law 470, 136 A. 209, aff'g 102 N. J. Law 517, 133 A. 81.

absence of a provision in the statute or charter to the contrary, such a change of ownership may be brought about in any of the various ways of transferring personal property.⁸⁴ Although a method of transfer may be provided by statute, other methods may be used in the absence of any express prohibition.⁸⁵

The Uniform Stock Transfer Act, which has been adopted in all forty-eight states and in Alaska and Hawaii, makes uniform the method of transferring title to stock. That act provides:

"Title to a certificate and to the shares represented thereby can be transferred only,

"(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby; or

"(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

"The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent."

After execution and delivery of the instruments, they are presented to the corporation with a request to transfer, the old certificate is surrendered and cancelled, a new certificate is issued to the transferee, and the stock is registered in his name.

Mere physical delivery of the custody of the certificates, without a written assignment or power of transfer, does not constitute a valid transfer of the stock.⁸⁶ On the other hand, physical delivery of the certificate is not necessary to transfer title to the shares.⁸⁷ Transfer on the books of the corporation, at the request of the record owner, takes from him all right, title, and interest in the stock thus transferred, and places it beyond

⁸⁴ Crocker v. Crocker et al., (1927) 84 Cal. App. 114, 257 P. 611; Young v. New Pedrara Onyx Co., (1920) 48 Cal. App. 1, 192 P. 55; Cliffs Corporation v. United States, (1939) 103 F. (2d) 77.

⁸⁵ Young v. New Pedrara Onyx Co., *supra* (Note 84); Jones v. Waldroup, (1940) 217 N. C. 178, 7 S. E. (2d) 366.

⁸⁶ Zoller v. State Board of Tax Appeals, (1940) 124 N. J. Law 376, 11 A. (2d) 833.

⁸⁷ Copeland v. Craig, (1940) 193 S. C. 484, 8 S. E. (2d) 858; Simonton v. Dwyer, (1941) 167 Ore. 50, 115 P. (2d) 316. See also Robbins v. Pacific Eastern Corporation, (1937) 8 Cal. (2d) 241, 65 P. (2d) 42.

his control. The corporation can no longer recognize his control of the stock.⁸⁸

The transfer of stock is not governed by the Uniform Sales Act,⁸⁹ nor by statutes on sales in those states that have not adopted the Uniform Sales Act.⁹⁰

Necessity for recording transfer of stock. Transfer on the books of a corporation is the most efficient and effective manner of transfer and is the final step in the process of changing title to the stock from one person to another.⁹¹ However, under the Uniform Stock Transfer Act, a transfer on the corporate books is not a prerequisite to the transfer of stock.⁹² Even when the statute, charter, or by-laws specifically provide that stock shall be transferable only on the corporate books, registration is not necessary to the validity of the transfer between the parties.⁹³ (See page 546.)

In many states, however, the statutes specifically authorize corporations to make regulations concerning the transfer of stock. The by-laws of most corporations contain a provision requiring recording of transfers on the books of the corporation. These requirements for recording transfers are intended for the benefit and protection of the corporation,⁹⁴ so that it may know whom to recognize as a stockholder⁹⁵ in the payment of divi-

⁸⁸ Copeland v. Craig, *supra* (Note 87).

⁸⁹ Eckart v. Brown, (1939) 34 Cal. App. (2d) 182, 93 P. (2d) 212; Porter v. Gibson, (1945) 25 Cal. (2d) 506, 154 P. (2d) 703.

⁹⁰ Sentell v. Richardson, (1947) 211 La. 288, 29 So. (2d) 852.

⁹¹ Copeland v. Craig, (1940) 193 S. C. 484, 8 S. E. (2d) 858.

⁹² Snyder Motor Co. v. Universal Credit Co., (1947) (Tex. Civ. App.) 199 S. W. (2d) 792.

⁹³ Townsend v. Tattnall Bank, (1948) 76 Ga. App. 500, 46 S. E. (2d) 607; Rule v. Commissioner of Internal Revenue, (1942) 127 F. (2d) 979. See also Drug v. Hunt, (1933) 35 Del. 339, 168 A. 87; Dennistoun v. Davis, (1930) 179 Minn. 373, 229 N. W. 353; Patterson v. Fitzgerald McElroy Co., (1927) 247 Ill. App. 81; People ex rel. Pickering v. Devin, (1855) 17 Ill. 84. See also Green v. McKee, (1949) 361 Pa. 95, 63 A. (2d) 3, in which unrecorded transfer qualified assignee as a "stockholder" for purpose of serving as director.

⁹⁴ Mortgage Land Inv. Co. v. McMains, (1927) 172 Minn. 110, 215 N. W. 192. See also J. G. Wilson Corp. v. Cahill, (1929) 152 Va. 108, 146 S. E. 274; Lipscomb's Adm'r v. Condon, (1904) 56 W. Va. 416, 49 S. E. 392; Bank of Commerce v. Bank of Newport, (1894) 63 F. 898; Chemical National Bank of New York v. Colwell, (1892) 132 N. Y. 250, 30 N. E. 644; Cochran's Adm'r v. Cochran, (1938) 273 Ky. 1, 115 S. W. (2d) 376; In re Giant Portland Cement Co., (1941) (Del. Ch.) 21 A. (2d) 697; York's Ancillary Adm'r v. Bromley, (1941) 286 Ky. 533, 151 S. W. (2d) 28.

⁹⁵ In re Giant Portland Cement Co., (1941) (Del. Ch.) 21 A. (2d) 697; In re Northeastern Water Co., (1944) (Del. Ch.) 38 A. (2d) 918; Application of Friedman, (1945) 184 Misc. 639, 54 N. Y. Supp. (2d) 45.

dends,⁹⁶ holding of corporate meetings,⁹⁷ granting of voting rights,⁹⁸ and other matters relating to the internal affairs of the corporation.⁹⁹ If the corporation refuses to transfer the stock on its records, the transferee cannot sue the corporation for conversion but should bring action to enforce the transfer.¹⁰⁰

Effect as to corporation of failure to record transfer of stock. A transfer of stock is ineffective as against the corporation until actually made on the corporation's transfer books;¹⁰¹ an unregistered transferee is not entitled to the rights and privileges of a stockholder in his relations with the corporation.¹⁰² Thus, payment on final distribution of assets to the shareholder of record, although not the actual stockholder, has been upheld.¹⁰³ The corporation may, however, waive the benefit of the requirement and consider someone other than the recorded holder as the owner of the stock.¹⁰⁴ If an irregular transfer is accepted and acquiesced in by the corporation, the corporation is bound by it.¹⁰⁵ Failure of a transferee to register his stock does not bar his claim to it as against an irregular transfer,¹⁰⁶ nor does it prevent him from maintaining a stockholder's suit against the management for waste of corporate property.^{106a}

See also *Whitfield v. Nonpareil Consol. Copper Co.*, (1912) 67 Wash. 286, 123 P. 1078.

⁹⁶ *Hale v. West Porto Rico Sugar Co.*, (1922) 200 N. Y. App. Div. 577, 193 N. Y. Supp. 555.

⁹⁷ *Hale v. West Porto Rico Sugar Co.*, *supra* (Note 96).

⁹⁸ See *Morrill v. Little Falls Mfg. Co.*, (1893) 53 Minn. 371, 55 N. W. 547.

⁹⁹ *In re Canal Const. Co.*, (1936) 21 Del. Ch. 155, 182 A. 545.

¹⁰⁰ *Robertson v. Nicholes Co.*, (1931) 141 N. Y. Misc. 660, 253 N. Y. Supp. 76.

¹⁰¹ *York's Ancillary Adm'r v. Bromley*, (1941) 286 Ky. 533, 151 S. W. (2d) 28; *Double O Mining Co. v. Simrak*, (1942) 61 Nev. 431, 132 P. (2d) 605; *Salt Dome Oil Corp. v. Schenck*, (1945) (Del.), 41 A. (2d) 583, citing *Russell v. Easterbrook*, (1898) 71 Conn. 50, 40 A. 905.

Even if a transfer is recorded on the books, it may be shown that true ownership remains in the transferor. *Swan v. Swan's Ex'r*, (1923) 136 Va. 496, 117 S. E. 858. See also *Allen v. Hill*, (1860) 16 Cal. 113, in which it was held that a surviving partner could vote stock owned by the partnership even if the deceased partner appeared on the books as the record owner.

¹⁰² *Salt Dome Oil Corp. v. Schenck*, *supra* (Note 101).

¹⁰³ *Campbell v. Perth Amboy Mut. Loan, Homestead & Bldg. Ass'n*, (1909) 76 N. J. Eq. 347, 74 A. 144.

¹⁰⁴ *Johnson v. Moore et al.*, (1926) 31 Ariz. 137, 250 P. 995; *Mortgage Land Inv. Co. v. McMains*, (1927) 172 Minn. 110, 215 N. W. 192; *Chemical National Bank of New York v. Colwell*, (1892) 132 N. Y. 250, 30 N. E. 644; *Stewart v. Walla Walla Print. & Pub. Co.*, (1889) 1 Wash. 521, 20 P. 605; *American Nat. Bank v. Oriental Mills*, (1891) 17 R. I. 551, 23 A. 795.

¹⁰⁵ *Stewart v. Walla Walla Print. & Pub. Co.*, (1889) 1 Wash. 521, 20 P. 605.

¹⁰⁶ *Laden v. Baader*, (1943) 134 N. J. Eq. 24, 34 A. (2d) 82.

^{106a} *Rosenthal v. Burry Biscuit Co.*, (1948) (Del. Ch.) 60 A. (2d) 106.

If the corporation refuses without justification to make a transfer on its books, it is deemed to have waived the requirement, and it must recognize the person entitled to the transfer as the owner of the stock.¹⁰⁷ At the time of refusal to transfer stock on its books, the corporation must give its reasons for refusal, and any reasons not so given are waived.¹⁰⁸

Effect between transferor and transferee of failure to record transfer of stock. As between a transferor and a transferee of shares of stock, the transfer is valid and effective without recording, even if recording is required.¹⁰⁹ An assignment duly executed on the back of a stock certificate, followed by delivery to the assignee, transfers the stock between the parties, even though stock is not transferred on the books of the corporation.¹¹⁰ The fact that the assignor continues to receive dividends from the stock does not affect the validity of the transfer.¹¹¹ The corporation, however, is not compelled to recognize the possessor of the certificate as the legal owner, if the circumstances indicate that he may not be.¹¹²

An unrecorded transfer is valid against persons standing in the place of the transferor, such as administrators.¹¹³ It may also be valid between a pledgor and a pledgee,¹¹⁴ or between a donor and a donee.¹¹⁵

¹⁰⁷ *Bates v. United Shoe Machinery Co.*, (1914) 216 F. 140. See also *Logan v. Crissinger*, (1923) 290 F. 415.

¹⁰⁸ *Hulse v. Consolidated Quicksilver Mining Corp.*, (1944) 65 Idaho 768, 154 P. (2d) 149.

¹⁰⁹ *Dennistoun v. Davis et al.*, (1930) 179 Minn. 373, 229 N. W. 353; *Bates v. Peru Sav. Bank*, (1934) 218 Iowa 1320, 256 N. W. 286; *A. M. Law & Co. v. Cleveland*, (1934) 172 S. C. 200, 173 S. E. 638; *In re Canal Const. Co.*, (1936) 21 Del. Ch. 155, 182 A. 545; *State v. Druggists' Addressing Co.*, (1938) (Mo. App.) 113 S. W. (2d) 1061; *Jones v. Waldroup*, (1940) 217 N. C. 178, 7 S. E. (2d) 366; *In re Giant Portland Cement Co.*, (1941) (Del. Ch.) 21 A. (2d) 697; *United States v. Rosebush*, (1942) 45 F. Supp. 664; *Double O Mining Co. v. Simrak*, (1942) 61 Nev. 431, 132 P. (2d) 605.

See also *Nicollet Nat. Bank v. City Bank*, (1887) 38 Minn. 85, 35 N. W. 577; *McCarthy v. Crawford*, (1908) 238 Ill. 38, 86 N. E. 750, rev'g 141 Ill. App. 276; *Bankers' Mortgage Co. v. Sohland*, (1927) 33 Del. 331, 138 A. 361; *Hogg v. Eckhardt*, (1931) 343 Ill. 246, 175 N. E. 382, rev'g 249 Ill. App. 346.

¹¹⁰ *York's Ancillary Adm'r v. Bromley*, (1941) 286 Ky. 533, 151 S. W. (2d) 28; *Dunn v. Wilson & Co.*, (1943) 51 F. Supp. 655; *Chatz v. Midco Oil Corp.*, (1946) 152 F. (2d) 153.

¹¹¹ *York's Ancillary Adm'r v. Bromley*, *supra* (Note 110).

¹¹² *Kund v. Fort Bedford Inn Co.*, (1942) 46 Pa. D. & C. 394.

¹¹³ *Shires v. Allen*, (1910) 47 Colo. 440, 107 P. 1072.

¹¹⁴ *Bank of Steamboat Springs v. Routt County Bank*, (1927) 80 Colo. 385, 252 P. 355.

¹¹⁵ *Dulin v. Commissioner of Internal Revenue*, (1934) 70 F. (2d) 828.

Stock transfer books. The work involved in transferring stock and in keeping stock transfer books may be performed (1) by an officer of the corporation, generally the secretary or treasurer; (2) by a separate department of the corporation under the supervision of one of its officers, usually the secretary or treasurer; or (3) by an independent transfer agent appointed by the corporation. The method pursued depends upon the size of the corporation, the extent to which its shares are distributed, and the facilities of the corporation to handle the transfer work. In any case, the transfers are generally recorded in a transfer record and in a stock ledger. The transfer record lists the various shares transferred from day to day from one person to another. The stock ledger contains the running account of each individual stockholder.

A corporation need not keep a special stock ledger and transfer record unless the statute or its charter requires them. In the absence of such requirement, transfers may be recorded in any book or record. An account in the stock ledger has been held sufficient.¹¹⁶ Entries inserted on a subscription list,¹¹⁷ and a notation made in the stock certificate book,¹¹⁸ have been held to constitute sufficient compliance with a statute requiring the corporation to keep a record of transfers. In some states, the statute indicates what items must be entered in the stock records. Compliance with these statutory requirements is essential.

If, as is often the case, the statute requires that stock books or records shall be kept at an office within the state, the statute must be followed. A penalty is generally imposed upon the corporation and its officers for noncompliance.

Liability of corporation for unauthorized transfers of stock. A corporation must exercise ordinary care and reasonable diligence to prevent its stockholders from being injured by unauthorized transfers of stock.¹¹⁹ It is liable for negligence in making transfers,¹²⁰ and hence may refuse to make a transfer if

¹¹⁶ *Cecil Nat. Bank v. Watontown Bank*, (1882) 105 U. S. 1039.

¹¹⁷ *Stewart v. Walla Walla Print. & Pub. Co.*, (1889) 1 Wash. 521, 20 P. 605.

¹¹⁸ *Bank of Commerce v. Bank of Newport*, (1894) 63 F. 898.

¹¹⁹ *Geyser-Marion Gold Min. Co. v. Stark*, (1901) 106 F. 558. See also *Clark & Wilson Lumber Co. v. McAllister*, (1939) 101 F. (2d) 709, discussed in 24 *Washington Univ. Law Qu.* 604 (1939); *Seymour v. National Biscuit Co.*, (1939) 107 F. (2d) 58, cert. denied 309 U. S. 665, 60 S. Ct. 590, discussed in 38 *Michigan Law Rev.* 726 (1939), and in 14 *Tulane Law Rev.* 461 (1940); *Kentucky Utilities Co. v. Skaggs*, (1943) 293 Ky. 622, 169 S. W. (2d) 808.

¹²⁰ *Schneider v. American Telephone & Telegraph Co.*, (1939) 169 N. Y. Misc. 939, 9 N. Y. Supp. (2d) 564.

it acts in good faith and has reasonable grounds for refusing to do so.¹²¹ The officers charged with the responsibility of deciding whether or not the transfer should be made are not expected to decide legal technicalities.¹²² Thus, a corporation is justified in refusing to transfer stock when there is a dispute as to the ownership,¹²³ or when a garnishment proceeding involving the stock is pending,¹²⁴ or when there is doubt as to the transferor's mental capacity.¹²⁵

Before recording a transfer, the corporation should make sure that the signature on the assignment and the power of attorney are genuine, and that the person executing them had authority to do so.¹²⁶ The corporation is liable for conversion if it transfers stock upon the demand of an agent who, within the corporation's knowledge, has no authority to make such a demand.¹²⁷ Where the circumstances surrounding a transfer of stock are such as to put the corporation on inquiry, the corporation is deemed to have notice of all that an inquiry would reveal.¹²⁸

Transfer by life tenant; by trustee or executor. A corporation must frequently decide whether or not a requested transfer of stock is authorized when stock is willed to a life tenant and remaindermen. The stock should be registered on the corpo-

¹²¹ *Mundt v. Commercial Nat. Bank*, (1919) 35 Utah 90, 99 P. 454; *Winans v. Alpha Beta Food Markets, Inc.*, (1936) 11 Cal. App. 653, 54 P. (2d) 48; *Soltz v. Exhibitors' Service Co.*, (1939) 334 Pa. 211, 5 A. (2d) 899. See also *Western Union Tel. Co. v. Davenport*, (1878) 97 U. S. 369, in which the court said that, if the officers "upon presentation of a certificate for transfer . . . are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. . . . Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner."

¹²² *United North & South Development Co. v. Rayner*, (1942) 124 F. (2d) 512.

¹²³ *Leff v. N. Kaufman's, Inc.*, (1941) 342 Pa. 342, 20 A. (2d) 786; *United North & South Development Co. v. Rayner*, *supra* (Note 122).

¹²⁴ *United North & South Development Co. v. Rayner*, *supra* (Note 122).

¹²⁵ *Kentucky Utilities Co. v. Skaggs*, *supra* (Note 119).

¹²⁶ *Baker v. Atlantic Coast Line R. Co.*, (1917) 173 N. C. 365, 92 S. E. 170; *Aronson v. Bank of America Nat. Trust & Savings Ass'n*, (1937) 9 Cal. (2d) 640, 65 P. (2d) 823, *aff'd*, 72 P. (2d) 548.

¹²⁷ *Aronson v. Bank of America Nat. Trust & Savings Ass'n*, (1941) 42 Cal. App. (2d) 710, 109 P. (2d) 1001.

¹²⁸ *Baker v. Atlantic Coast Line R. Co.*, (1917) 173 N. C. 365, 92 S. E. 170. See also *West v. American Tel. & Tel. Co.*, (1939) 108 F. (2d) 347, *rev'd on other grounds*, (1940) 311 U. S. 223, 61 S. Ct. 179.

ration's books as "life tenant under will." Does the corporation have the right to transfer that stock upon demand from the life tenant? In deciding this question, the laws of the state of the testator and the laws of the corporation's domicile must be considered. However, the life tenant is not the owner of the shares and, therefore, cannot pass title under the Uniform Stock Transfer Act.¹²⁹ When a corporation has notice that a person is not entitled to a certificate indicating unlimited ownership, but only life tenancy, it is liable to the remaindermen if it transfers the stock upon demand from the life tenant.¹³⁰ Even those statutes that make the corporation liable for transfer by a fiduciary only under certain conditions do not authorize transfer of the whole title to the stock upon demand of one who has only a life interest in it.¹³¹

Ordinarily when a trustee is described as such on the face of a stock certificate, the corporation permits transfer of the stock at its own peril.¹³² It is liable for a transfer on its books that deprives a trust of the stock. For example, the corporation knew that a trust provided that stock should be used for certain benevolent causes of a church. The church sold the stock and used the proceeds for a new church building. The corporation transferred the stock; it was, therefore, liable to the trustees of the benevolent causes.¹³³

A corporation is not liable for transfer of stock by an executor in breach of fiduciary duty unless it had knowledge of the breach, or the transfer in bad faith.¹³⁴ The corporation is not bound to make inquiry, nor is the executor bound to give requested information. However, if the executor undertakes to supply requested information, he must state the facts fully and

¹²⁹ *Seymour v. National Biscuit Co.*, (1939) 107 F. (2d) 58, cert. denied 309 U. S. 665, 60 S. Ct. 590.

¹³⁰ *West v. American Tel. & Tel. Co.*, (1939) 108 F. (2d) 347, rev'd on other grounds, (1940) 311 U. S. 223, 61 S. Ct. 179.

¹³¹ *Seymour v. National Biscuit Co.*, supra (Note 129).

¹³² *First National Bank of Biddleford v. Pittsburg, F. W. & C. Ry. Co.*, (1939) 31 F. Supp. 381, citing *Bayard v. Farmers' & Mechanics' Bank of Philadelphia*, (1866) 52 Pa. St. 232. See also *Klein v. Inman*, (1944) 298 Ky. 122, 182 S. W. (2d) 34. See also "Liability of a Corporation for Registering Unauthorized Transfer of Shares Standing in the Name of a Fiduciary," 86 *Univ. of Pa. Law Rev.* 653 (1938).

¹³³ *King v. Richardson*, (1943) 136 F. (2d) 849.

¹³⁴ *Harris v. General Motors Corporation*, (1942) 263 N. Y. App. Div. 261, 32 N. Y. Supp. (2d) 556.

fairly. Otherwise, the corporation is justified in refusing to make the transfer.¹³⁵

Appointment of transfer agent and registrar. Many large corporations with widely distributed stock follow the practice of employing transfer agents or registrars to assist them in the issuance and transfer of stock. The board of directors adopts a resolution of appointment, specifying the powers and duties of the transfer agent or registrar, and the class and number of shares for which the agency is created. Some trust companies that act as transfer agent and registrar issue a pamphlet indicating their documentary requirements and other regulations governing their relations with the corporation. The agency may be terminated at the will of the corporation or of the transfer agent or registrar. Usually, upon removal of the transfer agent by the corporation, the board of directors adopts a resolution terminating the agency, and designating an officer of the corporation to whom the transfer books and records are to be delivered.

Duties of registrar and transfer agent. The duty of the registrar is to see that the corporation does not issue its stock beyond the amount authorized. The registrar keeps a record of each share of stock issued and of each share of stock cancelled. It is not concerned with any of the details of transfer of stock. The transfer agent, on the other hand, not only attends to the actual transfer of the stock on the records of the corporation, and to the issuance of new certificates of stock, but it may also take care of stock subscriptions, preparation of stockholders' lists, payment of dividends, conversion or redemption of securities, and even mailing of notices to stockholders.

Liability of transfer agent and registrar. The transfer agent is the agent of the corporation employing it.¹³⁶ It owes no affirmative duty to the stockholders whose certificates of stock it issues and transfers, and incurs no personal liability in favor of such stockholders.¹³⁷ The transfer agent is responsible to the corporation primarily for the following: (1) wrongful refusals to transfer stock; ¹³⁸ (2) wrongful transfers of stock; and (3) failure

¹³⁵ Ibid.

¹³⁶ *Nicholson v. Morgan et al.*, (1922) 119 N. Y. Misc. 309, 196 N. Y. Supp. 147.

¹³⁷ *Palmer v. O'Bannon Corporation*, (1925) 253 Mass. 8, 149 N. E. 112.

¹³⁸ A transfer agent may be compelled to transfer stock by mandamus proceedings. *Catherwood v. Guarantee Trust & Safe Deposit Co.*, (1916) 252 Pa. 466, 97 A. 703.

to perform its duties as agent.¹³⁹ The statutes in some states impose a liability upon the transfer agent for failure to pay taxes due on transfers, or for allowing transfers to be made before required tax waivers have been obtained.

The registrar is liable both to the corporation and to an injured stockholder if it allows an overissue of stock. This liability is based on the principle that an officer or agent who issues unauthorized stock is liable to bona fide purchasers.

Issuance of new certificates of stock to transferees. Transferees of stock are entitled to new certificates upon surrender to the corporation of the old certificate.¹⁴⁰ A corporation, for its own protection, should refuse to issue a new certificate without the surrender of the old.¹⁴¹ It cannot be compelled to issue a new one until the old one is surrendered to it, except where the original certificate is lost or destroyed.¹⁴² A certificate of stock properly issued by a corporation having power to issue stock certificates is a declaration by the corporation to all who may innocently purchase the certificate that the person to whom it is issued is the owner of the number of shares of stock specified in the instrument.¹⁴³ The corporation must make sure that the person to whom it issues the certificate is the true owner.¹⁴⁴ A bona fide holder of the certificate, that is, one who has acquired the certificate in good faith, for value, properly indorsed, has a claim to recognition as a stockholder.¹⁴⁵ Obviously, if the corporation issues a new certificate of stock without demanding the surrender of the old one, it incurs the risk of having to recognize bona fide purchasers of both certificates as stockholders. Can-

¹³⁹ *Nicholson v. Morgan et al.*, (1922) 119 N. Y. Misc. 309, 196 N. Y. Supp. 147.

¹⁴⁰ *Handy v. Miner*, (1926) 258 Mass. 53, 154 N. E. 557; *O'Neil v. Wolcott Min. Co. et al.*, (1909) 174 F. 527. See *Morris v. Hussong Dyeing Mach. Co.*, (1913) 81 N. J. Eq. 256, 86 A. 1026.

¹⁴¹ *Holly Sugar Corporation v. Wilson*, (1938) 101 Colo. 511, 75 P. (2d) 149; *Suskin v. Hodges*, (1939) 216 N. C. 333, 4 S. E. (2d) 891.

¹⁴² *Knight v. Shutz*, (1943) 141 Ohio St. 267, 47 N. E. (2d) 886. See, however, *Danbom v. Danbom*, (1937) 132 Neb. 858, 273 N. W. 502, in which it was held that a court could require a corporation to issue a new certificate to a purchaser at a sheriff's sale without surrender of the outstanding certificate. This case is discussed in 86 *Univ. of Pa. Law Rev.* 101 (1937).

¹⁴³ *Manhattan Beach Co. v. Harned*, (1886) 27 F. 484.

¹⁴⁴ *Greasy Brush Coal Co. v. Hays*, (1942) 292 Ky. 517, 166 S. W. (2d) 983.

¹⁴⁵ *Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.*, (1893) 137 N. Y. 231, 33 N. E. 378; *Rand v. Hercules Power Co.*, (1927) 129 N. Y. Misc. 891, 223 N. Y. Supp. 383. Stock may be transferred to an officer or director of a corporation in the same manner as to any individual, provided that the transaction is not fraudulent or in breach of any trust. *Du Pont et al. v. Du Pont et al.*, (1919) 256 F. 129, aff'g 251 F. 937.

cellation of an old certificate on the corporation books when issuing the new certificate, without demanding the surrender of the old certificate, will not protect the corporation from liability to a bona fide holder of the old certificate.¹⁴⁶ The position to be taken by the corporation in case surrender cannot be made because the certificate is lost is discussed on page 554.

It is not essential to the validity of a pledge that a new certificate be issued to the pledgee. However, the pledgee is entitled to a certificate and may demand it.¹⁴⁷ The corporation may require the pledgee to give satisfactory proof of his authority to demand the transfer and to receive the new certificate.¹⁴⁸ Reference to the pledge agreement should be made in the certificate. For example, the certificate should be issued to "John Smith, pledgee under agreement with Paul Jones, dated"

Remedies of stockholder for failure of corporation to issue stock certificate. Upon refusal of the corporation to issue a certificate of stock when it is under obligation to do so, the person entitled to the stock certificate may pursue one of the following remedies against the corporation:

1. Compel the corporation to issue the certificate by a bill in equity.¹⁴⁹
2. Compel the issuance of the certificate by mandamus proceedings.¹⁵⁰
3. Consider the refusal as a conversion of the stock, and recover the market value of the stock at the time of the conversion.¹⁵¹

¹⁴⁶ *Nowy Swiat Pub. Co. v. Misiewicz*, (1927) 246 N. Y. 58, 158 N. E. 19, rev'g 218 N. Y. App. Div. 818, 218 N. Y. Supp. 834.

¹⁴⁷ *Hurley v. Pusey & Jones Co.*, (1921) 274 F. 487; *Lawrence v. I. N. Parlier Estate Co.*, (1940) 15 Cal. (2d) 220, 100 P. (2d) 765. For the right of a pledgee to have a new certificate issued in his name, see *Foto v. Bussell*, (1919) 45 Cal. App. 281, 187 P. 432, and *Bankers' Trust Co. v. Rood*, (1930) 211 Iowa 289, 233 N. W. 794.

¹⁴⁸ *Palmer v. O'Bannon Corp.*, (1925) 253 Mass. 8, 149 N. E. 112.

¹⁴⁹ *H. M. Rowe Co. v. Rowe*, (1928) 154 Md. 599, 141 A. 334; *Virginia Public Service Co. v. Steindler*, (1936) 166 Va. 686, 187 S. E. 353; *First Nat. Bank of Biddleford v. Pittsburgh F. W. & C. Ry. Co.*, (1939) 31 F. Supp. 381; *Young v. Cockman*, (1943) 182 Md. 246, 34 A. (2d) 428. This remedy is allowed only where the value of the stock cannot be readily ascertained with reasonable certainty, and where the recovery of damages would not give adequate relief. *Falk v. Dirigold Corp.*, (1928) 174 Minn. 219, 219 N. W. 82.

¹⁵⁰ The decisions as to whether or not mandamus is a proper proceeding to compel a transfer are conflicting. See *Burnsville Turnpike Co. v. State ex rel. McCalla*, (1889) 119 Ind. 382, 20 N. E. 421. See also *Jackson Opera House Co. v. Cox*, (1939) 188 Miss. 237, 192 So. 293.

¹⁵¹ *Beaumont Hotel Co. v. Caswell et al.*, (1929) (Tex. Civ. App.) 14 S. W. (2d)

4. Treat the refusal as a breach of contract, and sue for damages.¹⁵²

5. Consider the contract rescinded, and recover the money paid on the subscription.¹⁵³

The court will not direct the issuance of stock if the certificates already outstanding represent the total amount that the corporation is authorized to issue.¹⁵⁴ The stockholder, in such cases, is relegated to his remedy of money damages.¹⁵⁵ In any case, before a stockholder may maintain any action for refusal to issue a certificate, he must make a demand for it.¹⁵⁶

A stockholder may also have a right of action against a corporation for damages sustained because of delay in issuing a certificate,¹⁵⁷ but the officers of the corporation are not personally liable.¹⁵⁸

Rules for transfer of stock. Corporations that handle their own transfers of securities, as well as transfer agents and registrars, often issue printed rules outlining their requirements for transfer of stock, as well as a set of rules to guide themselves in effecting the transfers. These rules generally outline:¹⁵⁹ (1) the documents required for transfer of stock by individuals, corporations, fiduciaries, pledgees, bankrupts, and the like; (2) the manner in which the assignment of stock must be executed; and (3) the method of registration and issuance of new certificates of stock.

292; *Tobias v. Wolverine Min. Co., Ltd.*, (1932) 52 Idaho 576, 17 P. (2d) 338; *Young v. Cockman*, supra (Note 149). See also *Seymour v. National Biscuit Co.*, (1939) 107 F. (2d) 58, cert. denied 309 U. S. 665, 60 S. Ct. 590, discussed in 38 *Michigan Law Rev.* 726 (1939) and in 14 *Tulane Law Rev.* 461 (1940).

¹⁵² *In re Ballou*, (1914) 215 F. 810; *De Lamar v. Fidelity Loan & Investment Co.*, (1924) 158 Ga. 361, 123 S. E. 116.

¹⁵³ *Texla Oil Co. v. Calhoun*, (1927) 36 Ga. App. 536, 137 S. E. 84; *Beaumont Hotel Co. v. Caswell*, (1929) (Tex. Civ. App.) 14 S. W. (2d) 292.

¹⁵⁴ *Selwyn-Brown v. Superno Co.*, (1918) 181 N. Y. App. Div. 420, 168 N. Y. Supp. 918. See, however, *McWilliams v. Geddes & Moss Undertaking, etc. Co.*, (1936) (La. App.) 169 So. 894, in which it was held that a corporation could cancel the shares of stock wrongfully issued.

¹⁵⁵ *Dupoyster v. First Nat. Bank of Wickliffe*, (1906) 29 Ky. L. 1153, 96 S. W. 830.

¹⁵⁶ *Teeple v. Hawkeye Gold Dredging Co.*, (1908) 137 Iowa 206, 114 N. W. 906; *Swope v. Brietson Mfg. Co.*, (1922) 279 F. 560.

¹⁵⁷ *Rock v. Gustaveson Oil Co.*, (1922) 59 Utah 451, 204 P. 96. The measure of damages for delay is the difference between the selling price at the time delivery was due and the selling price on the market when delivery was actually made.

¹⁵⁸ *Radio Electronic Television Corp. v. Bartniew Distributing Corp.*, (1940) 32 F. Supp. 431; *Hulse v. Consolidated Quicksilver Mining Corp.*, (1944) 65 Idaho 768, 154 P. (2d) 149.

¹⁵⁹ For a complete set of such rules, see *Prentice-Hall Stock Transfer Service*.

Lost, destroyed, or stolen certificates of stock. A stockholder may compel the corporation to issue duplicate certificates of stock in place of those lost, destroyed, or stolen.¹⁶⁰ This right is now specifically confirmed by statute in most states. However, it existed at common law, and even in the absence of such a statute, a corporation may be compelled by a court of equity to issue duplicate certificates.¹⁶¹ The remedy provided by the various statutes for refusal of the corporation to issue the duplicates has been held to be in addition to the common law right.¹⁶²

The terms and conditions under which new certificates of stock may be issued in place of those lost, destroyed, or stolen, without resort to the courts, is generally outlined in the by-laws of the corporation. In those states where the statute prescribes the terms and conditions, the by-laws must follow the statutory provision. Some statutes specifically authorize the corporation to make provisions in the by-laws for issuance of duplicate certificates; others provide that the directors may determine the terms and conditions of issuance, unless otherwise provided in the by-laws or in the charter.

By-law and statutory requirements for replacing certificates of stock should be carefully observed. Thus, a corporation that does not comply with the requirements of the Uniform Stock Transfer Act when issuing new certificates to replace certificates alleged to have been destroyed, but which in fact were not, cannot deny the validity of the duplicate certificates issued by it.¹⁶³ However, the purchaser of a duplicate stock certificate who knows that it was issued in contravention of the Uniform Stock Transfer Act must surrender the stock for cancellation.¹⁶⁴

If the statute merely requires the furnishing of a bond, the corporation cannot require that the bond be issued by a surety

¹⁶⁰ *La Belle Iron Works v. Quarter Savings Bank*, (1914) 74 W. Va. 569, 82 S. E. 614; *Beneke v. Bankers' Mortgage Co.*, (1932) 135 Kan. 444, 10 P. (2d) 825; *Tilton v. Iowa Oil Company*, (1934) 139 Cal. App. 93, 33 P. (2d) 446.

For provisions of Uniform Stock Transfer Act (Sec. 17) authorizing issuance on court order of new stock certificate in place of certificate lost or destroyed, see *Prentice-Hall Stock Transfer Service*.

¹⁶¹ *Will's Adm'r v. George Wiedemann Brewing Co.*, (1916) 171 Ky. 681, 188 S. W. 778. See *Brown v. Anderson-Cottonwood Irr. Dist.*, (1920) 183 Cal. 186, 190 P. 797.

¹⁶² *Davis v. Lime Cola Bottling Works*, (1922) 18 Ala. App. 562, 93 So. 328.

¹⁶³ *Foley et al. v. Watertown Central Heating Co.*, (1933) 61 S. D. 488, 249 N. W. 815.

¹⁶⁴ *Edmund Wright-Ginsberg Company, Inc. v. Carlisle Ribbon Mills*, (1929) 105 N. J. Eq. 411, 148 A. 178, *aff'd* (1931) 108 N. J. Eq. 206, 154 A. 632.

company; all that can be required is a bond in an amount to be fixed within the discretion of the court, with such surety as the court may approve.¹⁶⁵ If a certificate is lost in the course of issuance, the stockholder is not required to comply with a by-law providing that a bond must be given in case of loss of a certificate.¹⁶⁶

Where the statutory requirements have been complied with, the corporation must issue a duplicate certificate of stock.¹⁶⁷ If it refuses to do so, the corporation may be held liable for damages.¹⁶⁸ The fact that certain certificates were intentionally destroyed does not prevent the stockholder from compelling the corporation to issue duplicates.¹⁶⁹

Usual requirements for issuance of duplicate certificates. Following are the usual requirements for the issuance of duplicate certificates:

1. An order from the stockholder, directing the corporation to stop any transfer of the lost certificate.
2. An affidavit of the stockholder, setting forth the material facts surrounding the loss of the certificate.¹⁷⁰
3. Advertisement by the stockholder of the loss of the stock certificate, and presentation to the corporation of proof of such advertisement.
4. An indemnity bond, approved by the board of directors of the corporation, in an amount double the market value of the stock at the time of the application for the new certificate of stock.
5. Lapse of a specified period of time before issuance of the new certificate of stock.

Rights of holders of lost certificates of stock. The rights of a bona fide holder of the old certificate of stock which allegedly has been lost, destroyed, or stolen are not affected by the issuance of the new certificate. The corporation must recognize him as a stockholder, as well as the bona fide holder of the new certificate.¹⁷¹ To protect the corporation against any loss which it

¹⁶⁵ *Dyer v. Bridge Heights Realty Co.*, (1930) 170 La. 1092, 129 So. 647.

¹⁶⁶ *Smith v. Universal Service Motors Co.*, (1929) 17 Del. Ch. 58, 147 A. 247.

¹⁶⁷ See footnote 160.

¹⁶⁸ See *First Nat. Bank of Ottawa v. Brown*, (1924) 117 Kan. 339, 230 P. 1038.

¹⁶⁹ *Tilton v. Iowa Oil Company*, (1934) 139 Cal. App. 93, 33 P. (2d) 446.

¹⁷⁰ See *Trust Co. of Georgia v. Finsterwald*, (1939) 188 Ga. 794, 4 S. E. (2d) 808, in which it was held that under the statute it was not necessary to state the "mode of loss."

¹⁷¹ *People's Bank v. Lamar County Bank*, (1915) 107 Miss. 852 67 So. 961.

may later sustain if the old stock certificate should reappear, the court directing issuance of a new stock certificate will require the person requesting replacement to furnish a bond to indemnify the corporation.¹⁷² The court may order issuance of a new certificate without requiring a bond if the facts show that no danger of reappearance of the old certificate exists.¹⁷³ A corporation which issues a new stock certificate without court order will require an indemnity bond as a condition of issuance.

Replacement of lost certificates by transfer agent. Corporations that have a transfer agent and a registrar handling the issuance and transfer of shares sometimes authorize the transfer agent to replace lost certificates upon obtaining a satisfactory surety bond to such an amount as is provided by the by-laws. The board of directors is thus relieved of the necessity of handling each case of a lost certificate of stock. The authority may be given to the transfer agent by means of a separate resolution passed by the directors, or this duty of the transfer agent may be included in the general resolution covering the appointment. The registrar, whose duty it is to see that there is no overissue of stock and who is required to countersign every certificate issued, may wish to be protected against any loss, damage, or liability that may arise from complying with the request of the corporation or its transfer agent to register and countersign certificates of stock issued in place of those that have been lost or destroyed. In such a case, the directors will authorize by resolution the execution of an agreement between the corporation and the registrar to indemnify the latter against such loss.

¹⁷² State ex rel. McCay v. New Orleans Cotton Exchange, (1905) 114 La. 324, 38 So. 204; Will's Adm'r v. George Wiedemann Brewing Co., (1916) 171 Ky. 681, 188 S. W. 778; Davis v. Lime Cola Bottling Works, (1922) 18 Ala. App. 562, 93 So. 328.

¹⁷³ Ibid.

CHAPTER 22

FORMS RELATING TO TRANSFER OF STOCK

No. 434

Resolution of directors authorizing corporation to act as its own transfer agent, and empowering president to appoint and remove transfer clerks.

RESOLVED, That the Company shall act as its own transfer agent; and

RESOLVED FURTHER, That the President shall have the power from time to time to employ one or more transfer clerks, or to assign the duties of a transfer clerk to one or more officers or employees of the Company, and shall have the further power to discharge the transfer clerk or clerks, or to revoke the duties of transfer clerk granted to any officer or employee.

No. 435

Resolution of directors appointing transfer agent and registrar.

RESOLVED, That theTrust Company of be and it hereby is appointed Transfer Agent and Registrar of the Capital Stock of this Company.

That said Trust Company be and it hereby is authorized to countersign as Transfer Agent and Registrar, when signed by the President or Vice President, and the Treasurer or one of the Assistant Treasurers of this Company, and sealed with its corporate seal, certificates for an original issue of the stock of this Company to the number of (.....) shares of Common Capital Stock, each of the par value of (\$.....) Dollars, and to deliver the same, as may be specified in writing by the President or one of the Vice Presidents of the Company, and to transfer and register such shares from time to time in books kept for that purpose, on the surrender for such transfer and registration of certificates for such stock, theretofore countersigned and registered and delivered by it as such Transfer Agent and Registrar, and having thereon proper indorsements duly authorized, and to deliver in lieu of the certificates so surrendered new certificates that have been signed and sealed, countersigned, and registered in the manner above prescribed;

RESOLVED FURTHER, That said Trust Company's authority shall also extend to the countersigning and registering of and delivery in the manner above prescribed, of any certificate or certificates of stock which may be issued by authority of this Company, evidenced by the written order of the President or the Vice President and one of the other aforementioned officers of this Company, in lieu of a lost or destroyed certificate or certificates of stock;

RESOLVED FURTHER, That said Trust Company is authorized to open and keep such stock transfer and registration book or books of this Company as may be required by law or for its own convenience in the performance of its said agency;

RESOLVED FURTHER, That when certificates of stock are presented to said Trust Company for transfer and registration, it is hereby authorized to refuse to transfer and register the same until it is satisfied that the indorsement on the certificate is valid and genuine, and that the requested transfer is legally authorized; and it shall incur no liability for the refusal, in good faith, to make transfers which it, in its judgment, deems improper or unauthorized. Where the indorsements on certificates presented for transfer are not known by the said Trust Company to be genuine, it is authorized to require the appearance before it of the registered holder of the certificate desiring to make the transfer, and the acknowledgment by him of his signature, or, in its discretion, it may accept in lieu thereof, as authority for making the transfer, the guaranty of the genuineness of the signature by some person or persons or corporation believed by it to be financially responsible. It may, in its discretion, decline to make transfers other than to one or more persons or corporations; and where stock is requested to be transferred into the name of a trustee, or other fiduciary, it may refuse to do so unless there is added a reference to the instrument defining the duties of such trustee or other fiduciary. The said Trust Company is charged with the duty of seeing that there shall be no certificates of stock of this Company issued and outstanding and registered by it in excess of the authorized issue above mentioned;

RESOLVED FURTHER, That the Company lodge with said Trust Company, appropriately certified as such:

1. Specimen signatures of the officers of the Company who are authorized by the foregoing resolutions to sign the certificates of stock of the Company;
2. Specimens of all the certificates of stock of the Company;
3. A copy of the Certificate of Incorporation of the Company, with all amendments; and
4. A copy of the By-laws of the Company.

RESOLVED FURTHER, That, in acting in respect to certificates believed by said Trust Company to be certificates of stock of the Company, to be signed by the officers herein before authorized to sign the same, and to be sealed with the corporate seal of the Company, the Company will hold said Transfer Agent and Registrar harmless against all liability;

RESOLVED FURTHER, That said Trust Company may use its own judgment in matters affecting its duties as such Transfer Agent and Registrar, and in its discretion may apply to and act upon instructions of its own counsel or of, the counsel for this Company, in respect to any questions arising in connection with said agency, and in following such advice of counsel or its own judgment it shall be liable only for its own wilful default or negligence;

RESOLVED FURTHER, That the Secretary of the Company be and he hereby is authorized to certify under its corporate seal a copy of these resolutions, and to lodge the same with said Trust Company as authority for all action to be taken by it as Transfer Agent and Registrar.

No. 436

Resolution of directors authorizing appointment of transfer agent/
registrar, to act in accordance with regulations set forth in
pamphlet.

[Note. This is a form furnished by a trust company acting as transfer agent and registrar.]

Appointment of {TRANSFER AGENT
REGISTRAR

.....
(NAME OF CORPORATION)

"Resolved, that..... Bank of the City of.....

is hereby appointed sole } Transfer Agent for
New York } Registrar

* all of the shares
.....shares of thePreferred stock, and

* all of the shares
.....shares of the Common stock

* If the appointment is to cover less than the entire amount of authorized stock of a particular class, the words "all of the shares" should be stricken out and the number of shares to be covered by the appointment inserted on the line. If the appointment is to cover all of the stock of a particular class, now or hereafter authorized by the articles of incorporation, the line and the word "shares" should be stricken out.

of this Company, to act in accordance with its general practice and with the regulations set forth in the pamphlet submitted to this meeting entitled 'Regulations of The Bank of the City of for the Transfer and Registration of Stock,' which pamphlet the Secretary is directed to mark for identification and file with the records of the Company."

I, the undersigned, Secretary of the above named Corporation, Do HEREBY CERTIFY that the foregoing is a true and correct copy of a resolution duly adopted by the Board of Directors of said Corporation at a meeting thereof duly called and held on , 19.., at which a quorum were present, and that said resolution has not been in any wise rescinded, annulled or revoked but the same is still in full force and effect.

AND I DO FURTHER CERTIFY to the following facts:

The authorized and outstanding stock of the Corporation is as follows:

CLASS	PAR VALUE	AUTHORIZED	OUTSTANDING *
.....
.....
.....

The address of the Corporation to which notices may be sent is

The below named persons have been duly elected, have duly qualified, and this day are, officers of the Corporation, holding the respective offices below set opposite their names, and the signatures below set opposite their names are their genuine signatures.**

-PRESIDENT.....
-VICE PRESIDENT.....
-TREASURER.....
-ASSISTANT TREASURER.....
-SECRETARY.....
-ASSISTANT SECRETARY.....

The name and address of legal counsel for the Corporation is.....

* Only stock outstanding prior to appointment should be shown. Do not include in this figure stock to be issued on or after appointment. If new company, the word "none" should be inserted. If new stock is to be issued in exchange for old outstanding stock, amount of old stock outstanding and terms of exchange should be shown.

** Only the names and signatures of the officers who will sign stock certificates or sign written instructions, requests, etc., to the Transfer Agent or Registrar need be included.

The names and addresses of all of the Transfer Agents and Registrars of the stock of the Corporation are as follows:

CLASS OF STOCK	TRANSFER AGENT(S)	REGISTRAR(S)
.....
.....
.....

WITNESS my hand and the seal of the Corporation this .. day of, 19...

.....
SECRETARY
(CORPORATE SEAL)

No. 437

Resolution of directors appointing sole transfer agent.

[Note. This is a form furnished by a trust company acting as transfer agent. The headings in boldface appear in the form as marginal notes.]

APPOINTMENT OF
..... COMPANY
AS TRANSFER AGENT OF THE STOCK OF
.....
(Name)
.....
(Business Address)

RESOLVED—

[Appointment]

FIRST: That the Company be, and it hereby is, appointed Transfer Agent of the shares of the stock of this Company, as hereinafter set forth, and that *all previous appointments in respect to the shares covered by these resolutions, and all previous resolutions in connection therewith be, and the same hereby are, rescinded and revoked*, for which stock there has also been appointed as Registrar in New York City,

SECOND: That this Board of Directors hereby approves the Capital Stock Schedule, presented to and hereby ordered filed with the minutes of this meeting, and certifies that all of the shares of the Company's stock now outstanding, or which will be outstanding pursuant to this authorization, have been duly authorized to be issued, and are, or when issued will be, fully paid and non-assessable.

[Authorization to make transfers of stock]

THIRD: * That for the purpose of the original issue of certificates (that is, certificates *not* issued upon the transfer and cancellation of

* If all of the stock in respect to which Transfer Agent is being appointed has heretofore been issued, strike out this paragraph THIRD.

existing certificates now outstanding), the Transfer Agent is hereby directed:

(a) To record and countersign as Transfer Agent, when duly executed by the Company, certificates of stock of the class or classes set forth in the Capital Stock Schedule for not exceeding the number of shares of each class specified in Column 6 of said Schedule;

(b) To deliver such certificates to the Registrar of the Company or any successor Registrar appointed by the Company, for registration and countersignature; and

(c) To deliver such certificates so countersigned, upon the receipt of the written order or orders of the Company signed by its.....
.....and/orunder its corporate seal, specifying: (1) the name or names and the number of shares in which such certificates shall be issued; and (2) the officer or other person or persons to whom or upon whose order such certificates shall be delivered.

[Authorization to make transfer of stock]

FOURTH: That the Transfer Agent be, and it hereby is, authorized and directed, from time to time, when surrendered to it for such purpose, properly endorsed or accompanied by instruments of assignment, and duly stamped as may be required by the laws of *, of New York and of the United States, and duly executed by the Company, to make transfers of:

(a) Certificates, if any, issued pursuant to the foregoing paragraph THIRD of these resolutions;

(b) Certificates, if any, heretofore issued and now outstanding, specified in Column 3 of the Capital Stock Schedule; and

(c) Certificates thus issued in transfer by it as Transfer Agent; and

to record and to countersign new certificates, when they shall have been duly executed by the Company, and to deliver such certificates to the Registrar for registration and countersignature, and, when so countersigned and returned by the Registrar, to deliver them in the usual course of business in lieu of and upon cancellation of the certificates so surrendered for transfer.

[Method of signing certificates **]

FIFTH: The Transfer Agent is hereby authorized to recognize as duly

* Here insert State of incorporation if stamps are required by the laws or rulings of that State.

** Strike out provision as to facsimile seals and signatures, except where same is authorized by statute and the by-laws and is desired by Company.

executed by the Company any certificate which shall either (a) be manually signed by * a President or a Vice President and a Treasurer or an Assistant Treasurer or a Secretary or an Assistant Secretary of the Company and on which the seal of the Company shall be impressed; or (b) bear the printed or engraved facsimile signatures of the said officers and a printed or engraved facsimile of the corporate seal of the Company.

When any officer of this Company shall no longer be vested with authority to sign for the Company written notice thereof shall immediately be given to the Transfer Agent, and, until receipt of such notice, the Transfer Agent shall be fully protected and held harmless in recognizing and acting upon certificates bearing the signature of such officer or a signature believed by it in good faith to be such genuine signature. In case any officer whose manual or facsimile signature appears on any unused stock certificates lodged with the Transfer Agent shall cease to be such officer, such certificates may nevertheless be issued and delivered (unless the Transfer Agent shall have been instructed in writing by an officer of the Company to the contrary), either in connection with any original issue or upon transfers, as though such officer had not ceased to be an officer. The Transfer Agent is authorized to recognize as duly executed and issued any outstanding certificate (a) which shall have been countersigned by any former transfer agent and/or registrar, without checking the signatures of the officers of the Company appearing on such certificate; or (b) the signatures on which (in case such signatures shall not have been lodged with the Transfer Agent pursuant to paragraph TWELFTH hereof) shall have been identified to the Transfer Agent by an officer of the Company, all officers being hereby authorized at any time to identify any such signature or signatures to the Transfer Agent on its request. The Transfer Agent shall be fully protected in conclusively relying upon any list of holders of shares, if any, now outstanding, furnished to it by any former Transfer Agent or by an officer of the Company.**

[Lost, stolen, or destroyed certificates]

SIXTH: That the Transfer Agent be, and it hereby is, authorized to issue a new or duplicate certificate in lieu of any alleged lost, stolen or destroyed certificate, upon being furnished with (a) an appropriate bond of indemnity in form and substance and with a surety company satisfactory to the Transfer Agent and in an amount at least equal to

* The officers authorized to sign must be in accordance with the provisions of the Certificate of Incorporation, the By-Laws, and the laws of the State of incorporation.

** Certified list of stockholders as of the date that this appointment becomes effective must be furnished.

twice the market or par value of the stock represented by such lost, stolen or destroyed certificate, naming the Transfer Agent as one of the obligees; and (b) a resolution of the Board of Directors, or the Executive Committee of the Board, specifically approving the indemnity bond as executed and the issuance of such new or duplicate certificate.

[Delay or refusal to effect transfers]

SEVENTH: That the Transfer Agent be, and it hereby is, authorized to refuse to transfer or delay in transferring (a) any certificate presented to it for transfer until it is satisfied, in its discretion, that the requested transfer is duly authorized, and in such connection may require such evidence or guaranty of the validity and genuineness of signatures, endorsements or assignments as is usual, or as it may in its discretion require, or until it is satisfied, in its discretion, as to whether any stamp, transfer, inheritance or other tax liability exists or has been paid in respect of any requested transfer or (b) any certificate reported lost, stolen or destroyed, or the ownership of which is in dispute, until satisfied in its discretion as to the ownership of such certificate; and shall be fully indemnified and saved harmless by the Company in connection with any such refusal or delay. That the Transfer Agent be, and it hereby is, authorized to act on the instructions of any officer of the Company in transferring or delaying or refusing to transfer any certificate, so reported lost, stolen or destroyed, or the ownership of which is in dispute, and if so instructed, may make any transfer notwithstanding any irregularity, and without further inquiry as to the validity or genuineness of any endorsement or assignment, and shall be fully protected in so doing.

[Further instructions]

That when the Transfer Agent deems it expedient, it may apply to any officer of the Company or to of , counsel for the Company, or to its own counsel, for instructions and advice; and for any action taken in accordance with such instructions or advice, the Company will fully indemnify, protect and hold harmless the Transfer Agent from any and all liability.

[Stockholders' lists]

EIGHTH: That the Transfer Agent be, and it hereby is, authorized and directed to prepare and deliver lists of stockholders of the Company upon the order of the or of the Company.

[Supply of stock certificates]

NINTH: That the Company will at all times keep the Transfer Agent furnished with an adequate supply of certificates of each class of stock in respect to which it is appointed, duly executed by the Company.

The Transfer Agent is hereby authorized, in its discretion, to retain any stock certificates cancelled in connection with transfers, together with all documents submitted therewith, and also to retain its books of original entry as Transfer Agent, on condition that the Transfer Agent, by accepting this appointment, agrees, in case of the termination of its appointment, or at any other time, when requested by the Company and on the payment of proper charges therefor, to furnish to the Company a certified list of stockholders and of certificates outstanding, and to permit the inspection, at reasonable times, of any such cancelled certificates, documents and original records.

[Compensation]

TENTH: That the Transfer Agent be, and it shall be, entitled to reasonable compensation for all services rendered by it in the execution of its duties, as well as all its reasonable expenses incurred or disbursed in the performance of such duties, including fees of its counsel for advice rendered in connection with such agency, and the proper officers of the Company are hereby authorized to pay all bills therefor when rendered.

[Indemnification]

ELEVENTH: That the Company shall indemnify, protect and hold harmless the Transfer Agent for any act, omission, delay or refusal made by it in reliance upon any stock certificate, signature, endorsement, assignment, order, certificate, document, or other instrument believed by it in good faith to be valid, genuine and sufficient, and in effecting any transfer believed by it in good faith to be duly authorized, and that the Transfer Agent shall not be liable for anything whatever in connection with this agency except its own wilful misconduct. That the Transfer Agent may employ agents or attorneys in fact, and shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care.

[Authority of officer of company to certify]

TWELFTH: That any officer of the Company be, and he hereby is, authorized to lodge with the Transfer Agent (a) a certified copy of these resolutions, together with a copy of the Capital Stock Schedule referred to in paragraph SECOND of these resolutions; (b) specimens of certificates of each class of stock covered by these resolutions in the form adopted by the Company; (c) specimens or facsimiles of the signatures of (1) all officers of the Company duly authorized to sign or countersign any stock certificates hereafter issued, and (2) all other officers, if any, and if such signatures are readily available, heretofore authorized to sign or whose signatures appear upon stock certificates now outstanding, for the purpose of comparison with signatures appear-

ing on certificates presented to it for issue or transfer; (d) a certified copy of the Certificate of Incorporation of the Company, including all of the amendments thereto; (e) a certified copy of the By-laws of the Company as at present in force; and (f) specimens or facsimiles of the signatures of any additional officers of the Company at any time hereafter duly authorized to sign stock certificates, and certified copies of any amendments that may, from time to time, be made to the Certificate of Incorporation or By-laws; and that the Transfer Agent be, and it hereby is, authorized to rely conclusively on any documents or signatures so lodged with it and be fully protected in so doing.

THIRTEENTH: This appointment shall be deemed to constitute an appointment of any banking corporation or trust company which, by merger, consolidation, purchase of assets or otherwise, shall succeed to the banking and trust business of the Bank of Company, and of the successor and successors of such banking corporation or trust company; and the term Transfer Agent (Registrar), wherever herein used, shall be deemed to include and apply to any such banking corporation or trust company, its successor and successors, whether organized under state or national law.

[on separate sheet]

The undersigned,, President, and
, Secretary, of, a corporation duly
 organized and existing under the laws of the State of, DO
 HEREBY CERTIFY:

(1) That the foregoing is a true and complete copy of certain resolutions, and of the Capital Stock Schedule therein referred to, duly adopted at a meeting of the Board of Directors of said corporation, duly and regularly convened and held on, 19..., at which a quorum for the transaction of business was present and voting throughout;

(2) That accompanying this Certificate and *identified by the signature of the Secretary or an Assistant Secretary*, are:

(a) Specimens of certificates of each class of stock of the Company covered by the foregoing resolutions in the form adopted by the Company, and in case facsimile signatures are authorized by said resolutions, specimen certificates bearing such facsimile signatures;

(b) A signature card bearing the names and specimens or facsimiles of the signatures of all the officers of the Company authorized to sign or countersign stock certificates hereafter issued, and also (where such signatures are available) of all the officers author-

[on separate sheet]

CAPITAL STOCK SCHEDULE

Class	Par Value	1 Shares Now Authorized by Certificate of Incorporation	2 Total Shares Authorized To Be Issued by Previous Resolutions	3 Total Shares Now Issued and Outstanding	4 * Balance Authorized To Be Issued Under Previous Resolutions and Not Yet Issued	5 Additional Shares Authorized by Present Resolution	6 ** Total Shares Not Yet Issued But Now Authorized To Be Issued Pursuant to This and Previous Resolutions	7 + Total Shares Authorized To Be Issued

* Column 4 will be the difference between Column 2 and Column 3.
** Column 6 will be the sum of Column 4 and Column 5.
+ Column 7 will be the sum of Column 2 and Column 5.

ized to sign, or whose signatures appear upon, stock certificates, if any, heretofore issued;

(c) A true and complete copy of the By-laws of the Company, as at present in force; and

(d) A copy of the Certificate of Incorporation of the Company, with all amendments to date, duly certified by the state officer having custody of the original thereof.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed the seal of the Company this . . day of, 19...

(Seal)

.....
President

.....
Secretary

No. 438

Resolution of directors appointing sole registrar.

[*Note.* This is a form furnished by a trust company acting as registrar. The headings in boldface appear in the form as marginal notes.]

APPOINTMENT OF
..... TRUST COMPANY
AS REGISTRAR OF THE STOCK OF
.....
(Name)
.....
(Business Address)

RESOLVED—

[Appointment]

FIRST: That the Trust Company be, and it hereby is, appointed Registrar of the shares of the stock of this Company, as hereinafter set forth, and that *all previous appointments in respect to the shares covered by these resolutions, and all previous resolutions in connection therewith be, and the same hereby are, rescinded and revoked*, for which stock there has also been appointed as Transfer Agent in New York City

SECOND: That this Board of Directors hereby approves the Capital Stock Schedule, presented to and hereby ordered filed with the minutes of this meeting, and certifies that all of the shares of the Company's stock now outstanding, or which will be outstanding pursuant to this authorization, have been duly authorized to be issued, and are, or when issued will be, fully paid and non-assessable.

[Authorization to register original issues of stock]

THIRD: * That for the purpose of the original issue of certificates (that is, certificates *not* issued upon the transfer and cancellation of existing certificates now outstanding), the Registrar is hereby directed

(a) To register, when duly executed by the Company and countersigned by the Transfer Agent, or any successor Transfer Agent appointed by the Company, certificates of stock of the class or classes set forth in the Capital Stock Schedule for not exceeding the number of shares of each class specified in Column 6 of said Schedule; and

(b) To redeliver the certificates, when registered by it, to the Transfer Agent.

[Authorization to register transfers of stock]

FOURTH: That the Registrar be, and it hereby is, authorized and directed from time to time, upon the cancellation of certificates, duly executed by the Company and surrendered to it by the Transfer Agent, representing a like number of shares of the same class of stock, to register transfers of:

(a) Certificates, if any, registered pursuant to the foregoing paragraph THIRD of these Resolutions;

(b) Certificates, if any, heretofore issued and now outstanding, specified in Column 3 of the Capital Stock Schedule; and

(c) Certificates thus registered by it upon transfers and countersigned by the Transfer Agent or any successor or additional Transfer Agent appointed by the Company; and

to register and countersign new certificates when they shall have been duly executed by the Company and countersigned and delivered to it for such purpose by the Transfer Agent; and to redeliver the certificates, so registered, to the Transfer Agent; *provided, however*, that the Registrar shall be under no duty whatever in connection with the names in which certificates are issued or the validity, sufficiency or correctness of any transfer from one name to another.

[Method of signing certificates]**

FIFTH: The Registrar is hereby authorized to recognize as duly executed by the Company any certificate which shall either (a) be manually signed by † a President or a Vice President and a Treasurer

* If all of the stock in respect of which Registrar is being appointed has heretofore been issued, strike out this paragraph Third.

** Strike out provision as to facsimile seals and signatures, except where same is authorized by statute and the by-laws and is desired by Company.

† The officers authorized to sign must be in accordance with the provisions of

or an Assistant Treasurer or a Secretary or an Assistant Secretary of the Company and on which the seal of the Company shall be impressed; or (b) bear the printed or engraved facsimile signatures of the said officers and a printed or engraved facsimile of the corporate seal of the Company.

When any officer of the Company shall no longer be vested with authority to sign for the Company written notice thereof shall immediately be given to the Registrar, and, until receipt of such notice, the Registrar shall be fully protected and held harmless in recognizing and acting upon certificates bearing the signature of such officer or a signature believed by it in good faith to be such genuine signature. In case any officer whose manual or facsimile signature appears on any stock certificates delivered by the Transfer Agent to the Registrar for registration shall have ceased to be such officer, such certificates may nevertheless be registered (unless the Registrar shall have been instructed in writing by an officer of the Company to the contrary), either in connection with any original issue or upon transfers, as though such officer had not ceased to be an officer. The Registrar is authorized to recognize as duly executed and issued any outstanding certificate (a) which shall have been countersigned by any previous registrar and/or transfer agent, without checking the signatures of the officers of the Company appearing on such certificates; or (b) the signatures on which (in case such signatures shall not have been lodged with the Registrar pursuant to paragraph ELEVENTH hereof) shall have been identified to the Registrar by an officer of the Company, all officers being hereby authorized at any time to identify any such signature or signatures to the Registrar on its request.

[Lost, stolen, or destroyed certificates]

SIXTH: That, in case of the alleged loss, theft or destruction of any certificate of stock, the Registrar is authorized to register, when so requested in writing by the Transfer Agent, a new or duplicate certificate, when the same shall have been countersigned by the Transfer Agent, in lieu of, and without requiring the surrender of, any such alleged lost, stolen or destroyed certificate, and shall be fully protected in relying upon any such request. The Company agrees that before the Registrar shall be required to register any such new or duplicate certificate, the Registrar and/or Transfer Agent, will be furnished with (a) an appropriate bond of indemnity in an amount at least equal to twice the market or par value of the stock at the time of execution of the bond, in form and substance and with a surety company satisfactory to the Registrar, and in an amount at least equal to twice the

the Certificate of Incorporation, the By-Laws, and the laws of the State of incorporation.

market or par value of the stock represented by such certificate, naming the Registrar and/or Transfer Agents as one of the obligees, an original copy to be filed with the New York Registrar; (b) a resolution of the Board of Directors, or the Executive Committee of the Board, specifically approving the indemnity bond as executed and the issuance of such new or duplicate certificate.

[Further instructions]

SEVENTH: That when the Registrar deems it expedient, it may apply to any officer of the Company or to of , counsel for the Company, or to its own counsel, for instructions and advice; and for any action taken in accordance with such instructions or advice, the Company will fully indemnify, protect and hold harmless the Registrar from any and all liability.

[Retention of original records]

EIGHTH: That the Registrar is hereby authorized, in its discretion, to retain its books of original entry as Registrar, on condition that the Registrar, by accepting this appointment, agrees, in case of the termination of its appointment, or at any other time, when requested by the Company and on the payment of proper charges therefor, to furnish to the Company a certificate of the number of shares outstanding, and to permit the inspection, at reasonable times, of any such original records in its possession.

[Compensation]

NINTH: That the Registrar be, and it shall be, entitled to reasonable compensation for all services rendered by it in the execution of its duties, as well as all its reasonable expenses incurred or disbursed in the performance of such duties, including fees of its counsel for advice rendered in connection with such agency, and the proper officers of the Company are hereby authorized to pay all bills therefor when rendered.

[Limit of liability]

TENTH: That the Registrar may employ agents or attorneys in fact, and shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; nor shall the Registrar be liable for anything whatever in connection with this agency, except its wilful misconduct. The Company shall indemnify and hold harmless the Registrar for any act done by it in good faith in reliance upon any instrument, order or stock certificate believed by it to be genuine and to be signed, countersigned or executed by any person or persons authorized to sign, countersign or execute the same.

[Authority of officer of company to certify]

ELEVENTH: That any officer of the Company be, and he hereby is,

authorized to lodge with the Registrar (a) a certified copy of these resolutions together with a copy of the Capital Stock Schedule referred to in paragraph SECOND of these resolutions; (b) specimens of certificates of each class of stock covered by these resolutions in the form adopted by the Company; (c) specimens or facsimiles of the signatures of (1) all officers of the Company duly authorized to sign or countersign any stock certificates hereafter issued, and (2) all other officers, if any, and if such signatures are readily available, heretofore authorized to sign or whose signatures appear upon stock certificates now outstanding, for the purpose of comparison with signatures appearing on certificates presented to it for any purpose; (d) a certified copy of the Certificate of Incorporation of the Company, including all of the amendments thereto; (e) a certified copy of the By-laws of the Company as at present in force; and (f) specimens or facsimiles of the signatures of any additional officers of the Company at any time hereafter duly authorized to sign stock certificates, and certified copies of any amendments that may, from time to time, be made to the Certificate of Incorporation or By-laws; and that the Registrar be, and it hereby is, authorized to rely conclusively on any documents or signatures so lodged with it and be fully protected in so doing.

[on separate sheet]

The undersigned,, President, and
, Secretary, of, a corporation duly organized and existing under the laws of the State of,

DO HEREBY CERTIFY:

(1) That the foregoing is a true and complete copy of certain resolutions, and of the Capital Stock Schedule therein referred to, duly adopted at a meeting of the Board of Directors of said corporation, duly and regularly convened and held on, 19.., at which a quorum for the transaction of business was present and voting throughout;

(2) That accompanying this Certificate and *identified by the signature of the Secretary or an Assistant Secretary*, are:

(a) Specimens of certificates of each class of stock of the Company covered by the foregoing resolutions in the form adopted by the Company, and in case facsimile signatures are authorized by said resolutions, specimen certificates bearing such facsimile signatures;

(b) A signature card bearing the names and specimens or facsimiles of the signatures of all the officers of the Company authorized to sign or countersign stock certificates hereafter issued, and also (where such signatures are available) of all the officers

[on separate sheet]
CAPITAL STOCK SCHEDULE

Class	Par Value	1 Shares Now Authorized by Certificate of Incorporation	2 Total Shares Authorized To Be Issued by Previous Resolutions	3 Total Shares Now Issued and Outstanding	4 * Balance Authorized To Be Issued Under Previous Resolutions and Not Yet Issued	5 Additional Shares Authorized by Present Resolution	6 ** Total Shares Not Yet Issued But Now Authorized To Be Issued Pursuant to This and Previous Resolutions	7 † Total Shares Authorized To Be Issued

* Column 4 will be the difference between Column 2 and Column 3.

** Column 6 will be the sum of Column 4 and Column 5.

† Column 7 will be the sum of Column 2 and Column 5.

authorized to sign, or whose signatures appear upon, stock certificates, if any, heretofore issued;

(c) A true and complete copy of the By-laws of the Company, as at present in force; and

(d) A copy of the Certificate of Incorporation of the Company, with all amendments to date, duly certified by the state officer having custody of the original thereof.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed the seal of the Company this .. day of, 19..

.....
President

.....
Secretary

(Seal)

No. 439

Resolution appointing sole registrar (another form).

[Note. This is a form furnished by a trust company acting as registrar.]

CERTIFIED COPY OF RESOLUTIONS OF THE BOARD OF DIRECTORS OF

.....
a.....corporation.

(1) RESOLVED, That, effective, 19...,
..... TRUST COMPANY, a corporation, be and it hereby is appointed Registrar (hereinafter called the Registrar) for the registration of certificates for the shares of capital stock of this corporation Authorized For Issue as set forth below, viz.:

CLASS	PAR VALUE	NUMBER OF SHARES		
		AUTHORIZED BY CERTIFICATE OF INCORPORATION	AUTHORIZED FOR ISSUE	OUTSTANDING (INCLUDING SHARES IN TREASURY)

(2) FURTHER RESOLVED, That the Registrar is hereby authorized and directed to register certificates for shares of said stock in accordance with these resolutions (whether upon transfer or upon original issue) only if such certificates (a) shall have been signed by or shall bear the facsimile signatures of the President or a Vice-President of this corporation and of its Treasurer or Secretary or,

at the time or previously in office, (and shall have been sealed with the seal of this corporation or bear a facsimile thereof) * and (b) shall have been countersigned by, Transfer Agent, or by such other Transfer Agent as may hereafter be appointed in place thereof by resolution of the Board of Directors of this corporation, a certified copy of which shall have been duly lodged with the Registrar.

(3) FURTHER RESOLVED, That the Registrar is hereby authorized and directed, upon surrender for cancellation of certificates for shares of said stock now outstanding or hereafter issued, to register as Registrar certificates (for the numbers of shares of stock represented by the certificates so cancelled) when such certificates shall have been countersigned and delivered to it for that purpose by the Transfer Agent, and to redeliver such certificates so registered to the Transfer Agent; provided, however, that the Registrar shall not be under any duty or responsibility with respect to the names in which such certificates are issued or the correctness of or authority for any transfer of certificates from one name to another.

(4) FURTHER RESOLVED, That for Original Issues of said stock of the following classes and not exceeding in the aggregate the number of shares set forth below, viz.:

CLASS (See Note **)	NUMBER OF SHARES (See Note **)
---------------------	--------------------------------

certificates may be registered by the Registrar upon written orders of this corporation signed by its President or a Vice President and by its Treasurer or Secretary or, under the seal of this corporation; and that the Registrar is hereby authorized and directed, when such certificates shall have been countersigned and delivered to it for that purpose by the Transfer Agent, to register certificates for such number of shares as may be specified in any such written order and, when so registered, to redeliver the same to the Transfer Agent.

(5) FURTHER RESOLVED, That this corporation immediately advise the Registrar in writing of all original issues of certificates, for shares of stock of the classes covered by this appointment, hereafter made or effected by this corporation or any transfer agent.

* NOTE: Strike out words in parentheses if seal is not required.

** NOTE: Insert here only the shares of which an *original issue* to be made hereafter has been authorized, i.e. shares shown in Resolution 1 as "Authorized for Issue" but not as "Outstanding." If no original issue to be made hereafter has been authorized, then this entire Resolution 4 should be stricken out.

(6) FURTHER RESOLVED, That the Registrar is hereby (a) authorized and directed to maintain records showing the serial numbers of the certificates registered by it and the numbers of shares represented thereby, together with such other records as the Registrar may deem necessary or advisable to discharge its duties as set forth in these resolutions, and (b) authorized to deliver from time to time to this corporation any such records, and any instruments or documents, made or accumulated in the performance of its duties as Registrar; and further that this corporation agrees to return such records, instruments or documents, or any thereof, when requested so to do to the Registrar.

(7) FURTHER RESOLVED, That, in the event any certificate for shares of said stock shall be represented to have been lost, stolen or destroyed (hereinafter called the old certificate), the Registrar, upon being furnished with (a) an indemnity bond (naming the Registrar as one of the obligees therein) in such form and amount and with such surety as shall be satisfactory to it and (b) a duly certified copy of a resolution of the Board of Directors of this corporation authorizing the issue of a new certificate or certificates in lieu of the old certificate and approving (or providing for the approval on behalf of this corporation of) such bond as to form, amount and surety, is hereby authorized, in lieu and without the surrender of the old certificate and without further proof of the ownership thereof, to register (when countersigned and delivered to it for that purpose by the Transfer Agent) a new certificate or certificates for the number of shares of stock represented by the old certificate and, when so registered, to redeliver such new certificate or certificates to the Transfer Agent.

(8) FURTHER RESOLVED, That the Registrar may, but need not, rely conclusively and act without further investigation upon any list, instruction, certification, authorization, stock certificate or other instrument or paper believed by it in good faith to be genuine and unaltered, and to have been signed, countersigned or executed by any duly authorized person or persons, or upon the instruction of any officer of this corporation or upon the advice of, No., City of, State of, counsel for this corporation, or of counsel for the Registrar; and further that the Registrar may refuse to register any certificates for shares of said stock if in good faith the Registrar deems such refusal necessary in order to avoid any liability either to this corporation or to itself; and further that this corporation agrees to indemnify and hold harmless the Registrar from and against any and all losses, costs, claims and liability which it may suffer or incur (a) by reason of so relying or acting or refusing to act, (b) by reason of any act or omission of this corporation or of any other registrar or of any transfer agent or

of any other agent of this corporation, (c) by reason of the failure of this corporation or of any such person, firm or corporation to do the acts by these resolutions contemplated to be done by this corporation or such person, firm or corporation, and/or (d) by reason of any action or non-action taken by the Registrar in accordance with these resolutions.

(9) FURTHER RESOLVED, That these resolutions shall remain in full force and effect except as altered or terminated by resolution of the Board of Directors of this corporation of which a duly certified copy shall have been filed with the Registrar, but no such alteration or termination shall affect or impair any rights or liabilities based on any action or non-action taken prior to such filing.

(10) FURTHER RESOLVED, That the President or any Vice President and the Secretary or any Assistant Secretary of this corporation are hereby authorized and directed (a) to certify these resolutions under the seal of this corporation and to lodge the same with the Registrar together with the following documents (Nos. 1, 2, 3, 4 and 5 to be duly certified by the Secretary or an Assistant Secretary of this corporation):

- (1) copy of the By-laws of this corporation as now in effect;
- (2) specimens of certificates for shares of stock of each class covered by this appointment which the Registrar is authorized to register;
- (3) specimens of certificates for shares of stock now outstanding which differ in form from and are exchangeable for the certificates for shares of stock of classes covered by this appointment which the Registrar is authorized to register, together with a statement of the terms of such exchanges;
- (4) list of names and specimen signatures of all officers of this corporation whose signatures may appear on said stock certificates now outstanding or to be issued or who are authorized to give instructions to the Registrar as provided in these resolutions;
- (5) list of all stop transfer orders filed with this corporation or any transfer agent or registrar thereof;
- (6) list of names and specimen signatures of the officers of the Transfer Agent who are authorized to countersign said stock certificates, duly certified by the appropriate officer of the Transfer Agent;
- (7) copies of the Certificate of Incorporation of this corporation and of all amendments thereof, all duly certified by the Sec-

retary of State, or other proper official, of the State of this corporation's incorporation;

- (8) opinion of counsel for this corporation covering the legality of the issue of said stock and the compliance thereof with the terms of the Securities Act of 1933, as amended; and
- (9) a certificate as to the number of shares of stock (of each of the classes above mentioned) outstanding immediately prior to the effective date of this appointment, signed by the registrar then acting as such or, if there be none, by the official custodian of the original transfer records of this corporation;

and (b) to notify the Registrar promptly of all changes which may from time to time be made with respect to said documents and to lodge with it duly certified copies of all documents which amend or supersede the same.

We, the undersigned,,
President, and, Secretary, of, a corporation, hereby certify:

1. That the foregoing are true and complete copies of resolutions duly adopted at a meeting of the Board of Directors of said corporation duly called and held at, in the City of, State of, on the .. day of, 19..., a quorum being present, and that the same are now in full force and effect and are not inconsistent with the Certificate of Incorporation and By-laws of said corporation as now in effect.

2. That accompanying this certificate are copies of all documents required to be furnished by the last of the foregoing resolutions, all duly certified, or originals, as therein provided.

WITNESS our hands and the seal of said corporation, this .. day of, 19...
(SEAL)

.....
President
.....
Secretary

No. 440

Resolution of directors appointing co-transfer agents.

CERTIFIED COPY OF RESOLUTIONS
OF THE
BOARD OF DIRECTORS
OF

.....

RESOLVED:

FIRST: That the Trust Company, of New York, New York, and, of, and, of, be and each is appointed Transfer Agent of certificates representing shares of stock of this Company hereinafter set forth.

Class	Par Value	Shares Authorized by Certificate of Incorporation	Shares Outstanding	Shares Authorized but Unissued
.....				
.....				
.....				
.....				

SECOND: That for the purpose of the original issue of certificates representing shares of stock authorized but unissued, each Transfer Agent is hereby directed:

(a) To record and countersign certificates signed by or bearing the facsimile signature of the officers of this Company authorized by its By-laws to sign stock certificates for not to exceed shares as may be required for the following purpose(s) and upon the following terms and conditions:

.....
(Reserve for Conversions, etc.)

and to present such certificates to the Registrar of this Company in the same city as the Transfer Agent so countersigning for registration and countersignature, and when so countersigned, to deliver the certificates to or upon the written order of the person entitled thereto.

(b) To record and countersign certificates for shares authorized but unissued and not required for the purposes set forth in subdivision (a) hereof when signed by or bearing the facsimile signatures of the officers of this Company authorized by its By-laws to sign stock certificates in such names and in such amounts as this Company may direct in a writing signed by the or the of this Company, and to present such certificates to the Registrar of this Company in the same city as the Transfer Agent so countersigned, for registration and countersignature and when so countersigned, to deliver the certificates to, or upon the written order of, any officer of this Company.

THIRD: That said Transfer Agents be and each of them hereby is

authorized and directed to make transfers, from time to time, upon the books of this Company, of any outstanding certificates representing shares of such stock of this Company heretofore issued and of certificates representing shares of such stock of this Company which may hereafter be issued, and of certificates issued in exchange therefor, signed by or bearing the facsimile signatures of the officers of this Company authorized by its By-laws to sign stock certificates and countersigned by any Transfer Agent and any Registrar, upon surrender thereof for transfer properly endorsed and duly stamped as may be required by the laws of the state of incorporation, of the State of New York, and of the United States, and upon cancellation of such certificates, to record and countersign new certificates, duly signed as aforesaid, for an equal number of shares of such stock and to present said certificates to the Registrar in the same city as the Transfer Agent so countersigning, viz.:

to in New York City,
 to in
 to in

for registration and countersignature, and when so countersigned to deliver said certificates to or upon the order of the person entitled thereto.

FOURTH: That said Transfer Agents are authorized and directed to maintain such records as the said Transfer Agents may deem necessary or advisable, provided, however, that as Transfer Agent in the City of shall be the only Transfer Agent required to maintain stockholders' records showing the name, address, certificate numbers and number of shares represented by each certificate held by each holder of shares of such stock, and are authorized to deliver from time to time to this Company for safekeeping any such records, cancelled stock certificates, instruments and documents made or accumulated in the performance of their duties as Transfer Agents, and further that this Company agrees to return to said Transfer Agents such records, cancelled stock certificates, instruments or documents, or any thereof, when requested to do so, and agrees to indemnify and hold harmless said Transfer Agents from and against all losses, costs, claims and liabilities which they may suffer or incur by reason of the failure of this Company to so return the same.

FIFTH: That it is the intention and purpose of these resolutions that certificates representing stock of this Company shall be interchangeably transferable in the Cities of and New York, N. Y. The fact of the recording and countersignature of new certificates, whether by way of original issue or upon a transfer, shall be advised daily by mail by the Transfer Agent countersigning the

same to the other Transfer Agents; and each Transfer Agent shall be fully protected and held harmless by this Company by reason of its failure or refusal to transfer any certificate countersigned by another Transfer Agent when it shall not have received notice of the issue or countersignature of such certificate. None of said Transfer Agents shall be in any manner liable for any act or omission of any other Transfer Agent.

SIXTH: That specimen signatures of the officers of this Company authorized to sign certificates of stock, as aforesaid, and of the officers of the respective Transfer Agents and Registrars authorized to sign for said respective Transfer Agents and Registrars, and specimen signatures of any additional officers who may be appointed by resolutions of the Board of Directors of this Company to sign such certificates and of any additional officers who may be appointed to sign on behalf of the respective Transfer Agents and Registrars, together with certified copies of the resolutions effecting such appointments, and specimen stock certificates, shall be lodged with each of the said Transfer Agents to be used by them for the purposes of comparison; and that said Transfer Agents and each of them shall be protected and held harmless in recognizing and acting upon any signature or certificate believed in good faith to be genuine. When any officer of this Company or of the respective Transfer Agents and Registrars shall no longer be vested with authority to sign for this Company or for the respective Transfer Agents or Registrars, as the case may be, written notice thereof shall immediately be given to each Transfer Agent, and until receipt of such notice each Transfer Agent shall be fully protected and held harmless in recognizing and acting upon certificates bearing the signature of such officer, or a signature believed in good faith to be such genuine signature.

SEVENTH: That in the event that any such certificate shall become lost or destroyed, no new certificate or certificates shall be issued in lieu thereof until an indemnity bond in such form as may be approved by the Board of Directors of this Company shall have been furnished. The bond shall be in form satisfactory to the Transfer Agent issuing the new certificate, and each Transfer Agent shall be named as an obligee therein.

EIGHTH: That when any of said Transfer Agents deem it expedient it may apply to the President, any Vice-President, the Secretary, or the Treasurer of this Company or to, of, City of, State of, counsel for this Company, or to its own counsel, for instructions or advice and this Company shall fully protect and hold the Transfer Agent harmless from any and all liability for any action taken by the Transfer Agent in accordance with such instructions or advice.

NINTH: That the President and the Secretary of this Company be and they hereby are directed to certify a copy of these resolutions under the seal of this Company and to lodge the copy with each Transfer Agent, together with certified specimen certificates of the stock of this Company in the forms duly adopted by it, a copy of the Charter or Certificate of Incorporation and all amendments thereto properly certified by the Secretary of State, or other proper public official, and a certified copy of the By-laws of this Company, and from time to time to furnish to each Transfer Agent certified copies of any amendments that may be made to the Charter or Certificate of Incorporation or By-laws of this Company.

We, the undersigned,, President, and, Secretary of, a corporation duly organized and existing under the laws of the State of, do hereby certify, pursuant to the foregoing Resolution, as follows:

(1) That the foregoing is a true and complete copy of Resolutions duly adopted at a meeting of the Board of Directors of said Company, duly called and held on the .. day of, 19.., at which a quorum was present and acting throughout, and that said Resolutions have not been rescinded, revoked or modified and are still in full force and effect.

(2) We further certify that said Company was duly organized under the laws of and that under the accompanying Charter or Certificate of Incorporation and all amendments thereto, said Company has an authorized capital stock of \$....., divided into:

..... shares of the par value of each of stock,
 shares of the par value of each of stock,
 shares of the par value of each of stock,
 shares of the par value of each of stock.

(3) That accompanying this certificate are:

(a) True and correct specimens of the certificates of each class of stock of said Company, mentioned in paragraph "FIRST" of the foregoing Resolutions, which have been duly adopted by the Board of Directors of said Company.

(b) True and correct specimens of the certificates for capital stock or other securities which are convertible into or exchangeable for any shares of any class of stock mentioned in subdivision (a) of paragraph "SECOND" of the foregoing Resolutions.

(c) Signature list bearing the names and specimen signatures of the officers of said Company and of each Transfer Agent and Registrar of said Company authorized to sign such certificates or whose signatures may appear on such certificates for shares of stock now outstanding or to be issued and the names and specimen signatures of officers of said Company authorized to give instructions to the Transfer Agents.

(d) A true and complete copy of the By-laws of said Company, as amended to date, duly certified under seal to be still in full force and effect.

(e) A true and complete copy of the Charter or Certificate of Incorporation of said Company together with all amendments duly certified by the Secretary of State or other public official.

(f) An opinion of, counsel for this Corporation as to (a) the validity of this Corporation's organization, (b) its authority to issue the shares of stock called for by the foregoing Resolutions and (c) the registration or exemption from registration of the stock under the Federal Securities Act of 1933 as amended.

(g) Instructions of an officer of said Company with respect to the sending of advices of original issues and transfers of certificates for shares of said stock other than to co-transfer agents.

WITNESS our hands and the seal of this Company this .. day of, 19...

.....
President
.....
Secretary

(CORPORATE SEAL)

No. 441

Resolution appointing co-registrar.

CERTIFIED COPY OF RESOLUTIONS OF
BOARD OF DIRECTORS
OF

.....

RESOLVED, That this Board hereby certifies that
and have been duly appointed, and are now
authorized to act as, Registrar and Transfer Agent, respectively, of
this Corporation in, for certificates of its stock;
and that (hereinafter referred to as the "New

York Transfer Agent'') has been duly appointed, and is now authorized to act as, Transfer Agent of this Corporation in the Borough of Manhattan, City and State of New York, for certificates of its stock.

RESOLVED, That THE BANK OF NEW YORK (hereinafter referred to as the "New York Registrar") be and hereby is appointed Registrar of this Corporation in the Borough of Manhattan, City and State of New York, for certificates of its stock, consisting of

Class of Stock:	Par Value	Number of Shares	
	Per Share:	Authorized:	Outstanding:
.....
.....
.....

RESOLVED, That for the original issue of shares of said stock hitherto unissued, the New York Registrar be and hereby is authorized to register and countersign as Registrar certificates, signed by the President or a Vice President and by the { Secretary } { Treasurer } or by an Assistant { Secretary } { Treasurer } of this Corporation, and countersigned and delivered to it for that purpose by the above named New York Transfer Agent for not exceeding in the aggregate:—

- Shares of the said Stock
- Shares of the said Stock
- Shares of the said Stock

and to redeliver such certificates, so registered, to said New York Transfer Agent.

RESOLVED, That the New York Registrar be and hereby is authorized to register transfers, from time to time, of certificates of said stock, whether now outstanding or hereafter issued, when countersigned by a duly authorized Transfer Agent or Co-Transfer Agent and a duly authorized Registrar or Co-Registrar of this Corporation,* (or, as to certificates of said stock now outstanding, when countersigned either by a duly authorized Transfer Agent or Co-Transfer Agent or by a duly authorized Registrar or Co-Registrar of this Corporation or when signed by the President or a Vice President and the { Secretary } { Treasurer } or an Assistant { Secretary } { Treasurer } of this Corporation), and upon the cancellation of the old certificates, to register and countersign new certificates for a corresponding aggregate number of shares of the same class of stock when they shall have been signed by said officers of this Corporation and countersigned and delivered to it for that purpose by the above named New York Transfer Agent, and to redeliver said new certificates,

* If the certificates now outstanding are countersigned both by a Transfer Agent and by a Registrar strike out the matter in parentheses.

when so registered and countersigned, to the said New York Transfer Agent; *provided*, that the New York Registrar shall be under no duty or responsibility in connection with the names in which certificates are issued or the correctness of any transfer from one name to another; or to examine into or approve the transfers of such shares, or the authority under which such transfers are made, or the payment of any taxes upon such transfers, but it shall be the sole duty of said Registrar to register the original issue, as above stated, and register additional certificates only upon cancellation of certificates of the same class and for a like number of shares, but it shall also register any certificate of stock which may be issued by authority of this corporation, in lieu of a lost or destroyed certificate of stock.

RESOLVED, That the New York Registrar's authority shall also extend to such additional issues of said stock as may be authorized by this Corporation.

RESOLVED, That the New York Registrar shall promptly advise all other Registrars of this Corporation of the registration by it of certificates of stock.

RESOLVED, That the New York Registrar shall not be liable to any extent or in any manner for any act or omission of any other Registrar of this Corporation, and shall be fully protected and held harmless by this Corporation for anything done or omitted by it in reliance upon advice received by it from any other Registrar as to the registration or countersignature, for original issue or for transfer, of certificates of stock by such other Registrar, and for its failure or refusal to register the transfer of any certificate registered or countersigned by any other Registrar of the registration or countersignature of which it shall not have been so advised.

RESOLVED, That this Corporation indemnify and hold harmless the New York Registrar for any act done by it in good faith in reliance upon any instrument or stock certificate believed by it to be genuine and to be signed, countersigned or executed by any person or persons authorized to sign, countersign or execute the same.

RESOLVED, That when any officer of this Corporation or of any other Registrar or of any Transfer Agent shall no longer be vested with authority to sign for this Corporation or for such other Registrar or for such Transfer Agent, as the case may be, notice thereof shall be given to the New York Registrar; and, until receipt of such notice, the New York Registrar shall be indemnified and held harmless in recognizing and acting upon any certificate bearing the signature of such officer.

RESOLVED, That when the New York Registrar deems it expedient, it may apply to this Corporation, at, or to counsel

RESOLVED, That in case of the alleged loss or destruction of any certificate of stock, no new certificate shall be issued in lieu thereof, unless there shall first be furnished an appropriate bond of indemnity in form, and issued by a surety company, satisfactory to the New York Registrar, in at least twice the then current market value of the stock represented by such lost or destroyed certificate, in which bond the New York Registrar shall be named as one of the obligees.

RESOLVED, That this Corporation lodge with the New York Registrar: (1) specimen stock certificates in the form adopted by this Corporation; (2) specimen signatures of all officers of this Corporation authorized to sign or countersign stock certificates; (3) a copy of the Charter or Certificate of Incorporation of this Corporation, with all amendments to date, duly certified by the state officer having custody of the original thereof; (4) a copy of the By-laws of this Corporation, as at present in force, duly certified by the Secretary or Clerk of this Corporation, under its corporate seal, and (5) a copy of these Resolutions, similarly certified.

I, { Secretary }
..... { Clerk } of,
....., a corporation duly organized and existing
under the laws of the State of,

I. That the foregoing is a true copy of certain Resolutions duly adopted at a meeting of the Board of Directors of the said Corporation, duly held on, 19.., and of the whole of the said Resolutions, and that the said Resolutions have not been rescinded or modified.

II. That accompanying this Certificate, and *authenticated by my autograph signature*, are: *

(1) Specimens of certificates of each class of stock of the said Corporation in the form adopted by the said Corporation;

(2) A signature card bearing the names and specimen signatures of all the officers of the said Corporation authorized to sign or countersign stock certificates;

(3) A copy of the Charter or Certificate of Incorporation of the said Corporation, with all amendments to date, duly certified by the state officer having custody of the original thereof, and

(4) A true and complete copy of the By-laws of the said Corporation, as at present in force.

III. That the total authorized stock of the said Corporation is:

..... Shares, divided into
 Shares of Stock of Par Value each;
 Shares of Stock of Par Value each;
 Shares of Stock of Par Value each.

That of the said authorized stock, there are now issued and/or about to be issued Shares of the said Stock, Shares of the said Stock, Shares of the said Stock, that such issue has been duly authorized, and that all of the said shares, when issued, will be full paid in the hands of the respective holders thereof.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed the seal of the said Corporation, this .. day of .., 19...

(Affix corporate
 seal here)

.....
 Secretary

 Clerk

No. 442

Resolution of directors appointing co-registrars and co-transfer agents.

WHEREAS, this Company has applied for the listing of its common stock upon the Stock Exchange, and, in connection therewith, the "A" Trust Company of (City), (State), has been appointed the Transfer Agent, and the "B" Bank of (City), (State), the Registrar for the transfer-

* These instruments MUST accompany this Certificate.

ring and registering of certificates of said common stock of this Company in that city, and

WHEREAS, the "C" Bank of (City), (State), has previously been appointed Transfer Agent, and the "D" Trust Company has previously been appointed Registrar of said common stock of this Company issued in (City), (State), and

WHEREAS, the "D" Trust Company, Registrar in (City), (State), has previously been directed and authorized to register and countersign, as Registrar, certificates of common stock of this Company when executed by a duly qualified officer of this Company, and countersigned by the "C" Bank of (City), (State), the Transfer Agent of this Company in the City of, State of, and to redeliver said certificates to said Transfer Agent, it is

RESOLVED, That said Registrars are hereby authorized and directed to register the transfer, from time to time, of certificates of such common stock, upon the cancellation of certificates for a like amount of said stock, signed by the proper officers of this Company and countersigned by any Transfer Agent and any Registrar, and to register and countersign new certificates accordingly when they shall have been signed by the proper officers of this Company and countersigned by the Transfer Agent in the same city as the Registrar so countersigning; and to redeliver said certificates accordingly when they shall have been signed by the "D" Trust Company and the "B" Bank of the City of, State of, as Registrars, provided, however, that said Registrars shall be under no duty whatever in connection with the names in which certificates are issued or the correctness of any transfer from one name to another.

FURTHER RESOLVED, That said Transfer Agents are hereby authorized and directed to make transfers from time to time of certificates of such common stock, upon the surrender and cancellation of certificates for a like amount of said stock, signed by the proper officers of this Company and countersigned by any Transfer Agent and any Registrar, and to issue new certificates accordingly, and deliver the same when they shall have been signed by the proper officers of this Company and registered by the Registrar in the same city as the Transfer Agent so signing and issuing;

FURTHER RESOLVED, That it is the intention and purpose of these resolutions that the certificates of the common stock of this Company shall be interchangeably transferable in the Cities of and The fact of the registration and countersignatures of new certificates shall be advised immediately by mail by the Registrar registering and countersigning them to the other Registrar, and such advice shall be sufficient to warrant the Registrar's receiving the same in accepting said advice as conclusive evidence of the registration of the certificates therein set forth; and each Registrar shall be fully

protected and held harmless by this Company by reason of its failure or refusal to register or countersign new certificates upon the transfer of any certificates countersigned by another Registrar, when it shall not have received such notice of the registry and countersignature of said certificates;

FURTHER RESOLVED, That specimen signatures of the officers of this Company authorized to sign certificates of stock, as aforesaid, and of the officers of the respective Transfer Agents and Registrars authorized to sign for said Transfer Agents and Registrars, be lodged forthwith with each of said Registrars and Transfer Agents, to be used by them, and each of them, if desired, for the purposes of comparison with signatures appearing upon the certificates of stock of this Company presented to them or either of them, in their respective capacities, and that said Registrars, and each of them, be protected and held harmless in recognizing and acting upon any signature believed in good faith to be genuine;

FURTHER RESOLVED, That when any officer of this Company or of any Transfer Agent or Registrar shall no longer be vested with authority to sign for this Company or for such Transfer Agent or Registrar, as the case may be, written notice thereof shall be given to each Registrar and Transfer Agent, and until receipt of such notice, said Registrar or Transfer Agent shall be fully protected and held harmless in recognizing and acting upon certificates bearing the signature of such officer;

FURTHER RESOLVED, That, when any Registrar or Transfer Agent deems it expedient, it may apply to this Company at (Street), (City), (State), or to its own counsel, for instructions or advice, and, for any action taken in accordance with such instructions or advice, this Company will fully protect and hold it harmless from any and all liability. None of said Registrars or Transfer Agents shall be in any manner liable for any acts or omissions of any other Registrar or Transfer Agent.

No. 443

Resolution appointing transfer agent, registrar, and dividend paying agent.

RESOLUTION OF

.....
(Name of Corporation)

APPOINTING

..... TRUST COMPANY

as

.....
Transfer Agent — Registrar — Dividend Paying Agent

“RESOLVED, That Trust Company (of New York) is hereby appointed for
(Transfer Agent or Registrar) (Insert the number of
.....
shares and classes of stock included in this appointment)
.....

.....
shares of the Capital Stock of this Company to act in accordance with its general practice and with the regulations set forth in the pamphlet submitted to and approved by this meeting entitled “Regulations of the Trust Company (of New York) for the Transfer and Registration of stock, and the Secretary is hereby directed to mark said pamphlet for identification and file the same with the records of the Corporation.”

“RESOLVED FURTHER, That Trust Company (of New York) is hereby appointed Agent for the disbursement of cash dividends, which may, from time to time, be declared and payable on the following shares and classes of stock of this Corporation:
.....
.....
in accordance with the regulations set forth in the pamphlet herein above referred to.”

I, the undersigned, Secretary of the above Corporation, Do HEREBY CERTIFY that the foregoing is a true and correct copy of a resolution duly adopted by the Board of Directors of said Corporation at a meeting thereof duly called and held on , 19.., at which a quorum was present and acting throughout, and that said resolution has not been in any wise rescinded, annulled or revoked but the same is still in full force and effect.

AND I Do FURTHER CERTIFY to the following facts:

The authorized and outstanding stock of the Corporation is as follows:

CLASS	PAR VALUE	AUTHORIZED	OUTSTANDING
.....
.....
.....

(Only stock outstanding prior to appointment should be shown in column “Outstanding.” If new company, the word “none” should be inserted. If new stock is to be issued in exchange for old outstanding stock, amount of old stock outstanding and terms of exchange should be shown.)

The address of the Corporation to which notices may be sent is

The persons below named have been duly elected, have duly qualified, and now are officers of the Corporation, holding the respective offices below set opposite their names, and the signatures set opposite their names are their genuine signatures.

NAME	OFFICE	SIGNATURE
.....	President
.....	Vice-President
.....	Treasurer
.....	Assistant Treasurer
.....	Secretary
.....	Assistant Secretary

The name and address of legal counsel for the Corporation is

The names and addresses of all of the Transfer Agents and Registrars of the stock of the Corporation are as follows:

CLASS OF STOCK	TRANSFER AGENT(S) AND ADDRESS	REGISTRAR(S) AND ADDRESS
.....
.....
.....
.....

WITNESS my hand and the seal of the Corporation this .. day of
, 19...

.....
 Secretary
 (CORPORATE SEAL)

No. 444

Resolution increasing authority of transfer agent or registrar.

Increase of Authority of } TRANSFER AGENT
 } REGISTRAR

.....
 (Name of Corporation)

“RESOLVED, That the number of shares of the stock of this Company for which THE BANK OF THE CITY OF NEW YORK is

authorized to act as sole Transfer Agent
 New York Registrar be and it hereby is
 increased by

.....shares of.....Preferred stock, and
shares of.....Common stock, and
shares of.....stock, and
shares of..... stock."

I, the undersigned, Secretary of the above named Corporation, Do **HEREBY CERTIFY** that the foregoing is a true and correct copy of a resolution duly adopted by the Board of Directors of said Corporation at a meeting thereof duly called and held on, 19.., at which a quorum were present, and that said resolution has not been in any wise rescinded, annulled or revoked but the same is still in full force and effect.

WITNESS my hand and seal of the Corporation this .. day of
, 19...

.....
 Secretary

No. 445

Resolution rescinding appointment of co-transfer agent and co-registrar in a designated city.

RESOLVED, That the action taken by the Board of Directors at a meeting held on the .. day of, 19.., whereby the Bank was appointed a Co-Transfer Agent for the shares of the preferred stock of this Corporation, for the City of, State of, and whereby Trust Company was appointed Co-Registrar for the shares of preferred stock of this Corporation, for the City of, State of, be and it hereby is rescinded.

No. 446

Resolution of directors approving bill for services of transfer agent.

RESOLVED, That the bill rendered by Bank for (\$....) Dollars, to cover its services in acting as Transfer Agent for the Corporation during the year 19.., be and it hereby is approved and ordered paid.

No. 447

Resolution authorizing transfer agent to cremate all unused stock certificates.

RESOLVED, That the Bank, as Transfer Agent of this Corporation, be and it hereby is authorized and directed to cremate all unused certificates of stock of the said Corporation now in its possession, and to furnish the Secretary of the said Corporation with a certificate of cremation of the said certificates of stock.

No. 448

Notice to stockholders of appointment of co-transfer agent.

To the Stockholders of the Corporation:

For the convenience of its stockholders, Corporation has appointed the Trust Company, (Street), (City), (State), as Co-Transfer Agent. Further transfers of its stock may therefore be made either in (City) or in (City).

..... Corporation

Dated, 19..

By
Secretary

No. 449

Notice to transfer agent and registrar of revocation of appointment
with request to turn records over to new transfer agent and
registrar.

....., 19..

..... Company
..... Street
..... City, State

Dear Sirs:

We enclose a certified copy of a resolution adopted at a meeting of the Board of Directors of this Corporation held, 19.., revoking your appointment as Transfer Agent and Registrar of this Corporation, to take effect at the close of business on, 19.. The Bank and Trust Company has been appointed Transfer Agent of this Corporation, and Trust Company has been appointed Registrar of this Corporation, to take effect on, 19.. We will appreciate your arranging to deliver the stock transfer records of this Corporation to such Transfer Agent, and the stock register records to such Registrar as soon as possible after the close of business on, 19.., in order to enable such Transfer Agent and Registrar, respectively, to effect such transfers and registrations of stock on, 19.., as are presented to them.

We have greatly appreciated the cordial and efficient manner in which you have served this Corporation as Transfer Agent and Registrar.

Very truly yours,

..... Corporation
.....
Treasurer

No. 450

Blanket resolution of directors authorizing issuance of duplicate certificate in event of loss.

RESOLVED, That, in the event of the loss, mutilation, or destruction of any certificate of stock of Corporation, a duplicate thereof may be issued, provided the owner makes a sufficient affidavit setting forth the loss, mutilation, or destruction of the original certificate, and gives a surety bond to the Corporation to such amount as may be determined by the (*indicate officer*).

No. 451

Resolution of directors authorizing transfer agent and registrar to issue certificate of stock in place of lost certificate.

WHEREAS,, of (*City*), (*State*), has made affidavit that he is the owner of Certificate No., issued in the name of for (*....*) shares of the stock of this Company, and that said certificate has been (lost—stolen—destroyed); and

WHEREAS, the said has made application to the Trust Company, Transfer Agent, for the issuance of a new certificate for (*....*) shares of the said stock and has furnished bond of the (*insert name of bonding company*) to indemnify and save harmless the, the principal obligee, Trust Co., of (*City*), (*State*), Registrar, their successors and assigns, from and against any and all costs, actions, suits, damages, charges, or expenses attendant upon the issuance of the certificate in lieu of the lost certificate;

NOW, THEREFORE, BE IT RESOLVED, That Trust Company be and it hereby is authorized to issue, and Trust Co., of, be and it hereby is authorized to register, a new stock certificate representing (*....*) shares of said stock in lieu of said (lost—stolen—destroyed) certificate in the name of the said

No. 452

Resolution of directors indemnifying transfer agent and registrar upon issuance of certificate in place of lost certificate, without furnishing a bond.

RESOLVED, That this corporation at all times indemnify and save harmless, its Transfer Agent, and, its Registrar, from and against any and all claims, actions, and suits,

whether groundless or otherwise, and from and against any and all liabilities, losses, damages, costs, charges, counsel fees, whether in connection with litigation or otherwise, and other expenses of every nature and character, arising from or by reason of the countersignature or registration of a certificate of stock to for (....) shares of the capital stock of this corporation, in place of Certificate No., issued in the name of the said for the aforesaid shares, which certificate has been lost, destroyed, or stolen.

[*Note.* Where a corporation issues a new certificate without demanding a surety bond, the transfer agent and registrar will generally require a resolution of indemnity such as the above. The more usual procedure, however, upon issuance of a new certificate in place of one lost, destroyed, or stolen, is to require a bond of indemnity. The above form may be combined with form No. 453.]

No. 453

Resolution of directors authorizing issue of certificate of stock in place of a destroyed certificate, without surety bond.

WHEREAS,, owner of record of (....) shares of the preferred stock of this corporation, evidenced by Certificate No., notified this corporation on the .. day of, 19.., that said certificate had been destroyed by fire on the .. day of, 19.., and has presented satisfactory proof of ownership and an affidavit setting forth the facts concerning the loss of said certificate in the fire which destroyed the residence of said; and

WHEREAS, this Board of Directors is convinced that the said certificate of stock was destroyed by fire and that there is therefore no danger of its reappearance;

NOW, THEREFORE, BE IT RESOLVED, That this corporation issue a new certificate for (....) shares of the preferred stock of this corporation, in place of Certificate No., to, without requiring of said a surety bond, and the President and the Secretary are hereby directed to execute such new certificate and to deliver the same to said

No. 454

Excerpt of minutes showing action of directors declining to replace lost certificate.

The petition of "A" for the issuance of a certificate of stock in lieu of one heretofore issued, alleged to have been lost or mislaid, was read, and, after due consideration, was respectfully denied, for the reason that said certificate of stock, which is in its nature assignable by

simple indorsement and delivery, might now be in the hands of an innocent purchaser for a valuable consideration.

No. 455

Published notice of loss of stock certificate and of intended issuance of new certificate.

NOTICE IS HEREBY GIVEN That Certificate No., issued by Company (whose address is (*Street*), (*City*), (*State*), for one (1) share of Capital Stock of (\$) Dollars par of said Company, to, on, 19 . . ., has been lost, destroyed, or stolen, and that a new certificate is about to be issued in place thereof.

All persons are warned against purchasing or dealing in said lost certificate, as transfer thereof will be refused should it be presented. Any information with respect to said certificate should be communicated to at (*Street*), (*City*), (*State*).

CHAPTER 23

DIVIDENDS

Introduction. This chapter presents the legal principles governing the rights and liabilities of the corporation, its directors, officers, and stockholders, involved in the declaration and payment of dividends. Questions of financial policy in declaring dividends¹ and the procedure for payment of dividends after they have been declared² are not discussed at length, for these subjects lie outside the scope of this book. They are, however, referred to occasionally in the chapter to show the need for certain resolutions.

Definition of a dividend; of declaration of a dividend. A dividend is a portion of the profits or surplus funds of the corporation, set aside by a valid resolution of the board of directors for distribution among the stockholders of record on a certain day, in proportion to their holdings, to be paid on demand or at a fixed time.³ Declaration of a dividend is the act of the directors in thus setting aside the funds for distribution among the stockholders. Profits are not dividends until so declared or set aside.⁴

Who has authority to declare a dividend. The authority to declare a dividend, and to fix the amount, time, and terms of its payment, generally rests with the board of directors.⁵ This rule

¹ See Charles W. Gerstenberg, *Financial Organization and Management*, 2nd rev. ed. (New York, Prentice-Hall, Inc., 1939), for a discussion of surplus and dividend policies.

² For a detailed discussion of the procedure in payment of dividends, see Lillian Doris and Edith J. Friedman, *Corporate Secretary's Manual and Guide*, revised by Howard H. Spellman (New York, Prentice-Hall, Inc., 1949).

³ *Mobile & Ohio Railroad v. Tennessee*, (1894) 153 U. S. 486; *Gable v. South Carolina Tax Commission*, (1939) 189 S. C. 346, 1 S. E. (2d) 244.

⁴ *Brown v. Luce Mfg. Co.*, (1936) 231 Mo. App. 259, 96 S. W. (2d) 1098; *Adams v. Farmers Gin Co.*, (1938) (Tex. Civ. App.) 114 S. W. (2d) 583.

⁵ See *Maloney v. Western Cooperage Co.*, (1939) 103 F. (2d) 992, in which the authority of the board of directors to declare dividends was delegated to the secretary-treasurer.

is, however, subject to the following limitations: (1) a statute may limit or control the action of the board of directors; and (2) the charter or by-laws of the corporation or some other governing instrument or contract may place an obligation on the board of directors to declare a dividend, or may limit its power to do so.⁶ The directors, of course, must act in good faith.⁷

Declaration of dividend by stockholders. The stockholders do not ordinarily have any right to declare dividends. However, when all the stockholders of a solvent corporation, including all the directors, meet and agree to a division of the profits, there is a declaration of dividends, even though the action took place at a stockholders' meeting.⁸ The courts have held that the stockholders may informally agree to distribute a certain sum as profits without any formal action, or without action of the board of directors, and that the dividend is a valid declaration if all the stockholders agree and no creditor or other third party is prejudiced thereby.⁹ Under some statutes, however, stockholders cannot declare a dividend and enforce its payment without the consent of the directors, although they agree unanimously and act in the most formal way at a legal meeting of stockholders.¹⁰ A declaration of a dividend by stockholders who have not the right to declare dividends may be ratified by the board of directors, which has the power in the first instance to declare a dividend. The ratification by the board may be shown without any formal action by the directors,¹¹ as, for example, by a payment of the dividend by the directors.

Necessity for formal declaration of dividend. No formal declaration of a dividend is necessary either by the board of directors or by the stockholders, except when required expressly by statute, by charter, or by the by-laws.¹² In many cases the

⁶ *Richter & Co. v. Light*, (1922) 97 Conn. 364, 116 A. 600; *Lydia E. Pinkham Medicine Co. v. Gove*, (1939) 303 Mass. 1, 20 N. E. (2d) 482; *Patterson v. Durham Hosiery Mills*, (1939) 214 N. C. 806, 200 S. E. 907; *Morrison v. State Bank of Wheatland*, (1942) 58 Wyo. 138, 126 P. (2d) 793.

⁷ *Leviton v. North Jersey Holding Co.*, (1930) 106 N. J. Eq. 517, 151 A. 389; *Lindgrove v. Schluter & Company, Inc.*, (1931) 256 N. Y. 439, 176 N. E. 832.

⁸ *Quinn v. Quinn Mfg. Co.*, (1918) 201 Mich. 664, 167 N. W. 898; *Spencer v. Lowe*, (1912) 198 F. 961.

⁹ *Kearneysville Creamery Co. v. American Creamery Co.*, (1927) 103 W. Va. 259, 137 S. E. 217, citing *Barnes v. Spencer & Barnes Co.*, (1910) 162 Mich. 509, 127 N. W. 752, and other cases.

¹⁰ *Milligan v. G. D. Milligan Grocer Co.*, (1921) 207 Mo. App. 472, 233 S. W. 506.

¹¹ *Ibid.*

¹² *Groh's Sons v. Groh*, (1903) 80 N. Y. App. Div. 85, 80 N. Y. Supp. 438;

courts have held that a dividend had in fact been declared though no formal vote had been taken by the directors authorizing the payment of the dividend.¹³ Ordinarily, the crediting of a stockholder on the books of a corporation with a portion of the profits amounts to a declaration of a dividend in his favor.¹⁴

Frequently action by the stockholders is required in carrying out a dividend declared by the directors. For example, if the directors have declared a stock dividend, the payment of the dividend may involve an increase in the capital stock. The consent of the stockholders is generally required by statute to effect the increase.¹⁵

But while from a legal standpoint a dividend may be declared without a resolution by the directors, from the standpoint of expediency, a dividend should not be declared without the passage of a carefully drawn resolution indicating: (1) the rate or amount of the dividend; (2) the class of stockholders to whom the dividend is payable; (3) the record date for determining who is entitled to the dividend; (4) the date when the dividend will be paid; and (5) the medium in which the dividend is to be paid.¹⁶

If the dividend is payable in property, it is advisable to study the income tax effects of the distribution. When a corporation makes a dividend distribution in property that has increased or decreased in value since its acquisition, the form of the dividend

Fidelity & Columbia Trust Co. v. Louisville Ry. Co., (1936) 265 Ky. 820, 97 S. W. (2d) 825. See also *Van Dyck v. McQuade*, (1881) 86 N. Y. 38, in which it was held that the liability of trustees could not be avoided because a vote was not taken and recorded as prescribed by statute. The statutory provision was for the benefit of the trustee, and, while he could waive the direction, he could not take advantage of the omission.

¹³ *Atherton et al. v. Beaman*, (1920) 264 F. 878, aff'g decree in 256 F. 871. See also *Railway Co. v. Martin*, (1893) 57 Ark. 355, 21 S. W. 465.

¹⁴ *Brown v. Luce Mfg. Co.*, (1936) 251 Mo. App. 259, 96 S. W. (2d) 1098. (This case involved a family corporation. A dividend declared by the president was held to be valid.) See also *Fidelity & Columbia Trust Co. v. Louisville Ry. Co.*, (1936) 265 Ky. 820, 97 S. W. (2d) 825.

¹⁵ See page 703 et seq.

¹⁶ In *English & Mersick Co. v. Eaton*, (1924) 299 F. 646, which was a tax case, the court said: "It is of course unnecessary to employ some particular terminology in order to declare a dividend. On the other hand, neither the Government nor the corporation is necessarily bound or concluded by the language of the resolution in the ascertainment of the corporate intent. For instance, when surplus has in fact been distributed, the Government will not be bound by a declaration of the corporation that said division of surplus constitutes a salary payment. . . . Reason and justice would therefore seem to indicate that the converse of that proposition should also be true and that, where surplus has not in fact been divided, it should not be regarded as a dividend at law."

resolution may determine whether the corporation realizes a taxable gain or sustains a deductible loss.¹⁷

Advantages of formal declaration of dividends. The record of the action taken in declaring a dividend should show who was present at the meeting at which the dividend was declared, and who voted against its passage. If this formal action is taken, the following advantages are gained: (1) the rights of all persons to the dividend are defined and the possibility of disputes between stockholders and their transferees, and between stockholders and the corporation, is minimized; (2) directors who oppose the declaration of a dividend are given an opportunity to protect themselves against individual liability should the dividend prove to be illegal, by indicating their dissent at the meeting and requesting their opposition to be entered in the minutes;¹⁸ (3) the record furnishes evidence in suits between the corporation and the stockholder of what was done with regard to the dividend;¹⁹ (4) all possibility that the dividend will be considered invalid because no formal action was taken or record made of the vote is avoided;²⁰ and (5) tax disputes may also be avoided if dividends are formally declared.²¹

When dividends may be declared. A dividend in a going concern may be declared and paid out of profits or surplus only and not out of the capital of the corporation.²² This rule applies even in the absence of any statute on the subject.²³ In most of the states some statutory provision is found expressing the rule.

¹⁷ See *Prentice-Hall Federal Tax Service*. See also "Corporation and Stockholder—Dividends in Kind," 1 *Tax Law Review* 86 (1945). This article discusses the problem of taxation on dividends in kind from the standpoint of both the corporation and the stockholder.

¹⁸ See liability of dissenting directors for illegal dividends on page 641.

¹⁹ See page 162, footnote 2 for value of minutes as evidence of transaction.

²⁰ See *American Wire Nail Co. v. Gedge*, (1895) 96 Ky. 513, 29 S. W. 353, in which one of the questions to be determined was whether a dividend had or had not been declared.

²¹ See 23 *Minnesota Law Review* 831 (1939), discussing *United States v. Southwestern Portland Cement Co.*, (1938) 97 F. (2d) 413.

²² Until a corporation pays or provides for the payment of its debts, it cannot lawfully declare a dividend. *Seaboard Ice Co. v. United States*, (1945) 60 F. Supp. 879, citing *Fletcher Cyclopedia Corporations*, §5340.

²³ *Davenport v. Lines*, (1899) 72 Conn. 118, 44 A. 17; *Mobile & O. R. Co. v. State of Tennessee*, (1894) 153 U. S. 486, 14 S. Ct. 968. See also *Levin v. Pittsburgh United Corporation*, (1938) 330 Pa. 457, 199 A. 332; *Baker v. Mut. Loan & Inv. Co.*, (1948) 213 S. C. 558, 50 S. E. (2d) 692.

For the origin of the restriction against declaration of dividends out of capital, see Kehl, "The Origin and Early Development of American Dividend Law," 53 *Harvard Law Rev.* 36 (1939).

The statutes vary in their terminology, but in substance they provide that the corporation may not make a dividend that will be equivalent to paying back to the shareholders a part of the capital paid by them for their shares. Thus, some of the statutes provide that "dividends may be made from the corporate net earnings or from the surplus assets over liabilities including capital stock"; that "directors shall not make dividends except from surplus profits arising from the business"; that "no corporation shall pay any dividends except from its net profits or actual surplus"; that "no dividend shall be paid while the corporation is insolvent or that will render the corporation insolvent."

It is the function of the directors in declaring a dividend to determine: (1) whether net earnings or a surplus applicable to the payment of dividends legally exists; and (2) whether, from the standpoint of financial expediency, a dividend should be declared.

What is surplus, from a financial standpoint. From a financial standpoint the directors have little difficulty in determining whether a surplus exists from which dividends should be declared. Surplus, from the standpoint of the corporation's financial condition, is the amount shown on the balance sheet as the difference between the value of the assets and the sum of the capital stock, liabilities, and reserves.²⁴ It is immaterial whether the surplus assets are carried on the books of the company as surplus, segregated assets, or in a special fund account.²⁵ The

²⁴ Earnings or surplus (the terms are used synonymously here) may be arrived at, from an accounting standpoint, in two ways: (1) by the balance sheet method, and (2) by the income statement method. Under the balance sheet method the surplus is determined by subtracting from the total assets the sum of all the liabilities, reserves, and capital stock. Under the income statement method, the earnings or surplus is found by determining the net income or loss for the period and adding thereto or subtracting therefrom the accumulated profits or deficit of previous periods.

The net income for the period for which the statement is prepared is found as follows: from the total sales there is deducted the cost of goods sold (which includes operating expenses) to arrive at the gross profit from sales. To the gross profit is added other income, such as income from investments, and from the total income there is deducted all fixed charges, taxes, maintenance costs, depreciation, interest upon loans, and other items of loss. See *People ex rel. Jamaica Water Supply Co. v. State Board of Tax Com'rs*, (1908) 128 N. Y. App. Div. 13, 112 N. Y. Supp. 392. See also *Corliss v. United States*, (1925) 7 F. (2d) 455; *Towles v. South Carolina Produce Assn.*, (1938) 187 S. C. 290, 197 S. E. 305.

Whether the balance sheet method is used to arrive at the earnings or surplus, or the income statement method is used, the same surplus figure will be reached.

²⁵ *Hyams v. Old Dominion Mining & Smelting Co.*, (1913) 82 N. J. Eq. 507, 89 A. 37.

directors know whether the value of the assets shown on the books of the corporation and in its balance sheet represent the actual value of the items listed. They know whether the property of the corporation has depreciated and whether proper allowance has been made.

With a definite dividend policy in mind, and an intimate knowledge of the affairs of the corporation, the directors can determine the extent to which reserves for the following purposes should be set up: (1) reserves for depreciation of property; (2) reserves for bad debts; (3) reserves for expansion or promotion; (4) reserves for taxes; (5) reserves for sinking funds, or other obligation reserves; (6) reserves for insurance, welfare, and pension purposes; and (7) reserves for contingencies. With a definite dividend policy in mind, they can determine what part of the surplus should be "plowed back" into the property of the corporation and what part they are willing to have the stockholders know is available for dividends. The part of the surplus that the corporation intends to keep in the business is generally termed "capital surplus" in the accounts of the corporation, and the part of the surplus that the corporation may use for dividend distributions is termed "earned surplus." By an analysis of the balance sheet, the directors can determine whether the corporation has accumulated reserves beyond the corporation's requirements, and, if so, whether the unnecessary reserves can be converted into a surplus to be distributed as dividends.

What is surplus, from a legal standpoint. From a legal standpoint, the task of determining whether a surplus or profits exist is less simple. The problems most likely to arise in determining whether a surplus exists legally are: (1) Must capital stock be taken at its par value, or may it be taken at the actual value received upon the sale of the par value stock? (2) How shall the directors arrive at the amount of capital represented by stock without par value? (3) What other items, if any, must be considered as capital liabilities in arriving at surplus or net profits?

No definite rules can be laid down to guide directors in determining whether a surplus or net profits legally exist from which dividends may be declared. This is so because, first, the statutes vary throughout the country in their provisions concerning the payment of dividends, and second, the interpretations of the statutes show various meanings for similar expressions. It is possible only to show several ways in which surplus has been

determined by the courts, and to caution directors that, if the question of the legality of a dividend arises, the courts will decide on the basis of the statute under which the corporation is organized.²⁶

Methods of determining whether surplus or profits exist from a legal standpoint. Following are four ways in which the courts have determined whether surplus or net profits exist for the payment of dividends. The method to be used by a particular corporation depends upon the interpretation given to the statute in the state in which the corporation is organized.

1. *Stock taken at par value.* A legal surplus exists when there is an excess in the aggregate value of all assets of a corporation over the sum of its entire liabilities, including capital stock at its par value. In other words, dividends may be paid out of net profits only, or, conversely stated, when the payment does not impair the capital stock of the corporation.²⁷ Thus, if a corporation's balance sheet shows assets accurately valued at \$100,000, capital stock outstanding having a par value of \$50,000, and liabilities of \$20,000, the corporation has a surplus of \$30,000, which, in the discretion of the directors, may be distributed to the stockholders as dividends.

2. *Stock taken at actual value received from sale.* A legal surplus exists when there is an excess in the aggregate value of all assets of the corporation over the sum of its entire liabilities including capital stock not at its par value, but at the actual value received from the sale of the stock.²⁸ Thus, if a corporation has issued and outstanding \$3,000,000 par value of its stock through the sale of which it has realized an actual value of \$1,700,000, and its assets amount to \$2,500,000 and its liabilities to \$300,000, the corporation has a surplus of \$500,000 available for dividends. Under this method of determining surplus, a distinction is made between capital and capital stock. The capital of the corporation, which is the amount which it has received for the stock sold, will not be impaired by the distribution of \$500,000, for, after the payment of the dividend, there will

²⁶ A reading of the statutes and of cases that interpret them reveals such a confused understanding of what constitutes surplus that many decisions cannot be presented here. They would confuse more than facilitate the directors in an honest effort to determine whether a surplus is legally available for dividends.

²⁷ *Cox v. Leahy*, (1924) 209 N. Y. App. Div. 313, 204 N. Y. Supp. 741; *Branch v. Kaiser*, (1928) 291 Pa. 543, 140 A. 498; *Towles v. South Carolina Produce Assn.*, (1938) 187 S. C. 290, 197 S. E. 305.

²⁸ *Peters v. United States Mortg. Co.*, (1921) 13 Del. Ch. 11, 114 A. 598, citing *Goodnow v. American Writing Paper Co.*, (1907) 73 N. J. Eq. 692, 69 A. 1014.

remain net assets equal to the amount realized upon the sale of the stock.

3. *Reserve for working capital.* Under a decision in one of the states, the amount of accumulated profits available for dividends is determined by deducting from the value of the assets, assuming that the valuation is correct, the capital stock, the reserve for working capital, and all other liabilities of the corporation.²⁹ The statute in this particular state gave the directors the right to declare dividends from profits after reserving a sum fixed by the stockholders as working capital for the corporation.

4. *Capital stock not deemed indebtedness.* In Iowa, it has been held that the liability of a corporation on its capital stock is not an indebtedness to be considered in determining whether it may lawfully pay dividends.³⁰

Determination of capital and surplus of corporation with no par stock. The rule that dividends must be declared from surplus and must not impair the capital of the corporation applies whether the stock has par value or has no par value. The question therefore arises: What is the capital and what the surplus of a corporation having stock without par value? The answer to the question depends upon the provisions of the statutes permitting the issuance of no-par value stock and upon the provisions of the statutes relating to the payment of dividends.³¹

In some states, the statutes require that the capital represented by no-par value shares shall be the amount of money or consideration received for the shares. Determination of surplus in such a case is as simple as in the case of par value stock. If the corporation has assets of \$500,000, par value stock outstanding in the amount of \$200,000, no-par stock outstanding for which the corporation has received \$110,000, and liabilities of \$20,000, the surplus of the corporation is \$170,000.

In other states, the statutes permit the board of directors to determine by resolution the portion of the consideration received

²⁹ Cannon v. Wiscasset Mills Co., (1928) 195 N. C. 119, 141 S. E. 344.

³⁰ Majestic Co. v. Orpheum Circuit, Inc., (1927) 21 F. (2d) 720, referring to the Iowa statute. It should be noted, however, that the statute was penal in nature and therefore was to be strictly construed in an action brought under it.

³¹ For a fuller consideration of the problems involved in no-par shares, see Adolf A. Berle, Jr., *Studies in the Law of Corporation Finance* (Chicago, Callaghan & Co., 1928); Cornelius W. Wickersham, *Stock without Par Value* (New York, Matthew Bender & Co., 1927); and John R. Wildman, *Capital Stock without Par Value* (New York, McGraw-Hill Book Company, 1928); Israels, *Problems of Par and No-Par Shares: A Reappraisal*, 47 *Columbia Law Rev.* 1279 (1947).

for no-par shares that shall be regarded as capital. In this case, the capital stock account on the books of the corporation shows the amount that the corporation considers as capital, and an account called "Paid-in Surplus" is credited with the difference between that amount and the consideration received for the stock. Transfers made to the capital account from time to time by resolution of the directors must be added, of course, to the amount originally regarded as capital.

Where the statutes do not indicate how capital represented by no-par shares shall be determined, the question arises: "What part of the consideration received from the sale of no-par shares shall be regarded as capital and what part, if any, may be regarded as surplus?" It cannot be said that the amount indicated in the articles of incorporation as the capital with which the corporation will begin business is the capital of the corporation represented by the no-par shares. Obviously, a corporation that has indicated the sum of \$1,000 in its articles of incorporation as the amount of capital with which it will begin business, and that has sold no-par value shares for \$100,000, would not be justified in considering \$1,000 as its capital. In the absence of some different arrangement, clearly stated to the purchasers of the stock at the time of the issuance of stock without par value, the corporation should regard as capital the full consideration received upon the sale of the no-par shares. It would be unfair to investors if any other method were followed, since purchasers of stock, in the absence of statutory, charter, or contract provision to the contrary, assume that whatever has been paid for their stock will be used by the corporation in carrying on its business, and that none of the consideration will be treated as surplus available for dividends.

Sources of surplus legally available for dividends. Following is an explanation of the availability of various sources of surplus for dividends, from a legal standpoint:

Increase in value of assets. The statute of the state in which the corporation is organized determines whether an increase in surplus due to an increase in the value of assets is available for dividends. If the statute permits the declaration of dividends from "surplus," it is immaterial how the surplus is acquired; an increase in surplus by enhancement in the value of the assets is available for distribution as dividends.³² The surplus, however,

³² See *Randall v. Bailey*, (1942) 288 N. Y. 280, 43 N. E. (2d) 43, quoting from *Edwards v. Douglas*, (1925) 269 U. S. 204, 46 S. Ct. 85.

must be bona fide and not fictitious. Thus, unjustified "write-ups" in the value of fixed assets are not realized appreciation of assets and cannot be included in determining surplus.³³ If the statute permits a declaration of dividends only from "net profits arising from the business," an estimated increase in the value of a building owned by the corporation would not be available for the distribution of profits.³⁴ Profits are not proved to have been earned by showing an increase in the market price of the corporation's inventories; the profits must have been realized before they can be regarded as available for dividends.³⁵ An increase in the value of cattle not realized by an actual sale has been held not to be a proper item to be taken into consideration in determining actual surplus of a company.³⁶

Accrued interest; estimated profits on partially executed contracts. Money owing to the corporation as interest does not constitute profits so as to entitle the directors to declare dividends therefrom until actually collected, regardless of how certain the corporation is to collect the interest.³⁷ Nor are estimated profits on partially executed contracts available for distribution as dividends.³⁸

Profit from sale of capital assets. Unless the corporation is in liquidation, profit from the sale of a capital asset may enter into earning or surplus account and is a proper source of dividends.³⁹

Premium upon sale of stock. The decisions are conflicting as to the availability of premiums received upon the sale of capital stock for distribution as dividends. It has been held on the one hand that the amount of the premium may be treated as profits.⁴⁰ On the other hand, it has been held that the entire proceeds of the sale of stock, even when sold for more than par, are part of

³³ Berks Broadcasting Co. v. Craumer, (1947) 356 Pa. 620, 52 A. (2d) 571. The Pennsylvania statute requires that unrealized appreciation or revaluation of fixed assets shall be shown on the books of the corporation as an item separate from surplus or paid-in surplus.

³⁴ Kingston v. Home Life Ins. Co. of America, (1917) 11 Del. Ch. 428, 101 A. 898. The Delaware statute has been amended since this case was decided.

³⁵ Sexton v. C. L. Percival Co., (1920) 189 Iowa 586, 177 N. W. 83; Southern California Home Builders v. Young, (1920) 45 Cal. App. 679, 188 P. 586; Irving Trust Co. v. Gunder, (1934) 152 N. Y. Misc. 83, 271 N. Y. Supp. 795.

³⁶ Hill v. International Products Co., (1925) 129 N. Y. Misc. 25, 220 N. Y. Supp. 711.

³⁷ Southern California Home Builders v. Young, *supra* (Note 35).

³⁸ *Ibid.*

³⁹ Adams v. Whitmarsh, (1941) 66 R. I. 53, 17 A. (2d) 433, citing 18 C. J. S. 1101, Corporations, §462.

⁴⁰ Smith v. Cotting, (1918) 231 Mass. 42, 120 N. E. 177.

the capital stock and therefore cannot be considered profits earned through the conduct of business out of which dividends may be paid.⁴¹ It would appear that if such a premium were used to pay dividends, and if the conditions under which the new stock was sold induced purchasers to believe they were buying "dividend earning" stock, they could claim they had been defrauded.

It has been held that the purchase by a corporation of its own stock, and resale at a higher price, produces a profit that is available for dividends.⁴²

Surplus after reduction of capital stock. Upon a legal reduction of its capital stock, the corporation may distribute as dividends the excess of its assets over the aggregate of its debts plus the amount to which the capital stock has been reduced.⁴³ This means of creating a surplus for dividends is often used when security values are declining and earnings are reduced. In jurisdictions where the source of the dividend is not limited by statute to net earnings or profits, a reduction of stock liability to create or to increase surplus may usually be effected in one of the following ways:

1. By requesting each stockholder to surrender a percentage of his shares for cancellation.
2. By reducing the par value of each share of stock.
3. By changing par value stock to no par and prescribing for the latter a smaller stated value than the par value of the former.
4. By reducing the stated value of stock without par value.

Profits upon sale of stock of other corporations. Such a profit is available for dividends.⁴⁴

Forfeited stock. It has been held that the amount of money received by a corporation for shares of stock that have been forfeited because of non-payment of calls does not constitute a profit out of which the corporation may declare dividends.⁴⁵ It would seem that if the corporation reissued the shares that had

⁴¹ Merchants' & Insurers' Reporting Co. v. Youtz, (1918) 39 Cal. App. 226, 178 P. 540.

⁴² National Newark & Essex Banking Co. of Newark v. Durant Motor Co. of New Jersey, (1938) 124 N. J. Eq. 213, 1 A. (2d) 316.

⁴³ Roberts v. Roberts-Wicks Co., (1906) 184 N. Y. 257, 77 N. E. 13; Strong v. Brooklyn, etc. R. Co., (1883) 93 N. Y. 426; Dominguez Land Corporation v. Daugherty, (1925) 196 Cal. 468, 238 P. 703.

⁴⁴ Equitable Life Assur. Society v. Union Pac. R. Co., (1914) 212 N. Y. 360, 106 N. E. 92, aff'g 162 N. Y. App. Div. 81, 147 N. Y. Supp. 382.

⁴⁵ Gratz v. Redd, (1843) 4 B. Mon. (Ky.) 178.

been forfeited and received in payment a sum which, together with the amount paid by the original holder, less the costs involved in forfeiting the stock, exceeded the par value of the shares, the corporation could treat the excess in the same manner as it would a premium received upon the sale of stock.⁴⁶

Settlement of debt at a discount. It has been held that where a debt was incurred as an operating expense, its settlement produces a profit available for dividends. But compromise of a lien that encumbered the corporation's property at the time it was acquired, or of any obligation incurred for capital purposes, does not result in surplus.⁴⁷

Payment of dividends from accumulations of surplus or current earnings. In the absence of statutory, charter, or contract provisions requiring dividends to be paid from current earnings, dividends may be paid from a surplus resulting from current earnings or from accumulated surplus.⁴⁸ Even if there is no profit for the period in which the dividend is paid, dividends may be lawfully declared out of surplus accumulated from the profits of previous years.⁴⁹ A corporation that had accumulated profits for a number of years and had retained them as working capital and as funds for creating greater security for the payment of dividends and for the protection of the company's credit, was held to be making a valid distribution of profits when it declared dividends on the common stock from the accumulation.⁵⁰ It has also been held that undistributed surplus that has been retained for use in the corporate business and that has been invested in physical assets may be withdrawn and distributed as dividends.⁵¹

Determining current profits—treatment of expenditures. In

⁴⁶ In *Gratz v. Redd*, supra, the court said: "Had a sale been made of the [forfeited] stock and had it commanded a price, substituting the purchasers in the place of the former stockholders, the amount bid might have been carried to profits; or, had a fair estimated value been fixed upon it, and that estimated value exceeded its par value, including the sum paid on it, that excess, perhaps, might have been carried to profits."

⁴⁷ *National Newark & Essex B. Co. v. Durant Motor Co.*, (1938) 124 N. J. Eq. 213, 1 A. (2d) 316.

⁴⁸ *Lynch v. Hornby*, (1918) 247 U. S. 339, 38 S. Ct. 543; *Moran v. U. S. Cast Iron Pipe & Foundry Co.*, (1924) 95 N. J. Eq. 389, 123 A. 546. See *Lich v. United States Rubber Co.*, (1941) 39 F. Supp. 675, for distinction between net profits and annual net earnings.

⁴⁹ *Murray v. Beattie Mfg. Co.*, (1912) 79 N. J. Eq. 322, 82 A. 1038.

⁵⁰ *People of Colorado ex rel. Fraser v. Gt. Western Sugar Co.*, (1929) 29 F. (2d) 810.

⁵¹ *National Lock Co. v. Hogland*, (1939) 101 F. (2d) 576.

arriving at the amount of profits for the current year, the net results of the year's operations will depend upon whether items of expenditures have been capitalized or charged to profit and loss. For example, if an expenditure of \$5,000 upon a machine which is to last two years is treated as an asset, the profit for the period will be \$5,000 (less whatever amount is deducted for depreciation) more than it would be if the expenditure were charged as an expense. Expenses chargeable to earnings include the general expenses of keeping up the organization of the company and all expenses incurred in operating the business and in keeping its property in good repair; expenses chargeable to capital include those which are incurred in the original acquisition of the business and in the enlargement and improvement of it.⁵² Ordinarily, the directors have the right to decide as a matter of policy whether an item of expenditure is to be capitalized by being treated as an asset or charged to profit and loss.

To determine current profits, there must be deducted from the income, the total of the operating expenses, fixed charges such as interest on bonded indebtedness, taxes, depreciation,⁵³ and costs of maintenance and upkeep.⁵⁴

Valuation of assets to determine if surplus for dividends exists. The courts are permitted to go behind the values of the assets as they appear on the books of the corporation or in its balance sheet, to see whether a surplus or profits actually existed when the dividend was declared.⁵⁵ If the courts could not do this, the directors, by an erroneous determination of values, could confer upon themselves the power to make dividends out of capital.⁵⁶ Each item on the asset side of the balance sheet should therefore be studied individually in arriving at the amount available for dividends, in order that assets which have a doubtful existence may be eliminated.

Necessity for restoring past impairment of capital before declaring a dividend. If by loss, or because of mismanagement or misconduct on the part of directors or officers, the assets of

⁵² See *Union Pac. R. R. Co. v. U. S.*, (1878) 99 U. S. 402; *U. S. v. Kansas Pac. Ry. Co.*, (1878) 99 U. S. 455.

⁵³ *People ex rel. Binghamton Light, Heat & Power Co. v. Stevens*, (1911) 203 N. Y. 7, 96 N. E. 114; *Krull v. Pierce*, (1947) (Ind. App.), 71 N. E. (2d) 617.

⁵⁴ *Corliss v. United States*, (1925) 7 F. (2d) 455; *People ex rel. Jamaica Water Supply Co. v. State Board of Tax Commissioners*, (1908) 128 N. Y. App. Div. 13, 112 N. Y. Supp. 392, modified 196 N. Y. 39.

⁵⁵ See *Gallagher v. New York Dock Co.*, (1940) 19 N. Y. Supp. (2d) 789.

⁵⁶ *Siegman v. Electric Vehicle Co.*, (1907) 72 N. J. Eq. 403, 65 A. 910.

the corporation are reduced below the sum of the capital stock plus liabilities, the balance sheet of the corporation will show a deficit, and its capital will be impaired. A corporation may not pay a dividend if its balance sheet shows a deficit, for such a payment would be equivalent to returning to the stockholders part of the capital of the corporation that was paid by them for their stock. Even though the corporation thereafter operates at a profit, if the amount earned is insufficient to offset the deficit and leave a surplus, the corporation will be unable to pay dividends.⁵⁷ Impairment of capital or paid-in surplus of a corporation that results from operating losses must be restored before any earnings can be available for distribution to the stockholders.⁵⁸ This is the rule according to the weight of authority as expressed in American decisions. A Federal court, however, has interpreted the Virginia statute as permitting a Virginia corporation to pay dividends out of earnings despite a deficit.⁵⁹ In England, the courts have held, almost without exception, that, if the profit and loss account for the current year shows a profit, a dividend may be declared equal to the amount of the profit, and no attention need be paid to losses of capital incurred in prior years.⁶⁰

Impairment of capital of corporation with wasting assets. The rule that the payment of dividends must not impair the capital of the corporation must be modified when applied to corporations with wasting assets.^{60a} Wasting assets corporations are distinguishable from the ordinary mercantile and manufacturing concern. A wasting assets corporation is one engaged in the exploitation of such assets as mines, oil wells, timber, or a corporation that holds property having a limited life, such as a lease for a term of years, or patents or copyrights, or a corpora-

⁵⁷ See *National Newark v. Essex B. Co. v. Durant Motor Co.*, (1938) 124 N. J. Eq. 213, 1 A. (2d) 316; *Foley Securities Corp. v. Commissioner of Int. Rev.*, (1939) 106 F. (2d) 731.

⁵⁸ *Commissioner of Internal Revenue v. W. S. Farish & Co.*, (1939) 104 F. (2d) 833; *Lich v. United States Rubber Co.*, (1941) 39 F. Supp. 675, aff'd, (1941) 123 F. (2d) 145.

⁵⁹ *U. S. v. Riely*, (1948) 169 F. (2d) 542. The Virginia statute provides for the payment of dividends "out of net earnings, or out of its net assets in excess of its capital as hereinafter defined."

⁶⁰ See C. F. Schlatter, "Payment of Dividends before Restoring Impaired Capital," in *Journal of Accountancy*, March, 1923, for citations of English cases and for analysis of American decisions which are frequently cited by writers to show that dividends may be paid while capital is impaired.

^{60a} See *Bailey v. Guaranty Liquidating Corporation*, (1936) 120 N. J. Eq. 288, 60 P. (2d) 579.

tion organized to liquidate specific assets. Stockholders of a mercantile corporation are entitled to expect the corporation to employ their capital in the acquisition of profits; stockholders of wasting assets corporations, on the other hand, cannot expect the capital of the corporation to remain intact. Such corporations, in the absence of a contract to the contrary, may declare dividends without making provision for past impairments of capital and without first providing for a depletion reserve for the recoupment of their wasting assets.⁶¹ They may consider as profits for dividend purposes all receipts less the cost of production, the cost of marketing, and overhead expenditures, without any charge or reserve for depletion of capital.⁶² This rule, however, does not give a mining corporation the right to sell a mine, or any part of it, and to distribute the profits in the form of dividends.⁶³ Nor may the corporation, on the basis of this doctrine, divert the capital values of its assets into the pockets of the common shareholders by way of dividends to the exclusion of preferred stockholders whose contracts give them, in relation to the common stockholders, a first and prior right to the assets. In other words, if there are two classes of stock, common and preferred, and the preferred has the right to payment at par upon dissolution of the company, if the capital of the corporation is in fact impaired, dividends cannot be paid on the common stock until provision is made by means of a reserve for paying off preferred stockholders in the event of liquidation.⁶⁴

Methods of eliminating a deficit. As indicated in the preceding paragraph, a corporation may not declare a dividend if, at the time of the proposed distribution, the balance sheet of the corporation shows a deficit. A deficit may, however, be wiped out in one of the following ways:

1. By reappraising assets that have been carried on the books at an undervaluation. The increased value of the assets will wipe out the deficit.⁶⁵ Any one of the following bases are available for revaluation: (a) original cost less depreciation; (b) replacement cost; (c) value realized at a forced sale; or (d) present market or present sales value.

⁶¹ *De Brabant v. Commercial Trust Co.*, (1933) 113 N. J. Eq. 215, 166 A. 533.

⁶² *Lee v. Neuchatel Asphalte Co.*, (1889) 41 Ch. Div. 1; *Excelsior Water & Mining Co. v. Pierce*, (1891) 90 Cal. 131, 27 P. 44.

⁶³ *Excelsior Water & Mining Co. v. Pierce*, *supra* (Note 62).

⁶⁴ *Wittenberg v. Federal Mining & Smelting Co.*, (1926) 15 Del. Ch. 147, 133 A. 48. In this case previous decisions on the wasting assets doctrine are reviewed.

⁶⁵ See footnote 32.

2. By converting unnecessary reserves into surplus.

3. By reducing the capital stock.⁶⁶ For example, if the par value of a corporation's stock outstanding is \$500,000, and its assets are \$600,000 and its liabilities \$200,000, the deficit of \$100,000 can be wiped out and a surplus created by a reduction of the capital stock to \$250,000, effected through a decrease in the par value per share or in the number of shares outstanding.

Writing up goodwill to eliminate a deficit. During the early life of a corporation losses may be incurred in establishing the business and putting it on a paying basis. After the corporation has reached a point where its reputation is established and where operation at a profit is assured, the directors may feel that the company has created goodwill equivalent to or greater than the deficit. They might argue that the net operating loss in excess of income during the initial period was in reality development expenses incurred in establishing a steady patronage and the good name of the concern. By capitalizing the initial deficit as goodwill and placing the account on the books, the company eliminates the deficit and creates a surplus.

Accountants almost without exception agree that good will should not be recognized in the accounts unless it has been purchased.⁶⁷ As to capitalizing initial deficit as goodwill, they maintain that goodwill created under such circumstances is merely a device for effecting an eventual inflation of the earned surplus account by relieving it of charges for expenses and losses.

Accountants also maintain that a company should not put goodwill on its books even after years of successful and profitable operation. Although the company may be entirely correct in maintaining that it has created goodwill, it is not justified in placing the account on its books by a credit to surplus or by any other credit.

Conditions that must exist before eliminating a deficit. For the above practices to be effective in eliminating a deficit and creating a surplus, the following conditions must exist:

1. The action taken by the board of directors must be free from fraud; the directors must act honestly and in good faith.

⁶⁶ See footnote 43.

⁶⁷ The following case deals with the subject of writing into the assets the intangible asset "goodwill": *Randall v. Bailey*, (1940) 23 N. Y. Supp. (2d) 173, *aff'd*, (1941) 262 N. Y. App. Div. 844, 29 N. Y. Supp. (2d) 512, *aff'd*, (1942) 288 N. Y. 280, 43. N. E. (2d) 43.

2. The action must not be contrary to the provisions of the statute under which the corporation was organized and the interpretations of the statutes as shown by the court decisions.

3. The facts must justify the action taken. Thus a reappraisal that was not in fact justified could not be made the basis of an increase in the assets. The writing up of "goodwill" would not be justified if the corporation were continually operating at a loss.⁶⁸ On the other hand, a corporation would be justified in placing a value upon its goodwill where, after several years of operation at a loss, it had succeeded in establishing a reputation to a point where its operation at a profit was assured.

Financial expediency of a conservative dividend policy. Certain advantages accrue from a large surplus built up by a conservative dividend policy. These advantages are well expressed in the following excerpt from the annual report of a large public utility corporation:

Among the more important advantages to a company of a large surplus represented in the fixed assets are the following:

1. It strengthens the company's credit, enabling the company to make its interest and dividend payments uniform and dependable.

2. It enables the company on the strength of this credit to obtain its capital requirements on the most favorable terms.

3. It enables the company to ride out commercial and financial disturbances which might otherwise cripple or destroy it.

4. It enables the company to maintain at all times the highest state of efficiency in its operation, which would be impossible for any company which is obliged to adjust its more or less inflexible operating expenses to the constant and inevitable fluctuations of business.

5. It is a reservoir, as it were, which, supplied by a fluctuating stream of gross revenue, enables the company to maintain even and uniform disbursement for service, maintain a uniform operating organization, and that high state of efficiency which can result only from a permanent operating force.

Provisions of various tax laws, designed to prevent evasion of

⁶⁸ See the following cases discussing goodwill value: *Rockwood Pottery Co. v. Commissioner of Int. Rev.*, (1930) 45 F. (2d) 43; *Securities Realization Co. v. Peabody & Co.*, (1939) 300 Ill. App. 156, 20 N. E. (2d) 874; *Colton v. Duvall*, (1931) 254 Mich. 346, 237 N. W. 48; *Randall v. Bailey*, *supra* (Note 65).

taxes by failure to declare a dividend, provide for a high rate of punitive tax upon excessive surplus. Although the preceding arguments in favor of a large surplus are sound from the point of view of financial policy, great care should be taken to avoid conflict with the provisions of tax laws, lest the tax penalty be so great as to destroy the economic advantage. Furthermore, there is the danger that if the directors fail to declare dividends and the corporation is compelled to pay a tax penalty, the directors may be held liable in a stockholders' derivative action for the damage caused the corporation.

Kinds of dividends. Dividends, classified according to the manner of payment, fall into the following groups: (1) cash dividends, (2) property dividends, (3) scrip dividends, (4) bond dividends, and (5) stock dividends. Dividends may also be classified as "regular" and "extra." A dividend in addition to that which the corporation has been paying, or which the corporation is required to pay, is an "extra" dividend. If an "extra" dividend is paid regularly, it may lose its identity as an "extra" dividend and become a "regular" dividend. The payment of "extra" dividends and the labeling of dividends as "regular" and "extra" are entirely matters of financial policy to be determined by the directors. Dividends may also be divided into "profits dividends" and "liquidation dividends." Dividends paid by a going concern out of the profits of the business and not as a step toward liquidation or dissolution are "profits dividends." In this chapter we are concerned only with "profits dividends." "Liquidation dividends" are a distribution of the property among the stockholders looking to an entire or partial suspension of operations.

Medium in which dividends may be paid. The board of directors generally determines the medium to be used in the payment of dividends. It may declare dividends payable in cash, property, scrip, bonds, stock, or in cash or stock at the option of the stockholder. The amount of cash the corporation has on hand and in the banks is no indication of the corporation's ability to declare and pay a dividend, though it may have a decided influence on the way in which a dividend is paid.

Cash dividends—borrowing to pay dividends. If the corporation has invested its earnings for corporate purposes and has no ready funds sufficient to pay a cash dividend, it may borrow, for the purpose of declaring a dividend, a sum not exceeding the

amount of the surplus.⁶⁹ The fact that borrowed money is to be used for the payment of dividends does not render the declaration and payment illegal, if it appears that the corporation had used surplus profits equal to the amount of the dividend paid, for the purpose of improving the corporate property.⁷⁰ If the profits have been invested in corporate property and therefore money must be borrowed to pay dividends, it may be considered that money was borrowed for the purpose of carrying on the corporate business, and the payment of the dividend with the borrowed money is not illegal.⁷¹

Dividends payable in property. The surplus of a corporation is not represented by any particular asset, but is a mathematical proposition, namely, the *excess* of assets over debts and capital. Therefore, any asset, or any part of any asset, if physically divisible, may be paid out as dividends. Thus, if a corporation which has a surplus holds stock in another corporation, or real property not necessary for its corporate purposes, that stock or real property is legally distributable to the extent of the surplus precisely the same as if it were cash.⁷² Such a dividend is properly called a property dividend. A corporation does not warrant the title to property which it distributes as a property dividend.⁷³

A stockholder cannot be compelled to take the property distributable to him on account of a dividend.⁷⁴ If a stockholder should refuse to take the property dividend, the corporation may retain it in trust for him, or possibly sell it for his benefit.⁷⁵ The courts have not decided how the refusal of the stockholder will be handled, but one court has said: "In case of his refusal to accept stock in another corporation as a dividend, the corporation will

⁶⁹ Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co., (1912) 197 F. 347; Cox v. Leahy, (1924) 209 N. Y. App. Div. 313, 204 N. Y. Supp. 741; West v. Hotel Pennsylvania, (1942) 148 Pa. Super. Ct. 373, 25 A. (2d) 593; Oshrin v. Celanese Corporation of America, (1942) 37 N. Y. Supp. (2d) 548.

⁷⁰ Excelsior Water & Mining Co. v. Pierce, (1891) 90 Cal. 131, 27 P. 44.

⁷¹ Gilbert Paper Co. v. Prankard, (1923) 204 N. Y. App. Div. 83, 198 N. Y. Supp. 25.

⁷² Liebman v. Auto Strop Co., (1926) 241 N. Y. 427, 150 N. E. 505.

⁷³ Olsen v. Homestead Land and Improvement Co., (1894) 87 Texas 368, 28 S. W. 944.

⁷⁴ State v. B. & O. R. R. Co., (1847) 6 Gill (Md.) 363. See also Strout v. Cross, Austin & Ireland Lumber Co., (1940) 283 N. Y. 890, 28 N. E. (2d) 890, citing Williams v. Western Union Tel. Co., (1883) 93 N. Y. 162, in which it was held that a stockholder could not be compelled to accept property in satisfaction of accumulated dividends, thereby jeopardizing her right to receive the dividends in cash in the future.

⁷⁵ Williams v. Western Union Tel. Co., (1883) 93 N. Y. 162.

find some way to deal with the stock which the law will sanction.”⁷⁶ The stockholder does not have the option to receive an equivalent amount of cash in lieu of a property dividend.⁷⁷

Scrip dividends. A scrip dividend is a distribution of surplus to the stockholders in the form of notes or promises to pay the amount of the dividend at a certain time. The notes are called “dividend certificates” or “scrip.” They usually bear interest at a fixed rate from the date of the note. This form of dividend may be legally paid.⁷⁸ However, if the corporation does not have actual earnings out of which to pay the dividend, the notes are invalid.⁷⁹ Also, if the notes are issued pursuant to a resolution passed at an illegal meeting of the directors, they are invalid.⁸⁰

A scrip dividend is usually advisable under the following circumstances: (1) when the corporation has a surplus but not sufficient cash with which to pay a cash dividend, and the directors do not wish to borrow for the purpose of obtaining cash but do desire to have present stockholders participate in the earnings of the corporation; (2) when the corporation has a surplus and cash but wishes to reserve the cash for corporate purposes; (3) when the corporation wishes to distribute the profits earned upon the stock, in order to avoid any future dispute as to the right to such profits between present shareholders and their successors in interest, such as life tenants and remaindermen.

Bond dividends. The payment of a dividend in the form of bonds is unusual, but a corporation has the right to distribute its surplus in the form of bonds in the absence of statutory provisions to the contrary, and may even secure the bonds by a mortgage upon its property.⁸¹

Stock dividends. In the absence of a provision in the constitution, statute, charter, or by-laws to the contrary, surplus of a corporation may be capitalized and distributed in the form of additional stock to the shareholders, pro rata according to their stock holdings. Such a distribution is properly called a stock

⁷⁶ Ibid.

⁷⁷ *State v. B. & O. R. R. Co.*, supra (Note 74).

⁷⁸ *Bankers' Trust Co. v. R. E. Dietz Co.*, (1913) 157 N. Y. App. Div. 594, 142 N. Y. Supp. 847. See also *Hupp Motor Car Corp. v. Guaranty Trust Co. of N. Y.*, (1939) 171 N. Y. Misc. 21, 11 N. Y. Supp. (2d) 855, in which it was held that an offer of means whereby holders of scrip may convert their scrip into cash may be revoked by the corporation at any time.

⁷⁹ *Stagal Oil Co. v. Bartholomew*, (1940) (Tex. Civ. App.) 144 S. W. (2d) 1012.

⁸⁰ *Meyers v. El Tejon Oil & Refining Co.*, (1946) (Cal. App.), 169 P. (2d) 60.

⁸¹ *Wood v. Lary*, (1888) 47 Hun. (N. Y.) 550, appeal dismissed in 124 N. Y. 83, 26 N. E. 338.

dividend.⁸² The ordinary stock dividend is the issuance of common stock to the holders of common stock. The term is also used to describe the issuance of preferred shares to holders of common shares, common shares to the holders of preferred shares, and preferred shares to the holders of preferred shares. If a dividend is paid in stock of a corporation other than the one that is authorizing the dividend, it is not a stock dividend.⁸³ Nor is the distribution of treasury shares as a dividend within the ordinary meaning of stock dividend.⁸⁴

Ordinarily, the fact that the statute requires stock to be paid for in cash, property, or services does not prevent the corporation from declaring a stock dividend and regarding the stock as having been paid for by the distribution of the surplus of the corporation.⁸⁵

If the corporation has unissued shares of stock sufficient to cover the distribution of the surplus as a stock dividend, the directors merely authorize the payment of the stock dividend from the shares of unissued stock. If the corporation does not have sufficient unissued shares to take care of the distribution, the increase in the capital stock must be properly authorized in the manner required by statute.⁸⁶ The payment of a stock dividend is in the discretion of the directors.⁸⁷ Unless an increase in the capital stock is necessary, the stockholders' consent is not essential, in the absence of a provision to the contrary in the statute or charter. However, it has been held that a court of equity may interfere to compel the payment of a cash dividend where the purpose of the stock dividend is to keep the profits of

⁸² Distribution of additional stock without capitalization of surplus is not a stock dividend but a "split-up."

⁸³ *Commissioner of Corporations and Taxation v. Morgan*, (1940) 306 Mass. 305, 28 N. E. (2d) 217; *In re Villard's Will*, (1941) 176 N. Y. Misc. 852, 29 N. Y. Supp. (2d) 323, citing *Peabody v. Eisner*, (1918) 247 U. S. 347, 38 S. Ct. 546; *In re Goodman's Estate*, (1946) 66 N. Y. Supp. (2d) 706.

⁸⁴ *Bass v. Commissioner of Internal Revenue*, (1942) 129 F. (2d) 300.

⁸⁵ *Young v. Bradford County Telephone Co.*, (1941) 341 Pa. 394, 19 A. (2d) 134. In Tennessee, however, the court held that an application to amend the charter for the purpose of enabling the corporation not only to increase its corporate stock but to grant it the right to pay for the increased stock in surplus and undivided profits, consisting of both tangible and intangible assets, was illegal and void, because the legislature had not granted it either the right or the power to pay for its stock in this way. *United Hosiery Mills Corp. v. Stevens*, (1921) 146 Tenn. 531, 243 S. W. 656. In this case the procedure followed in amending the charter was also questioned.

⁸⁶ See page 771.

⁸⁷ *Williams v. Western Union Tel. Co.*, (1883) 93 N. Y. 162.

the business within the control of those dominating the affairs of the corporation.⁸⁸

If the statute or charter requires that dividends shall be paid in cash, the corporation cannot declare a stock dividend and compel the stockholders to accept stock instead of cash.⁸⁹ Nor may a corporation distribute a stock dividend to a particular class of stockholders if the effect of such action would be to deprive stockholders of another class of their rights. For example, suppose Corporation A has \$100,000 of 7 per cent preferred stock and \$100,000 of common stock, the only difference between the two classes being that the preferred stock has a preference as to dividends. The corporation proposes to capitalize its surplus of \$50,000 and to declare a stock dividend on the common stock alone. It is not permitted to do so, for the issuance of a stock dividend to the common stockholders to the exclusion of the preferred stockholders would constitute an impairment of the rights of the preferred stockholders. They would be entitled to relief in equity if the stock had not been delivered, or to damages for breach of the contract obligation if the stock had been delivered.⁹⁰

Effect of a stock dividend, in general. The effect of a stock dividend is a division of the corporate property into a larger number of ownership units. Each one of the shares of the increased capital stock represents a smaller fractional interest than before in the total corporate property.^{90a} A stock dividend takes nothing from the property⁹¹—it is really a bookkeeping

⁸⁸ *Keough v. St. Paul Milk Co.*, (1939) 205 Minn. 96, 285 N. W. 809.

⁸⁹ *Hardin County v. Louisville & Nash. R. R. Co.*, (1891) 92 Ky. 412, 17 S. W. 860.

⁹⁰ *Riverside & Dan River Cotton Mills v. Thomas Branch & Co.*, (1927) 147 Va. 509, 137 S. E. 620. See *Niles v. Ludlow Valve Mfg. Co.*, (1913) 202 F. 141, in which it was held that where the certificate of incorporation provides that the preferred stock should "receive interest or dividends of 8% per annum and be preferred as to capital as well as to dividends," a stock dividend to the common stockholders alone was valid. See also *Tennant v. Epstein*, (1934) 356 Ill. 26, 189 N. E. 864, rev'g 271 Ill. App. 204.

^{90a} *Chadwick v. McClurg*, (1928) 103 N. J. Eq. 55, 142 A. 173; *Gray v. Hemenway*, (1912) 212 Mass. 239, 98 N. E. 789; *Keough v. St. Paul Milk Co.*, (1939) 205 Minn. 96, 285 N. W. 809.

⁹¹ *City Bank Farmers Trust Co. v. Ernst*, (1934) 263 N. Y. 342, 189 N. E. 241; *Burns v. Hines*, (1939) 298 Ill. App. 563, 19 N. E. (2d) 383; *Commissioner of Corporations and T. v. Morgan*, (1940) 306 Mass. 305, 28 N. E. (2d) 217; *First National Bank of Tuscaloosa v. Hill*, (1941) 241 Ala. 606, 4 So. (2d) 170; *Powell v. Maryland Trust Co.*, (1942) 125 F. (2d) 260, citing *Gibbons v. Mahon*, (1890) 136 U. S. 549, 10 S. Ct. 1057.

process.⁹² Any other kind of dividend diminishes the property of the corporation by the amount of the dividend, but leaves the fractional interest of each share of the capital stock exactly as it was before. It has even been held that a statutory prohibition against declaring dividends in "cash or property" out of unrealized assets does not apply to a stock dividend, because it does not decrease the company's capital assets.⁹³ The surplus capitalized for purposes of the stock dividend is no longer available for the declaration of dividends, but becomes part of the permanent capital of the corporation.⁹⁴ Thereafter, the corporation spreads its earnings over a larger number of shares.

Transfers from surplus to capital upon payment of stock dividends. An ordinary stock dividend (a dividend payable in shares of common stock to holders of common stock) implies a transfer of earned surplus to capital account, whether the latter is designated as capital stock or capital surplus. While the amount to be transferred is legally within the discretion of the directors, the interrelated problem of determining how many shares shall be issued as a stock dividend brings in questions of good corporate and accounting practice as well. The Committee on Accounting Procedure of the American Institute of Accountants⁹⁵ has established a few fundamental principles as guides in corporate accounting for stock dividends. These principles are embodied in the following discussion.

The board of directors should determine, first, the aggregate amount to be transferred from earned surplus; second, the number of shares to be issued in connection with the transfer. In the second step, it is important to observe the legal requirements as to the per share amount to be capitalized. These legal requirements may be set by statute, charter, or by-laws. Ordinarily, it is an amount sufficient to make the shares "fully paid." In par value stock, this is usually the par value. In non-par stock with a stated value, it is usually the stated value. In non-par stock without a stated value, the amount is usually left to the discretion of the directors. The legal requirements are usually minimum requirements and do not prevent the capitalization of a larger amount per share.

⁹² *First National Bank of Tuskaloosa v. Hill*, supra (Note 91); *Powell v. Maryland Trust Co.*, supra (Note 91).

⁹³ *Berks Broadcasting Co. v. Craumer*, (1947) 356 Pa. 620, 52 A. (2d) 571.

⁹⁴ *Bass v. Commissioner of Internal Revenue*, (1942) 129 F. (2d) 300.

⁹⁵ *Accounting Research Bulletin*, No. 11, September, 1941.

In addition to observing the legal requirements, the directors should follow the requirements of good corporate and accounting practice in determining the number of shares to be issued and the capitalization per share. If the corporation is issuing a single stock dividend and capitalizing a large amount of earned surplus accumulated over a period of time, the directors should observe the following two principles:

(1) The amount of income capitalized per share should "bear an appropriate relationship to the existing capitalization per share." Thus, the number of dividend shares should not exceed the number determined by dividing the amount of earned surplus authorized to be capitalized by the total amount per share in the capital-stock and capital-surplus accounts of the corporation before the declaration of the stock dividend.

(2) The directors "should take into consideration a fair market value per share for the increased number of shares to be outstanding after the stock dividend, and where such fair market value per share is substantially in excess of the amount per share of the combined capital-stock and capital-surplus accounts before the stock dividend, they should fix the number of dividend shares so that the amount charged to earned surplus per share will have a reasonable relationship to such fair market value. Unless such relationship is maintained, the stockholder may believe that the market value of the dividend shares he receives represents his pro-rata share of the capitalized current income of the corporation, whereas the market value per share may be materially in excess of such capitalized income per share."⁹⁶

When earned surplus capitalized per share exceeds its par or stated value, the excess should be credited to the capital-surplus account instead of to the capital-stock account. It is also sometimes desirable that part of the credit should be made to capital surplus in cases involving no par value stock without a stated value.

The transfer from surplus to capital has no effect on the stockholders or the corporation, so far as the Federal income tax is concerned, or on the relative rights of life tenants and remaindermen who may have interests in the shares. Some problems may arise in connection with the relative rights of different classes of stockholders; but the only general rule that can be cited in regard to such problems is that the corporate accounts

⁹⁶ See footnote 95.

may be treated in any way, provided that stockholders of one class are not thereby deprived of their relative rights.

Notice to the stockholders of a stock dividend. When a corporation issues a stock dividend, it should tell the stockholders:

1. The amount of earned surplus capitalized per share.
2. The aggregate amount of earned surplus capitalized.
3. The capital accounts to which the aggregate amount has been charged and credited.
4. The percentage by which the stockholder's interest in the corporation before issuance of the stock dividend will be reduced if he should sell his dividend shares.

Dividends payable in cash or in stock. When dividends are payable in cash or in stock, the stockholder is given a certain number of days within which to notify the corporation that he chooses to apply his dividend to the purchase of additional stock. In some cases provision is made for all dividends to be paid in cash, unless notice to the contrary is received; in others, all dividends are applied to the purchase of shares unless notice is received by the corporation that the stockholder elects to receive his dividend in cash.

A dividend payable in cash or stock is not a stock dividend.⁹⁷ This type of optional dividend differs from a stock dividend in the following respect: in the case of a stock dividend, the stockholder may refuse to accept the shares of stock offered as a dividend, but he cannot demand cash in lieu of such shares; in the case of the dividend payable in cash or in stock, the stockholder may take cash or he may apply his dividend to the purchase of additional shares of stock. If he accepts a note instead of cash, he cannot later demand payment of the note with stock.⁹⁸

Right to dividends between stockholders of same class. All the stockholders of a class of stock upon which a dividend has been declared must be given their pro rata share of the dividend according to their stockholdings, without discrimination, and regardless of the time when the stock was acquired.⁹⁹ Discrimination, such as declaring the dividend payable only to certain

⁹⁷ *Kellogg v. Kellogg*, (1938) 166 N. Y. Misc. 791, 4 N. Y. Supp. (2d) 219, aff'd 254 N. Y. App. Div. 812, 5 N. Y. Supp. (2d) 506, 507, 509.

⁹⁸ *Coon v. Schlimme Dairy Co.*, (1940) 294 Mich. 51, 292 N. W. 560. In this case the stockholders accepted notes in payment of the dividends to avoid the Federal tax on the corporation's surplus.

⁹⁹ *State ex rel. Sorenson v. Nebraska State Bank of O'Neill*, (1932) 123 Neb. 289, 242 N. W. 613; *Jones v. Terre Haute, etc. R. R. Co.*, (1874) 57 N. Y. 196.

stockholders of the class and not to others,¹⁰⁰ offering some of the shareholders payment in one medium and other stockholders payment in some other form,¹⁰¹ giving certain stockholders of the class larger dividends than others, or fixing different times for payment of the dividend,¹⁰² is not permissible.¹⁰³ However, a dividend payable in preferred stock to preferred stockholders, and in common stock to common stockholders, was held not discriminatory.¹⁰⁴ If all the stockholders who are entitled to participate in the division authorize, ratify, or acquiesce in any distribution of the surplus among themselves differing from the ordinary pro rata division, the directors may make the division according to the agreement among the stockholders.¹⁰⁵ A corporation may not declare a dividend on corporate stock held in the treasury.¹⁰⁶

Rights to dividends between stockholders of different classes. Unless otherwise specified, the shares of stock of a corporation all stand upon the same footing. They participate equally in the organization and control and also in any distribution of funds of the corporation, whether it be of earnings or of corporate assets. Of course, there may be a classification of stock that gives to the members of one class rights and privileges not enjoyed by the other. (See classification of stock, page 403, et seq.) The relation of the various classes of stockholders to one another and to the corporation is entirely contractual. To determine the rights and preferences of one class of stockholders over another as to dividends, one must look to the language of the preferences in the charter or organization documents, which contain the evidence of the contract between the holders of the different classes of stock.¹⁰⁷ See reclassification of stock on page 723.

¹⁰⁰ *Segerstrom v. Holland Piano Mfg. Co.*, (1924) 160 Minn. 95, 199 N. W. 897; *Scott v. P. Lorillard Co.*, (1931) 109 N. J. Eq. 417, 157 A. 388.

¹⁰¹ *State v. Baltimore & O. R. Co.*, (1847) 6 Gill (Md.) 363.

¹⁰² *Tichenor v. Dr. G. H. Tichenor Co.*, (1935) (La. App.) 164 So. 275.

¹⁰³ *Hale v. Republican River Bridge Co.*, (1871) 8 Kan. 312.

¹⁰⁴ *Howell v. Chicago & N. W. R. Co.*, (1868) 51 Barb. (N. Y.) 378.

¹⁰⁵ *Breslin v. Fries-Breslin Co.*, (1904) 70 N. J. L. 274, 58 A. 313; *Brown v. Luce Mfg. Co.*, (1936) 231 Mo. App. 259, 96 S. W. (2d) 1098; *Cleveland Shopping News Co. v. Routzahn*, (1937) 89 F. (2d) 902, aff'g 13 F. Supp. 362.

¹⁰⁶ *Gearhart v. Standard Steel Car Co.*, (1909) 223 Pa. 385, 72 A. 699; *Guarantee Co. of North America v. East Rome Town Co.*, (1895) 96 Ga. 511, 23 S. E. 503; *Robinson v. National Bank of New Berne*, (1884) 95 N. Y. 637; *Turnbull v. Longacre Bank*, (1928) 249 N. Y. 159, 163 N. E. 135, modifying 222 N. Y. App. Div. 655, 224 N. Y. Supp. 928; *H. J. Heinz Co. v. Driscoll*, (1941) 37 F. Supp. 803.

¹⁰⁷ *Lyman v. Southern Ry. Co.*, (1928) 149 Va. 274, 141 S. E. 240. See also

Right of preferred stock to stated dividends. The rule that dividends may be paid only out of surplus profits or net earnings, and not out of capital, applies to preferred stock as well as to common stock.¹⁰⁸ A corporation has no power to agree to pay preferential dividends whether or not sufficient profits are earned, for a dividend paid when the corporation has no earnings is a return of capital.¹⁰⁹ The preferred dividend is not a guaranteed debt, but a right to distribution out of the earnings and income of the corporation. No obligation or right to declare the dividend arises until a fund is available from which it can properly be paid.¹¹⁰

The rule that the declaration of dividends rests in the sound discretion of the board of directors applies to preferred stock as well as to common stock.¹¹¹ A dividend on preferred stock, as on common stock, does not become due and payable until it is declared.¹¹² The board of directors is not required to declare a dividend out of net profits when, in its judgment, the corporation's business and financial condition do not warrant payment of a dividend. This is true even if the corporation has guaranteed dividends on preferred stock under a statute permitting the guaranty of cumulative dividends payable out of net profits.¹¹³ Thus, even if sufficient profits have been earned to pay a preferential dividend, the directors have the right to decide not to

Wagstaff v. Holly Sugar Corporation, (1938) 253 N. Y. App. Div. 616, 3 N. Y. Supp. (2d) 552, aff'd 279 N. Y. 55, 17 N. E. (2d) 681.

¹⁰⁸ New York, L. E., etc. R. Co. v. Nickals, (1886) 119 U. S. 296; Hazel Atlas Glass Co. v. Van Dyk & Reeves, Inc., (1925) 8 F. (2d) 716; Funderburk v. Magnolia Sugar Co-op., Inc., (1942) (La. App.) 8 So. (2d) 374.

¹⁰⁹ Lockhart v. Van Alstyne, (1875) 31 Mich. 76; Painesville, etc. R. R. Co. v. King, (1866) 17 Ohio St. 535; Castorland Milk & Cheese Co. v. Shantz, (1919) 179 N. Y. Supp. 131; Guaranty Mtge. Co. v. Flint, (1925) 66 Utah 128, 240 P. 175.

¹¹⁰ Chaffee v. Rutland R. Co., (1882) 55 Vt. 110; see also Hamblock v. Clipper Lawn Mower Co., (1909) 148 Ill. App. 618; Lich v. United States Rubber Co., (1941) 39 F. Supp. 675, aff'd, (1941) 123 F. (2d) 145; In re Fisher's Estate, (1942) 344 Pa. 607, 26 A. (2d) 192.

¹¹¹ Morse v. Boston & Maine R. R. Co., (1928) 263 Mass. 308, 160 N. E. 894; Bassett v. United States Cast Iron Pipe and Foundry Co., (1909) 75 N. J. Eq. 539, 73 A. 514. See also Wabash Ry. Co. v. Barclay, (1930) 280 U. S. 197, 50 S. Ct. 106.

¹¹² Heyn v. Fidelity Trust Co., (1938) 174 Md. 639, 197 A. 292, reversed on other grounds, 1 A. (2d) 83, 739; Funderburk v. Magnolia Sugar Co-op., Inc., *supra* (Note 108).

¹¹³ Collins v. Portland Electric Co., (1926) 12 F. (2d) 671; New York, L. E., etc. R. Co. v. Nickals, (1886) 119 U. S. 296; Cring v. Sheller Wood Rim Mfg. Co., (1932) 98 Ind. App. 310, 183 N. E. 674. See also Austin v. Wright, (1930) 156 Wash. 24, 286 P. 48; Warburton v. John Wanamaker Philadelphia, (1938) 329 Pa. 5, 196 A. 506, discussed in 36 *Michigan Law Rev.* 1384 (1938); 14 *Notre Dame Lawyer* 121 (1938), and 4 *Univ. of Pittsburgh Law Rev.* 218 (1938).

declare a dividend, if, in their honest judgment, such a declaration would be against the best interests of the corporation.¹¹⁴ Nor can the preferred stockholders compel the directors to pay a dividend in cash, when they have declared a stock dividend.¹¹⁵

Under certain circumstances, however, preferred stockholders may be entitled to the payment of dividends immediately out of the first profits made by the corporation.¹¹⁶ The certificates, or the by-laws, can be drawn so as to make preferred stockholders practically creditors.¹¹⁷ Some courts have gone further than others in holding that the discretion of the directors in declaring dividends is limited when the preferred stock contract provides without qualification that stockholders are entitled to dividends at a fixed rate, payable at a fixed time. The following paragraphs give instances where the preferred stock contract was interpreted to mean that payment of dividends was not obligatory, and instances where the corporation was compelled to pay the dividends in years in which there were net profits.

Instances when payment of preferred dividends was not obligatory.

1. A provision that the preferential dividends shall be dependent upon the profit of each particular year does not obligate the directors to declare dividends.¹¹⁸

2. A provision in the articles of incorporation "that the preferred stock shall be entitled to dividends out of the net profits of the company as determined by the directors" does not mean that if there are net profits they must be distributed in any event, without regard to the condition of the company.¹¹⁹

3. A provision in the certificate that, "Out of the surplus profits * * *, the holders of the preferred stock shall be entitled to receive dividends at the rate of 7% per annum, payable quarterly on the first days of January, April, July and October in each year * * * before any dividends shall be declared or set apart for the common stock," was held not to give preferred

¹¹⁴ *New York, L. E., etc. R. Co. v. Nickals*, (1886) 119 U. S. 296.

¹¹⁵ *Malone v. Armor Insulating Co.*, (1940) 191 Ga. 146, 12 S. E. (2d) 299.

¹¹⁶ *Hastings v. International Paper Co.*, (1919) 187 N. Y. App. Div. 404, 175 N. Y. Supp. 815.

¹¹⁷ *Hassett v. S. F. Iszard Co.*, (1945) 61 N. Y. Supp. (2d) 451; *New England Trust Co. v. Penobscot Chemical Fibre Co.*, (1946) (Me.) 50 A. (2d) 188, citing *Spear v. Rockland-Rockport Lime Co.*, (1915) 113 Me. 285, 93 A. 754.

¹¹⁸ *New York, L. E., etc. R. Co. v. Nickals*, *supra* (Note 114).

¹¹⁹ *Ferland v. Frank Ridlon Co.*, (1923) 246 Mass. 64, 140 N. E. 421.

stockholders a contractual right to receive dividends whenever surplus profits existed.¹²⁰ (See point 4 below to the contrary.)

Instances when payment of preferred stock dividends was obligatory. Following are several instances when a corporation was compelled to pay dividends in years in which there were net profits:

1. A provision in the certificate of preferred stock and in the certificate of incorporation that the holders of preferred stock were "entitled to dividends, not to exceed 6 per cent, payable semi-annually, not cumulative, whenever in any year the net earnings, after payment of all interest charges, suffice for the payment thereof," was held to give the preferred stockholders the right to dividends if the earnings of the corporation in each year exceeded the expenses, and this right did not depend upon a declaration of the dividend by the board of directors.¹²¹

2. Where a by-law provided that the preferred stock should carry a 6 per cent per annum noncumulative dividend, payable semi-annually on the first day of July and January of each year, out of the net profits of the preceding year, and a pro tanto division if such dividends fall short of 6 per cent, it was held that the directors must pay a dividend on the preferred stock whenever in any year there were net profits available.¹²²

3. It has been held that an agreement that "the preferred stock shall be paid (if earned) 10 per cent dividends, payable quarterly, 2½ per cent quarterly," manifests an intention, in view of the practical construction by the parties, that the holders of the preferred stock should be paid the stipulated return whenever earned, or, if not earned, then out of assets at dissolution.¹²³

4. Where a by-law provided that preferred stock should carry a 7 per cent per annum cumulative dividend, payable quarterly, it was held that the directors must pay preferred dividends from available profits, although they consider it wiser to use the corporation's funds and credit for improvements.¹²⁴

5. An agreement that directors should ascertain annual net earnings and "forthwith declare and pay" a dividend on desig-

¹²⁰ *Hassett v. S. F. Iszard Co.*, (1945) 61 N. Y. Supp. (2d) 451.

¹²¹ *Wood v. Lary*, (1888) 47 Hun (N. Y.) 550, appeal dismissed, 124 N. Y. 83, 26 N. E. 338.

¹²² *Burk v. Ottawa Gas & Electric Co.*, (1912) 87 Kan. 6, 123 P. 857.

¹²³ *Langben v. Goodman*, (1925) (Tex. Civ. App.) 275 S. W. 841.

¹²⁴ *New England Trust Co. v. Penobscot Chemical Fibre Co.*, (1946) (Me.) 50 A. (2d) 188, citing *Spear v. Rockland-Rockport Lime Co.*, (1915) 113 Me. 285, 93 A. 754; but see *Hasset v. S. F. Iszard Co.*, footnote 120 to the contrary.

nated stock was held to make a declaration of dividends mandatory in years when net earnings were available.¹²⁵

6. The directors may be compelled to declare dividends on preferred stock in years in which there are earnings if the preference is limited to a certain number of payments and the common shareholders are deprived of certain rights until such payments are made. For example, if the subscribers to common stock are not to be regarded as shareholders or are not entitled to vote until five successive dividends have been paid on the preferred stock, and sufficient earnings have been made to declare dividends, the court will compel the directors to recognize the subscribers as stockholders, and will decree that the amount of dividends which should have been declared be distributed to the preferred stockholders.¹²⁶

Right of preferred stockholders to participate in surplus or earnings in excess of stated preference. The rights of preferred stockholders to share in dividends beyond the rate specified in their contracts have been determined by some courts in one way and by others in an entirely different way.¹²⁷ Some authorities have held that, when a dividend is declared, the preferred stockholders are entitled to the first claim to the extent of their preference for the current year, and, if any excess remains after paying a similar dividend on the common stock, both classes of stockholders are entitled to share equally in the excess.¹²⁸ The preferred stock under this interpretation is called "participating."¹²⁹ The theory behind this rule is that the preferred stockholders yield nothing in compensation for the benefits which they receive; but that they hold all the rights of the common shareholders in addition to their preferential rights.¹³⁰ Other courts have held that common stockholders are entitled to all the surplus earnings of the corporation after the prior rights of the preferred stockholders have been safeguarded.¹³¹ The preferred

¹²⁵ *Crocker v. Waltham Watch Co.*, (1944) 315 Mass. 397, 53 N. E. (2d) 230.

¹²⁶ *Mackintosh v. Flint & P. M. R. Co.*, (1888) 34 F. 582.

¹²⁷ See 22 *Minnesota Law Rev.* 676 (1938); 12 *St. Johns Law Rev.* 108 (1937).

¹²⁸ *Englander v. Osborne*, (1918) 261 Pa. 366, 104 A. 614.

¹²⁹ See *United States v. Liberty Baking Corporation*, (1938) 25 F. Supp. 203. For a discussion of the various types of participating stock, see A. A. Berle, Jr., "Participating Preferred Stock," 26 *Columbia Law Review* 303.

¹³⁰ *Stone v. United States Envelope Co.*, (1920) 119 Me. 394, 111 A. 536.

¹³¹ *Johnson v. Johnson & Briggs*, (1924) 138 Va. 487, 122 S. E. 100; see also *Whitney v. Puro Filter Corporation*, (1933) 63 F. (2d) 811; *James F. Powers Foundry Co. v. Miller*, (1934) 166 Md. 590, 171 A. 842; *In re Fisher's Estate*, (1942) 344 Pa. 607, 26 A. (2d) 192.

stock may then be termed "nonparticipating." The theory behind this rule is that, in receiving the greater security for his preferential right, the preferred stockholder impliedly agrees to accept such rights in lieu of equal participation.¹³²

The statute,¹³³ or the terms of the contract under which the preferred stock is issued, may definitely prescribe the stockholders' rights to dividends in excess of the stated preference. For example, if the contract provides that the stockholders are to receive a dividend "up to, but not exceeding" the specified percentage, before any dividends are paid on the common stock, the holders of the common stock are entitled to all dividends above the fixed percentage.¹³⁴ Similarly, if the certificate of stock states that the preferred stockholders are entitled to noncumulative dividends at a specified rate and to "no other or further share of the profits," all the profits in excess of the preferred percentage belong to the common stockholders.¹³⁵

On the other hand, if the statute provides that the corporation shall be bound to pay such dividends as may be expressed in the certificate, but not to exceed 8 per cent per annum, before any dividend shall be set aside or paid on the common stock, no more than 8 per cent may be paid on the preferred stock before a dividend is paid on the common stock. After dividends are paid on the common stock, the preferred stock may participate in dividends to any amount.¹³⁶ In a case where the cumulative preferred stock was entitled to 6 per cent annual dividends "before any dividend shall be set aside or paid on the common stock," no dividend was paid for nine years. A 54 per cent dividend was then declared on both the cumulative preferred and on the common stock. The court held that a preferred stockholder could restrain payment of the dividend to common stockholders. This decision was based on the theory that common stock was not entitled in any year to more than 6 per cent unless it shared the excess equally with the preferred stockholders, since each new year marks the beginning of a new dividend-paying period.¹³⁷

¹³² *Stone v. United States Envelope Co.*, supra (Note 130).

¹³³ *Harr et al. v. Pioneer Mechanical Corporation*, (1933) 65 F. (2d) 332, modifying 2 F. Supp. 517.

¹³⁴ *Scott v. Baltimore & O. R. Co.*, (1901) 93 Md. 475, 49 A. 327.

¹³⁵ *Equitable Life Ass. Soc. v. Union Pac. R. Co.*, (1914) 212 N. Y. 360, 106 N. E. 92; *Tennant v. Epstein*, (1934) 356 Ill. 26, 189 N. E. 864, rev'g 271 Ill. App. 204.

¹³⁶ *Star Pub. Co. v. Ball*, (1922) 192 Ind. 158, 134 N. E. 285.

¹³⁷ *Englander v. Osborne*, (1918) 261 Pa. 366, 104 A. 614.

Cumulative and noncumulative dividends. Dividends on preferred stock may be either cumulative or noncumulative. If dividends on preferred stock are cumulative, the holder of the stock is entitled to accumulated dividends on such preferred stock at the agreed rate for all years following the issuance of such preferred stock and without regard to the earnings of the corporation in any particular year during that period, before any dividend can be paid upon the common stock.¹³⁸ Until recent years the holder of cumulative preferred stock was considered to have a vested right in all dividend arrears, but now, in a substantial number of leading jurisdictions, this right can be breached by charter amendment, merger or consolidation, or recapitalization under appropriate enabling legislation. For a discussion of the general principles governing the right to eliminate dividend arrearages, see pages 725, et seq.¹³⁹ Preferred stock entitled to cumulative dividends does not create a debt of the corporation, but simply restricts the corporation from declaring dividends on other classes of stock until the cumulative dividends have been declared and paid.¹⁴⁰

If dividends on preferred stock are noncumulative, a dividend not earned in one year need not be paid in a subsequent year. When noncumulative stock is entitled only to a dividend declared out of annual profits, a dividend earned but not paid in one year need not be paid in a subsequent year. This is the rule established by a decision of the Supreme Court of the United States.¹⁴¹ Under the decisions prior to the Supreme Court case, it had been held that noncumulative preferred dividends, when earned, accrued to the holders of preferred stock whether or not such dividends had been declared.¹⁴² However, the contract

¹³⁸ *Lockwood v. General Abrasive Co.*, (1924) 210 N. Y. App. Div. 141, 205 N. Y. Supp. 511; *Levin v. Pittsburgh United Corporation*, (1938) 330 Pa. 457, 199 A. 332; *Bank of America Nat. T. & Sav. Assn. v. West End C. Co.*, (1940) 37 Cal. App. (2d) 685, 100 P. (2d) 318.

¹³⁹ The right of the cumulative preferred stockholder to arrearages of dividends in the liquidation of the corporation depends entirely upon the construction of his contract. See *Powell v. Craddock-Terry Co.*, (1940) 175 Va. 146, 7 S. E. (2d) 143; *Levin v. Pittsburgh United Corporation*, (1938) 330 Pa. 457, 199 A. 332; *Garrett v. Edge Moor Iron Co.*, (1937) 22 Del. Ch. 142, 194 A. 15.

¹⁴⁰ *Public Service Commission v. New York & Richmond Gas Co.*, (1934) 151 N. Y. Misc. 347, 271 N. Y. Supp. 388; *McNulty v. W. & J. Sloane*, (1945) 184 N. Y. Misc. 835, 54 N. Y. Supp. (2d) 253.

¹⁴¹ *Wabash Railway Company v. Barclay*, (1930) 280 U. S. 197, 50 S. Ct. 106; followed in *Joslin v. Boston & Maine R. Co.*, (1931) 274 Mass. 551, 175 N. E. 156. In both these cases the annual earnings were invested in capital improvements.

¹⁴² *Day v. U. S. Cast Iron Pipe & Foundry Co.*, (1924) 95 N. J. Eq. 389, 123 A.

under which noncumulative preferred stock is issued may be so worded that the discretion of the directors in the declaration of dividends is controlled, and the interest of holders of noncumulative preferred stock in dividends earned may be protected.¹⁴³ For example: preferred stock was entitled to 7 per cent noncumulative dividends out of "any or all surplus net profits" before dividends could be declared on the common stock. One year the company transferred part of the surplus net profits into a reserve for dividends on the common stock without declaring the full 7 per cent on the preferred. The court held that the preferred was entitled to have allotted to it the withheld earnings to the extent of its priority before dividends could be paid to the common stockholders.¹⁴⁴ (See the right of preferred stockholders to stated dividends, on page 623.)

In an effort to improve the legal status of noncumulative preferred dividends, the New Jersey courts, through statutory interpretation, have developed the "dividend credit theory." This theory requires that if full dividends on noncumulative preferred stock are not paid in any year in which the earnings are in excess of the dividends paid, those earnings, to the extent legally available for dividends, must be applied to the preferred dividend arrears for that year, before common stock dividends can be paid in subsequent years.^{144a}

If the contract with the preferred stockholders does not specify whether dividends shall be cumulative or noncumulative, but entitles the preferred stockholders to a certain annual dividend, without making the dividends payable in each year dependent upon the profits of that year, the dividends on the preferred stock are cumulative.¹⁴⁵

546, aff'd on appeal, 96 N. J. Eq. 736, 126 A. 302; *Collins v. Portland Electric Power Co.*, (1925) 7 F. (2d) 221, aff'd, 12 F. (2d) 671; *Morse v. Boston & Maine R. R.*, (1928) 263 Mass. 308, 160 N. E. 894.

¹⁴³ For a discussion of noncumulative preferred stock contracts in which the declaration of dividends is discretionary with the directors, and those in which the discretion is limited either as to time, amount, or both, see "Rights of Non-Cumulative Preferred Stockholders," W. H. S. Stevens, 34 *Columbia Law Review* 1439 (1934). See also *Agnew v. American Ice Co.*, (1949) 2 N. J. 291, 66 A. (2d) 330, rev'g (1948) 142 N. J. Eq. 578, 61 A. (2d) 154.

¹⁴⁴ *Cintas v. American Car & Foundry Co.*, (1942) 131 N. J. Eq. 419, 25 A. (2d) 418, aff'd, (1942) 132 N. J. Eq. 460, 28 A. (2d) 531, citing *Bassett v. U. S. Cast Iron Pipe & Foundry Co.*, (1908) 74 N. J. Eq. 668, 70 A. 929, aff'd, (1909) 75 N. J. Eq. 539, 73 A. 514.

^{144a} See "Corporate Capitalization," Chester Rohrlich, 1 *Vanderbilt Law Review* 533, 563 (June, 1948), and cases there cited.

¹⁴⁵ *Hazel Atlas Glass Co. v. Van Dyk & Reeves, Inc.*, (1925) 8 F. (2d) 716;

Who is entitled to dividends. To avoid confusion in business transactions, and to fix accurately the obligation of the corporation toward its present and future stockholders, a resolution declaring a dividend should state definitely that the dividend is payable on a certain date, only to stockholders of record on a specified date. If the resolution does not specify a record date, stockholders on the date the dividend is declared are entitled to participate in the dividend.¹⁴⁶

The corporation must pay the dividend to the person in whose name the stock is registered upon its books at the date the dividend is declared,¹⁴⁷ or at the record date if one is fixed in the resolution.¹⁴⁸ This rule applies even when the dividend is payable at some future time,¹⁴⁹ and without regard to when the earnings were accumulated.¹⁵⁰

The corporation is protected if payment is made to the record holder,¹⁵¹ unless it has actual notice of the transfer of the stock.¹⁵² After notice of the transfer, the corporation becomes liable to the transferee for dividends paid to the registered holder, although the transfer has not been registered on the corporation's books.¹⁵³ Furthermore, if the corporation's books are erroneous through its own fault, it will be compelled to pay the dividend to the rightful

Cotting v. N. Y. & N. E. R. Co., (1886) 54 Conn. 156, 5 A. 851. See also Willson v. Laconia Car Co., (1931) 275 Mass. 435, 176 N. E. 182; Warburton v. John Wanamaker Philadelphia, (1938) 329 Pa. 5, 196 A. 506; In re Louisville Gas & Elec. Co., (1948) 77 F. Supp. 176, comment, 47 *Michigan Law Rev.* 121 (Nov. 1948). See also 22 *Minnesota Law Rev.* 676 (1938).

¹⁴⁶ See Nutter v. Andrews, (1923) 246 Mass. 224, 140 N. E. 744; Richter & Co. v. Light, (1922) 97 Conn. 364, 116 A. 600.

¹⁴⁷ Wilmington Trust Co. v. Nye Odorless Incinerator Corp., (1932) 18 Del. Ch. 311, 159 A. 844. See, however, McAlister v. Eclipse Oil Co., (1936) (Tex. Civ. App.), 92 S. W. (2d) 545, in which it was held that payment of dividends to one who appears on the books of the company as stockholder is illegal where he was not, in law, the owner of the stock.

¹⁴⁸ Smith v. Taecker, (1933) 133 Cal. App. 351, 24 P. (2d) 182.

¹⁴⁹ Hill v. Newichawanick Co., (1876) 8 Hun (N. Y.) 459, aff'd, 71 N. Y. 593; Smith v. Taecker, supra (Note 148); In re Depew's Estate, (1943) 179 N. Y. Misc. 1074, 41 N. Y. Supp. (2d) 19.

¹⁵⁰ Hansen v. Bear Film Co., (1945) (Cal. App.), 158 P. (2d) 779.

¹⁵¹ Barbato v. Breeze Corporations, Inc., (1942) 128 N. J. L. 309, 26 A. (2d) 53; Knight v. Shutz, (1943) 141 Ohio St. 267, 47 N. E. (2d) 886.

¹⁵² Brisbane v. D. L. & W. R. R. Co., (1883) 94 N. Y. 204; Lunt v. Genesee Valley Trust Co., (1937) 162 N. Y. Misc. 859, 297 N. Y. Supp. 27; American Seal-Kap Corp. of Delaware v. Claggett, (1941) 27 N. Y. Supp. (2d) 281.

¹⁵³ Guarantee Co. of North America v. East Rome Town Co., (1895) 96 Ga. 511, 23 S. E. 503; Baar v. Fidelity & Columbia Trust Co., (1946) 302 Ky. 91, 193 S. W. (2d) 1011.

owner.¹⁵⁴ If the proper officers of the corporation have knowledge of the transfer, from some source other than the corporate books, this may constitute notice to the company.¹⁵⁵ When the corporate officer obtains the knowledge while acting for his individual benefit, and not in behalf of the corporation, the corporation is not chargeable with such knowledge.¹⁵⁶

The corporation may pay dividends to a record owner of stock who claims to have lost his certificate. It will not be liable to the holder of the lost certificate for the dividends paid to the record holder, until it has notice that a bona fide purchaser holds the lost certificate.¹⁵⁷

Closing transfer books for payment of dividends. For the convenience of the corporation in paying dividends, the stock transfer books may be closed for a certain number of days before the disbursement of the dividend. Many of the statutes contain a provision permitting the closing of the transfer books; but even in the absence of such provision corporations are frequently authorized by their charters and by-laws to follow this practice. Of course, if the dividend is payable to stockholders of record on a certain date, it is unnecessary to close the books; a list of the stockholders as of the date mentioned, prepared from the stock records, is sufficient from a legal and practical standpoint. Many large corporations appoint an agent, usually a trust company, to take care of the details involved in the payment of dividends. The appointment is generally made by resolution of the board of directors.

Right of holders of partly paid stock to dividends. A mere subscriber to stock who has not paid for his stock in full is not entitled to participate equally with stockholders whose stock has been entirely paid for,¹⁵⁸ in the absence of some provision there-

¹⁵⁴ *Blooming-Grove Cotton Oil Co. v. First Nat. Bank*, (1900) (Tex. Civ. App.) 56 S. W. 552; *Ashton v. Zeila Mining Co.*, (1901) 134 Cal. 408, 66 P. 494. Where corporation paid dividends to the wrong person for 10 years by mistake, and on application of such person that the stock had been lost, issued new stock to him and paid dividends thereon for another 10 years, it was held that the real owner was entitled to recover such dividends from the corporation. *Holly Sugar Co. v. Wilson*, (1938) 101 Colo. 511, 75 P. (2d) 149. This case was criticized in 13 *Wash. Law Rev.* 334 (1938).

¹⁵⁵ *Guarantee Co. of North America v. East Rome Town Co.*, *supra* (Note 153).

¹⁵⁶ *Fourth Nat. Bank v. Manchester Real Estate & Mfg. Co.*, (1915) 77 N. H. 481, 93 A. 661.

¹⁵⁷ *Turnbull v. Longacre Bank*, (1928) 249 N. Y. 159, 163 N. E. 135; *Brisbane v. D. L. & W. R. Co.*, (1883) 94 N. Y. 204.

¹⁵⁸ *Baltimore City Pass. Railway Co. v. Hambleton*, (1893) 77 Md. 341, 26

for in the charter, by-laws, or contract under which the subscription to stock is made. However, where stock certificates have been issued for stock that has been partly paid, the shares of stock stand upon an equality, irrespective of the fact that a larger amount has been paid upon some of them than upon others, and dividends must be divided among the shareholders in proportion to the nominal amounts of their shares, and not in proportion to the amounts respectively paid up on the shares,¹⁵⁹ unless the statute provides otherwise.

A corporation that has a surplus has the power, as between itself and its stockholders, to agree that a dividend declared from such surplus shall be applied to the payment of subscriptions. Where a corporation agrees to treat stock as fully paid in consideration of the surrender by the stockholders of accumulated profits, it cannot later disturb the arrangement, in its own behalf or in behalf of subsequent creditors with notice.¹⁶⁰

Right to dividends as between purchaser and seller of stock. The right of the corporation to pay dividends to the stockholders of record does not affect the right to dividends as between purchaser and seller. Before a dividend is declared, the intangible right to share in the earnings of the corporation is a mere incident to the stock and passes with it at a sale or transfer. But when the dividend is declared, it constitutes a property interest separate from the stock and forms no part of it, and on a sale does not pass as an incident to it.¹⁶¹ Thus, in the absence of a provision in the contract of sale to the contrary, a purchaser of stock is not entitled to dividends already declared, even though the dividends are not payable until a date after the sale has taken place.¹⁶² If, as a matter of custom or usage on a stock exchange, the rule prevails that dividends already declared and not paid go with the stock, and the seller has actual knowledge

A. 279; *Schwartz v. Manufacturers' Casualty Ins. Co.*, (1939) 335 Pa. 130, 6 A. (2d) 299.

¹⁵⁹ *Gellerman v. Atlas Foundry, etc. Co.*, (1906) 45 Wash. 114, 87 P. 1059. But see *Richardson v. Vermont, etc. R. R. Co.*, (1872) 44 Vt. 613, 621.

¹⁶⁰ *Kenton Furnace Railroad & Manufacturing Co. v. McAlpin*, (1880) 5 F. 737.

¹⁶¹ *Ford v. Snook*, (1923) 205 N. Y. App. Div. 194, 199 N. Y. Supp. 630, order aff'd in 240 N. Y. 624, 148 N. E. 732, citing *Wheeler v. Northwestern Sleigh Co.*, (1889) 39 F. 347; *In re Depew's Estate*, (1943) 179 N. Y. Misc. 1074, 41 N. Y. Supp. (2d) 19.

¹⁶² *Hopper v. Sage*, (1889) 112 N. Y. 530, 20 N. E. 350; *Nutter v. Andrews*, (1923) 246 Mass. 224, 140 N. E. 744; *First Nat. Bank & Trust Co. v. Glenn, Collector of Internal Revenue*, (1941) 36 F. Supp. 552, citing *Ford v. Snook*, supra (Note 161).

of the custom, or knowledge that may be implied from information that his agent would trade through the exchange, the seller will be bound by the rules.¹⁶³

The authorities are conflicting as to who has the right to dividends that are declared on one date and payable at a later date to stockholders of record at an intermediate date, when title to the stock is transferred between the date of declaration and the record date.¹⁶⁴ The majority opinion is that the right to the dividend accrues at the time the dividend is declared. The provision in the declaration that the dividend is payable to stockholders of record at a future date is for the protection of the corporation and does not affect the beneficial ownership of the dividend.¹⁶⁵ If there is a dispute between the transferor and the transferee as to who is entitled to the dividends, and the corporation knows of the dispute, it can impound all dividends until the dispute is settled.¹⁶⁶

Any dividend declared subsequent to a sale of stock belongs to the purchaser of the stock.¹⁶⁷ This rule applies generally even though the contract of sale is executory.¹⁶⁸ Thus, where there is a binding agreement to sell stock and a dividend is declared between the time of making the agreement to sell and the delivery of the certificates, the dividend belongs in equity to the

¹⁶³ *Ford v. Snook*, supra (Note 161).

¹⁶⁴ See Graham, "When Do Dividends Vest?" 27 *Georgetown Law Journal* 74 (1938).

¹⁶⁵ *First Nat. Bank & Trust Co. v. Glenn*, Collector of Internal Revenue, (1941) 36 F. Supp. 552, citing 38 *Harvard Law Review* 245, and *Ford v. Snook*, (1923) 205 N. Y. App. Div. 194, 199 N. Y. Supp. 630, aff'd (1925) 240 N. Y. 624, 148 N. E. 732; *In re Wanzer's Estate*, (1942) 177 N. Y. Misc. 929, 32 N. Y. Supp. (2d) 467; *In re Depew's Estate*, (1943) 179 N. Y. Misc. 1074, 41 N. Y. Supp. (2d) 19. But see *In re Bashford's Estate*, (1942) 178 N. Y. Misc. 951, 36 N. Y. Supp. (2d) 651. This case held that the dividends belong to the stockholders of record at the date fixed in the resolution, rather than at the date of declaration; that the New York Statute as amended in 1930 completely nullified the *Ford v. Snook* supra (Note 161) rule.

¹⁶⁶ *Perkins v. Benguet Consol. Mining Co.*, (1942) 55 Cal. App. (2d) 720, 132 P. (2d) 70, rehearing denied, 12/30/42, hearing denied, 1/28/43.

¹⁶⁷ *Sautbine v. Stroud*, (1925) 5 F. (2d) 809; *Hubbard v. George*, (1918) 81 W. Va. 538, 94 S. E. 974; *Lunt v. Genesee Valley Trust Co.*, (1937) 162 N. Y. Misc. 859, 297 N. Y. Supp. 27; *Whitney v. Nolan*, (1937) 296 Mass. 419, 6 N. E. (2d) 386; *Brower v. Fenner & Beane*, (1939) 237 Ala. 632, 188 So. 240.

¹⁶⁸ *Martindell v. Fiduciary Counsel, Inc.*, (1942) 131 N. J. Eq. 523, 26 A. (2d) 171, aff'd, (1943) 133 N. J. Eq. 408, 30 A. (2d) 281, and cases cited. But see *Richards v. Pacific Southwest Discount Corporation*, (1941) 44 Cal. App. (2d) 551, 112 P. (2d) 698, holding that under an executory contract the buyer is not entitled to the dividends until legal title actually passes.

purchaser and not to the seller.¹⁶⁹ In the absence of an agreement to the contrary, even though the shares are not transferred upon the books of the corporation before they are closed, owing to neglect of the seller to make prompt delivery of the securities, the seller is bound to turn the dividend received by him from the corporation, or an equivalent amount, over to the purchaser of the stock.¹⁷⁰ This rule applies as well where the purchaser is not to pay for the stock immediately. Thus, where shares of stock are sold on August 1, to be paid for on August 29, and a dividend is declared between the day of the sale and the day set for payment, the dividend belongs to the purchaser of the shares, in the absence of an agreement to the contrary.¹⁷¹

Where stock is sold at a fixed price "plus accrued dividends," the stipulated price per share of the stock is increased by a sum equivalent to the dividend rate from the date of the last dividend date to the date when the sale takes place. Such a contract imposes on the buyer the obligation to pay such dividend rate to the time of the sale, in addition to the price specified.¹⁷²

Right to dividends upon pledge of stock. When stock is pledged by the owner as collateral security for a debt, the pledgee has a right and is in duty bound to collect the dividends on the stock and to apply them to the debt for which the stock is pledged, or to hold them as trustee for the pledgor. Under a pledge of stock, the general property in the stock remains in the pledgor, but the pledgee has such title as authorizes him to collect dividends. Of course, the pledgor and the pledgee may agree that the right to collect dividends shall remain with the pledgor. In this case the general rule does not apply.¹⁷³ The pledgee has no right to dividends declared prior to the pledge of the stock.¹⁷⁴ Since dividends on pledged stock belong to the pledgee, the pledgor's creditors cannot attach them.¹⁷⁵

¹⁶⁹ *Thompson v. Exchange Bldg.*, (1928) 157 Tenn. 275, 8 S. W. (2d) 489; *Smith v. Taecker*, (1933) 133 Cal. App. 351, 24 P. (2d) 182, reviewed in 22 *California Law Rev.* 353 (1934); *Lunt v. Genesee Valley Trust Co.*, (1937) 162 N. Y. Misc. 859, 297 N. Y. Supp. 27; *Whitney v. Nolan*, (1937) 296 Mass. 419, 6 N. E. (2d) 386.

¹⁷⁰ *Richter & Co. v. Light*, (1922) 97 Conn. 364, 116 A. 600.

¹⁷¹ *Black v. Homersham*, (1878) L. R. 4 Exch. Div. 24. See also *Hubbard v. George*, *supra* (Note 167); *La Fountain & Woolson Co. v. Brown*, (1917) 91 Vt. 340, 101 A. 36.

¹⁷² *Kennedy Bros. v. Bird*, (1934) 287 Mass. 477, 192 N. E. 73.

¹⁷³ *Guarantee Co. of North America v. East Rome Town Co.*, (1895) 96 Ga. 511, 23 S. E. 503. See also *Commercial Nat. Bank v. National Surety Co.*, (1932) 259 N. Y. 181, 181 N. E. 92; *Railroad Credit Corporation v. Hawkins*, (1936) 80 F. (2d) 818.

¹⁷⁴ *Fairbanks v. Merchants' Nat. Bank*, (1889) 132 Ill. 120, 22 N. E. 524.

¹⁷⁵ *Womack v. De Witt*, (1939) 40 Del. 304, 10 A. (2d) 504.

A corporation that has notice that a pledge has been made must pay the dividends to the pledgee.¹⁷⁶ If it does not, it is liable to the pledgee for such dividends, even though the transfer of the stock has not been entered on the books of the corporation.¹⁷⁷

Notice of dividends declared and dividends "passed." Although notice that a dividend has been declared is not required to be sent to stockholders, it is generally desirable that written or published notice be given, in order that stockholders who are contemplating the sale of their shares may make the sale with correct knowledge of the dividend situation. Directors are not required to notify stockholders that a regular dividend will be "passed," that is, omitted. Frequently directors include in the minutes of the meeting their reasons for failing to declare a regular dividend, but such a record is not required, since the dividend cannot be paid without a resolution authorizing its declaration. As a matter of good practice, corporations which find it advisable to "pass" a dividend after a regular dividend has been established send notice to their stockholders giving the reasons for the "passing" of the dividend.

Power of directors to revoke a dividend. The declaration of a lawful dividend creates a debt against the corporation in favor of each stockholder for his share of the dividend.¹⁷⁸ Since a debtor may not rescind his debt without the consent of his creditor, it follows generally that the corporation may not rescind the declaration of a dividend without the consent of the stockholders.¹⁷⁹ This rule applies although the declaration provides that the dividend shall be paid in such installments as the directors see fit.¹⁸⁰ Sometimes the corporation becomes not merely a

¹⁷⁶ *Railroad Credit Corporation v. Hawkins*, supra (Note 173); *Morrison v. Gulf Oil Corporation*, (1940) 189 Miss. 212, 196 So. 247. See also *First Nat. Bank of Anniston v. Wellborn*, (1939) 237 Ala. 183, 186 So. 549.

¹⁷⁷ *Guarantee Co. of North America v. East Rome Town Co.*, supra (Note 173). But see *Mandel v. North Hudson Investment Co.*, (1933) 112 N. J. Eq. 144, 164 A. 455, where the opposite conclusion was reached.

¹⁷⁸ *In re Central New Jersey Land & Improvement Co.'s Dissolution*, (1933) 113 N. J. Eq. 332, 166 A. 705; *Smith v. Taecker*, (1933) 133 Cal. App. 351, 24 P. (2d) 182; *State v. Nebraska State Bank of O'Neill*, (1932) 123 Neb. 289, 242 N. W. 613; *United States v. Southwestern Portland Cement Co.*, (1938) 97 F. (2d) 413, rev'g 22 F. Supp. 921.

¹⁷⁹ *McLaran v. Crescent Planing Mill Co.*, (1906) 117 Mo. App. 40, 93 S. W. 819; *Hope Lumber Co. v. Stewart*, (1922) (Mo. App.) 241 S. W. 675; *Grant v. Ross*, (1896) 100 Ky. 44, 37 S. W. 263; *Alexander & Alexander v. United States*, (1938) 22 F. Supp. 921; *Taylor v. Axton-Fisher Tobacco Co.*, (1943) 295 Ky. App. 226, 173 S. W. (2d) 377.

¹⁸⁰ *Commissioner of Internal Revenue v. Cohen*, (1941) 121 F. (2d) 348.

debtor, but a trustee, as where the corporation has not only declared the dividend, but has deposited a fund out of which the dividends are to be paid; the trust relation in such a case cannot be terminated at the pleasure of the board by a vote rescinding the former action.¹⁸¹

A revocation of a dividend after declaration is, however, permissible under the following circumstances:

1. If the directors have declared a dividend that will impair the capital of the corporation, under a misapprehension of what constitutes profits and under a belief that there were profits to divide.¹⁸²

2. If the action of the board of directors in declaring a dividend has not been made public or in any manner indicated to the stockholders, and no fund has been set apart for the payment of the dividend.¹⁸³

3. If, after the dividend has been declared, but before any trust fund has been created for its payment, some untoward event happens that makes it inadvisable in the honest judgment of the directors to pay the dividend. For example, if the property of the corporation were destroyed by fire after the declaration of a dividend and before its payment, and the directors, exercising their honest judgment, decided that the earnings intended to be distributed as dividends should be used for the restoration of the destroyed property, the revocation of the dividend would be valid.¹⁸⁴ The action of directors in rescinding a scrip dividend because of war that seriously affected the corporation's business was upheld by the courts.¹⁸⁵

Revocation of stock dividends. The courts recognize a distinction between a cash dividend and a stock dividend. They hold that the board of directors may revoke a stock dividend at any time prior to the actual issuance of the stock, where the stock dividend involves an increase of the corporation's nominal

¹⁸¹ *Staats v. Biograph*, (1916) 236 F. 454, citing *Van Dyk v. McQuade*, (1881) 86 N. Y. 38.

¹⁸² *Benas v. Title Guaranty Trust Co.*, (1924) 216 Mo. App. 53, 267 S. W. 28.

¹⁸³ *Ford v. Easthampton Rubber Thread Co.*, (1893) 158 Mass. 84, 32 N. E. 1036. But see *McLaran v. Crescent Planing Mill Co.*, *supra* (Note 179), in which *Ford v. Easthampton Rubber Thread Co.*, *supra* (this note) is not followed. See also *United States v. Southwestern Portland Cement Co.*, (1938) 97 F. (2d) 413, *rev'g* 22 F. Supp. 846.

¹⁸⁴ *Dock v. Schlichter Jute Cordage Co.*, (1895) 167 Pa. 370, 31 A. 656.

¹⁸⁵ *Staats v. Biograph Co.*, (1916) 236 F. 454.

capital.¹⁸⁶ The directors cannot rescind a stock dividend that is payable in shares of stock which the corporation had acquired by purchase,¹⁸⁷ since no increase in the corporation's nominal capital is involved in such a distribution.

Power of stockholder to compel declaration of a dividend. Stockholders are not entitled, as a matter of right, to the distribution of net earnings through dividends, in the absence of an express provision, binding upon creditors, giving the stockholders a lien on the net income and earnings of the corporation.¹⁸⁸ Stockholders may, however, compel the declaration of a dividend under the following circumstances: (1) if the statute¹⁸⁹ or contract under which the stock is issued requires the directors to pay dividends to the stockholders in each year in which there are sufficient earnings;¹⁹⁰ or (2) if the stockholders can convince a court of equity¹⁹¹ that the directors have acted fraudulently, oppressively, or unreasonably in refusing to declare a dividend.¹⁹²

A stockholder cannot sue to compel the declaration of a dividend without first attempting to move the corporation to declare such dividend, unless it appears that such an attempt would be useless.¹⁹³ As the corporation is not indebted to the stockholder until after the declaration of a dividend, an action to compel the declaration must be brought in equity, not in law.¹⁹⁴

The courts will not interfere with the discretion of the directors if they have acted in good faith, without fraud, without abuse of discretion, and in a manner that is not unjust or oppres-

¹⁸⁶ *Terry v. Eagle Lock Co.*, (1879) 47 Conn. 141; *McLaran v. Crescent Planing Mill Co.*, supra (Note 179); *Staats v. Biograph Co.*, supra (Note 185).

¹⁸⁷ *Dock v. Schlichter Jute Cordage Co.*, supra (Note 184).

¹⁸⁸ *Harris Trust & Savings Bank v. Chicago Rys. Co.*, (1932) 56 F. (2d) 942. A stockholder does not own the corporation's surplus. His rights are confined to the right to demand that a dividend be declared when it can be proved that such is the duty of the directors. *Kelly v. Galloway*, (1937) 156 Ore. 301, 66 P. (2d) 272; *Green v. Philadelphia Inquirer Co.*, (1938) 239 Pa. 169, 196 A. 32. See also *Luikart v. Wells*, (1936) 130 Neb. 172, 264 N. W. 410.

¹⁸⁹ See *Amick v. Coble*, (1943) 222 N. C. 484, 23 S. E. (2d) 854.

¹⁹⁰ See page 624.

¹⁹¹ *Knight v. Alamo Mfg. Co.*, (1916) 90 Mich. 223, 157 N. W. 24; *Jones v. Van Heusen Charles Co.*, (1930) 230 N. Y. App. Div. 694, 246 N. Y. Supp. 204.

¹⁹² *Mitchell et al. v. Des Moines & F. D. R. Co.*, (1921) 270 F. 465; *Blanchard v. Prudential Ins. Co.*, (1911) 78 N. J. Eq. 471, 79 A. 533; *Dodge v. Ford Motor Car Co.*, (1919) 204 Mich. 459, 170 N. W. 668; *Eshleman v. Keenan*, (1937) 22 Del. Ch. 82, 194 A. 40; *W. Q. O'Neill Co. v. O'Neill*, (1940) 108 Ind. App. 116, 25 N. E. (2d) 656, discussed in 28 *Georgetown Law Jour.* 1135 (1940).

¹⁹³ *Lydia E. Pinkham Medicine Co. v. Gove*, (1939) 303 Mass. 1, 20 N. E. (2d) 482.

¹⁹⁴ *Rubens v. Marion-Washington Realty Corporation*, (1945) 116 Ind. App. 55, 59 N. E. (2d) 907.

sive to minority stockholders.¹⁹⁵ Generally, the mere fact that a large corporate surplus exists is not enough to warrant equitable intervention.¹⁹⁶ The test resolves itself into an examination of the good faith and reasonableness of the policy of retaining that which otherwise is available for dividends.¹⁹⁷

Power of stockholder to compel payment after a dividend has been declared. When a dividend has been declared out of earnings, the effect of the declaration is a separation from the property of the corporation of so much of the earnings as is equal to the dividend declared. This amount becomes the property of the stockholders, and, if the corporation refuses to pay to any stockholder his share of the dividend, the stockholder has the right to bring an action against the corporation for its collection.¹⁹⁸ But a dividend payable at a future date cannot be sued for until that date arrives.¹⁹⁹ After a dividend is declared, the stockholders stand as general creditors of the corporation.²⁰⁰ Their rights as creditors vest as soon as the dividend is declared, regardless of when the dividend is payable.²⁰¹ In the event of bankruptcy, they share pro rata with the general creditors in recovering the amount of the dividend.²⁰²

When the corporation has not only declared a dividend, but

¹⁹⁵ *Liebman v. Auto Strop Co.*, (1926) 241 N. Y. 427, 150 N. E. 505; *Staats v. Biograph Co.*, (1916) 236 F. 454; *Schnell v. Alston Mfg Co.*, (1906) 149 F. 439; *Daniels v. Briggs*, (1932) 279 Mass. 87, 180 N. E. 717; *Barrows v. J. N. Fauver Co., Inc.*, (1937) 280 Mich. 553, 274 N. W. 325; *Schmitt v. Eagle Roller Mill Co.*, (1937) 199 Minn. 382, 272 N. W. 277, discussed in 21 *Minnesota Law Rev.* 849 (1937); *Green v. Philadelphia Inquirer Co.*, (1938) 329 Pa. 169, 196 A. 32; *NY Pa NJ Utilities Co. v. Public Service Commission*, (1938) 23 F. Supp. 313; *Laredef Corp. v. Federal Seaboard Terra Cotta Corp.*, (1942) 131 N. J. Eq. 368, 25 A. (2d) 433; *Jones v. Costlow*, (1944) 349 Pa. 136, 36 A. (2d) 460.

¹⁹⁶ *Marks v. American Brewing Co.*, (1910) 126 La. 666, 52 So. 983; *Daniels v. Briggs*, (1932) 279 Mass. 87, 180 N. E. 717; *Ochs v. David Maydole Hammer Co.*, (1930) 138 N. Y. Misc. 665, 246 N. Y. Supp. 539; *Schmitt v. Eagle Roller Mill Co.*, (1937) 199 Minn. 382, 272 N. W. 277; *Keough v. St. Paul Milk Co.*, (1939) 205 Minn. 96, 285 N. W. 809.

¹⁹⁷ *Keough v. St. Paul Milk Co.*, (1939) 205 Minn. 96, 285 N. W. 809.

¹⁹⁸ *Geo. Feick & Sons Co. v. Blair*, (1928) 26 F. (2d) 540; *In re Sutherland*, (1928) 23 F. (2d) 595; *In re Givens' Estate*, (1936) 323 Pa. 456, 185 A. 778.

¹⁹⁹ *Berkowitz v. Palm Springs La Quinta Development Co.*, (1940) 37 Cal. App. (2d) 249, 99 P. (2d) 372.

²⁰⁰ *In re Given's Estate*, supra (Note 198). See also *Federal Terra Cotta Co. v. Atlantic Terra Cotta Co.*, (1943) 133 N. J. Eq. 360, 32 A. (2d) 331; *Peoples-Pittsburgh Trust Co. v. United States*, (1944) 54 F. Supp. 742.

²⁰¹ *Maloney v. Western Cooperage Co.*, (1939) 103 F. (2d) 992. See also *Geo. Feick & Sons Co. v. Blair*, supra (Note 198).

²⁰² *Fidelity & Columbia Trust Co. v. Louisville Ry. Co.*, (1936) 265 Ky. 820, 97 S. W. (2d) 825.

has specifically appropriated and set apart from its other assets a fund out of which the dividend is to be paid, the action of the corporation creates a trust fund in the hands of the corporation for payment to the stockholders, and the amount cannot be reached by the general creditors nor withdrawn nor reclaimed by the corporation.²⁰³

As a general rule, a stockholder cannot recover interest on a dividend after it has been declared, although he may be allowed interest after a demand and a refusal.²⁰⁴ However, demand is unnecessary if it is clear that it would not be complied with.²⁰⁵

A stockholder is under no obligation to draw or to demand his dividend within any prescribed period. If he chooses, he may leave the dividend with the corporation and be under no default. The dividends are payable on demand, and, until the stockholder makes a demand for payment of his dividend and the demand is refused, the statute of limitations will not begin to run against the debt.²⁰⁶ However, if the acts, or words, or both, of the corporation indicate to the stockholder that the corporation will not pay a dividend to him, this is equivalent to a demand and refusal for the payment, and the statute of limitations is set in motion without a specific demand from the stockholder and refusal by the corporation.²⁰⁷

Right of corporation to set off dividend against debt due. A corporation has the right to retain dividends due to a stockholder and to apply them in satisfaction of a debt owing by the stockholder to the corporation,²⁰⁸ unless the dividend is declared after the stockholder becomes insolvent.²⁰⁹ However, it may not set off a dividend against a transferee of the stockholder who is indebted to the corporation, if the shares were assigned before the declaration of the dividend, and if the corporation had knowledge that the stock had been transferred, even though the

²⁰³ *In re Interborough Consol. Corp.*, (1923) 288 F. 334, aff'g order (D. C.) 277 F. 249. See also *Le Roy v. Globe Ins. Co.*, (1836) 2 Edw. Ch. (N. Y.) 657; *Clarke v. New York Trust Co.*, (1943) 137 F. (2d) 607, citing *Porges v. Sheffield*, (1923) 262 U. S. 752, 43 S. Ct. 700.

²⁰⁴ *J. G. Wilson Corp. v. Cahill*, (1929) 152 Va. 108, 146 S. E. 274.

²⁰⁵ *Perkins v. Benguet Consol. Mining Co.*, (1942) 55 Cal. App. (2d) 720, 132 P. (2d) 70, rehearing denied, 12/30/42, hearing denied, 1/28/43.

²⁰⁶ *Cavitt v. Amsler*, (1922) (Tex. Civ. App.) 242 S. W. 246.

²⁰⁷ *Ibid.*

²⁰⁸ *J. G. Wilson Corp. v. Cahill*, (1929) 152 Va. 108, 146 S. E. 274; *Railroad Credit Corporation v. Hawkins*, (1936) 80 F. (2d) 818, cert. denied 298 U. S. 667, 56 S. Ct. 750.

²⁰⁹ *Harr v. Bankers Securities Corp.*, (1938) 129 Pa. Sup. Ct. 547, 196 A. 522.

transfer had not been recorded on the books.²¹⁰ The same rule applies upon notice to the corporation of a pledge of the stock.²¹¹

Where a dividend is not declared until after the death of a stockholder, the corporation may not set off the dividend against the debt of the deceased stockholder; upon the stockholder's death, such dividend becomes an asset of the decedent's estate, payable to his personal representative, and distributable by the representative to the persons entitled to the dividend.²¹²

Liability of directors for unlawful dividends. The statutes in most of the states impose upon the directors a personal liability to the corporation and to creditors for the declaration and payment of unlawful dividends. Many of these statutes provide for fines and imprisonment penalties.²¹³ In the absence of a statute on the subject, the directors are liable to the corporation and to creditors if they pay dividends out of capital.²¹⁴ However, it has been held that where the corporation was not insolvent and the money paid out as dividends to the stockholders was not needed to pay creditors, no recovery could be allowed.²¹⁵

The directors must find out whether the earnings authorize the payment of a dividend, and it is their duty to know whether a dividend is justified before authorizing its payment.²¹⁶ Mere ignorance of facts that the directors ought to know, or could easily have learned, does not excuse them from liability for declaring an illegal dividend.²¹⁷ But if the directors in good faith and without negligence declare a dividend that later turns out to have impaired the capital stock, they cannot be held personally liable.²¹⁸ In deciding whether a dividend was rightfully made,

²¹⁰ *Grafton v. North American Transp. & Trading Co.*, (1919) 216 Ill. App. 262; *Gemmell v. Davis*, (1892) 75 Md. 546, 23 A. 1032.

²¹¹ *Railroad Credit Corporation v. Hawkins*, supra (Note 208).

²¹² *J. G. Wilson Corp. v. Cahill*, (1929) 152 Va. 108, 146 S. E. 274.

²¹³ See statutory provisions in each state, collected in *Prentice-Hall Corporation Service*.

²¹⁴ *Boyd v. Schneider*, (1904) 131 F. 223, rev'g 124 F. 239; *Cochran v. Shetler*, (1926) 286 Pa. 226, 133 A. 232; *Baker v. Mut. Loan & Inv. Co.*, (1948) 43 S. C. 558, 50 S. E. (2d) 692.

²¹⁵ *Spiegel v. Beacon Participations*, (1937) 297 Mass. 398, 8 N. E. (2d) 895, discussed in 17 *Boston Univ. Law Rev.* 724 (1937).

²¹⁶ *Wesp v. Muckle*, (1910) 136 N. Y. App. Div. 241, 120 N. Y. Supp. 976, aff'd, *Wesp v. Strassenburgh*, (1911) 201 N. Y. 527, 94 N. E. 1100.

²¹⁷ *Fell v. Pitts*, (1919) 263 Pa. 314, 106 A. 574.

²¹⁸ *Cochran v. Shetler*, supra (Note 214); *Moore v. Murchison*, (1915) 226 F. 679; *Williams v. Spensley*, (1917) 251 F. 58; *Myers v. C. W. Toles & Co.*, (1939) 287 Mich. 340, 283 N. W. 603. See, however, *Irving Trust Co. v. Gunder*, (1934) 152 N. Y. Misc. 83, 271 N. Y. Supp. 795.

In *Gallagher v. New York Dock Co.*, (1940) 19 N. Y. Supp. (2d) 789, it was

the transaction is viewed from the standpoint of the time when the dividend was declared and not in the light of subsequent events.²¹⁹

It has generally been held that the statute of limitations, barring, because of delay, an action to enforce the directors' liability, begins to run from the time the right of action accrued and not from the time it was discovered.²²⁰

Liability of absent and dissenting directors for illegal dividends. The statutes in some states specifically provide that directors who dissent from the declaration of a dividend, or who are absent at the time the dividend is declared, shall not be personally liable for dividends unlawfully paid. These statutes must be studied carefully to see what action, if any, is required to be taken by an absent or dissenting director in order to avoid liability.

A director who dissents from the declaration of a dividend should, in any event, note his dissent on the minutes of the meeting. A director who was absent from the meeting at which an illegal dividend was declared should inform the board of directors of his dissent immediately upon learning of the declaration of the dividend, in order to avoid liability for the acts of his co-directors. The general rule is that, in the absence of statutory provision, a director is responsible for the wrongful acts of his associates where they have come to his knowledge, and where he acquiesces therein and takes no steps to avert the injurious consequences of the acts when, by due diligence, he might have prevented them from being done.²²¹ An absent director will not be held liable for acts of his associates if he has not connived at or participated in the acts, or if he was not negligent in failing to act.²²² A director is not required to attend every meeting of the board of directors and therefore may

held that, in determining whether or not net earnings are sufficient to declare and pay a dividend, directors are entitled to accept the judgment and advice of their accountants. The statutes in some states specifically protect the directors from liability if they rely in good faith upon the books of account of the corporation or statements prepared by the corporation's officials.

²¹⁹ *Main v. Mills*, (1874) 6 Biss. 98, 16 F. 506.

²²⁰ *Pourroy v. Gardner*, (1932) 122 Cal. App. 521, 10 P. (2d) 815; *McGill's Adm'x v. Phillips*, (1932) 243 Ky. 768, 49 S. W. (2d) 1025.

²²¹ *Schout v. Conkey Ave. Saving Aid & Loan Ass'n*, (1895) 11 N. Y. Misc. 454, 32 N. Y. Supp. 713. See also *City Investing Co. v. Gerken*, (1924) 121 N. Y. Misc. 763, 202 N. Y. Supp. 41.

²²² *Schout v. Conkey Ave. Saving Aid & Loan Ass'n*, *supra* (Note 221); *Watkinson v. Adams*, (1939) 187 Okla. 432, 103 P. (2d) 498.

ordinarily not be held liable for acts in which he has not concurred.²²³

Return of illegal dividends by stockholders. A corporation generally has the right to recover illegally paid dividends from stockholders,²²⁴ and, if the corporation will not reclaim the dividend illegally paid, a stockholder may file a bill to compel repayment.²²⁵ Stockholders who receive dividends that impair the capital of the corporation may be compelled by creditors to repay the amount of the dividend.²²⁶ Under some decisions, the time when the debt to the creditor was incurred is immaterial, recovery being possible regardless of whether the creditor became such before or after the illegal dividend was declared.²²⁷ Under other decisions, creditors whose claims were incurred subsequent to the dividend cannot recover from the stockholders if the dividend was declared while the corporation was solvent.²²⁸ One standing in the shoes of the creditors, such as a receiver of a corporation²²⁹ and a trustee in bankruptcy,²³⁰ may take steps to recover illegally paid dividends, as well as an assignee for the benefit of creditors where the right is included in the assignment.²³¹

The fact that the statute makes the directors expressly liable personally for the payment of illegal dividends does not exonerate the stockholders who have received the money from liability to repay it for the benefit of the creditors.²³² The stockholder who received the illegal payment remains liable for its repayment and is not discharged from that liability by a subsequent transfer of his shares. The liability does not devolve upon the transferee, even where the statute provides that every person

²²³ *Murphy v. Penniman*, (1907) 105 Md. 452, 66 A. 282.

²²⁴ *Lexington L. F. & M. Ins. Co. v. Page*, (1856) 17 B. Mon. (Ky.) 412; *Grant v. Ross*, (1896) 100 Ky. 44, 37 S. W. 263.

²²⁵ *Gager v. Paul*, (1901) 111 Wis. 638, 87 N. W. 875.

²²⁶ *Cottrell v. Albany Card & Paper Mfg. Co.*, (1911) 142 N. Y. App. Div. 148, 126 N. Y. Supp. 1070; *Williams v. Boice*, (1884) 38 N. J. Eq. 364; *Georgia Power Co. v. Watts*, (1937) 184 Ga. 135, 190 S. E. 654. See also *Myers v. C. W. Toles & Co.*, (1939) 287 Mich. 340, 283 N. W. 603, in which it was stated that stockholders could not be held liable for illegal dividends where the provisions of the statute for enforcement of such liability had not been followed.

²²⁷ *Ibid.*

²²⁸ *Ratcliff v. Clendenin*, (1916) 232 F. 61.

²²⁹ *Hayden v. Williams*, (1899) 96 F. 279.

²³⁰ *Ulness v. Dunnell*, (1931) 61 N. D. 95, 237 N. W. 208; *Cottrell v. Albany Card & Paper Mfg. Co.*, (1911) 142 N. Y. App. Div. 148, 126 N. Y. Supp. 1070.

²³¹ *Grant v. Ross*, (1896) 100 Ky. 44, 37 S. W. 263.

²³² *Williams v. Boice*, (1884) 38 N. J. Eq. 364; *Powers v. Heggie*, (1929) 268 Mass. 233, 167 N. E. 314.

becoming a stockholder by transfer "shall, in proportion to his shares, succeed to all the rights and be subject to all the liabilities of prior shareholders."²³³

Whereas there are many decisions holding that stockholders are liable for the repayment of illegal dividends, even though they have received the dividends without knowledge that they were illegally declared, the United States Supreme Court has held that a trustee in bankruptcy of a national bank could not recover from a stockholder a dividend paid out of capital while the corporation was solvent and was a going concern at the time of the payment, if the stockholder received the dividend in good faith and in the full belief that the corporation was solvent and prosperous.²³⁴ The receiver of an insolvent bank, however, could recover dividends, declared and paid after the bank became insolvent, from a stockholder who had received them in good faith.²³⁵ Stockholders may not be compelled to repay dividends that were declared in good faith and without negligence by the directors, simply because the corporation later becomes insolvent as the result of subsequent disasters.²³⁶

²³³ *Hurlbut v. Taylor*, (1885) 62 Wis. 607, 22 N. W. 855.

²³⁴ *McDonald v. Williams*, (1898) 174 U. S. 397, 19 S. Ct. 743; *Ratcliff v. Clendenin*, (1916) 232 F. 61.

²³⁵ *Hayden v. Williams*, (1899) 96 F. 279.

²³⁶ *Reid v. Eatonton Mfg. Co.*, (1869) 40 Ga. 98; *Bartlett v. Smith*, (1932) 162 Md. 478, 160 A. 440, 161 A. 509, reviewed in 18 *Iowa Law Review* 516 (1933); *Quintal v. Adler*, (1933) 146 N. Y. Misc. 300, 262 N. Y. Supp. 126. See also 30 *Michigan Law Review* 1070 (1932).

CHAPTER 24

FORMS RELATING TO DIVIDENDS

No. 456

Resolution of directors declaring regular dividend.

RESOLVED, That the regular quarterly dividend of per cent on the common stock of this Corporation be and it hereby is declared, payable on the .. day of, 19.., to stockholders of record at the close of business on the .. day of, 19...

No. 457

Resolution of directors declaring cash dividend on preferred and common stock.

RESOLVED, That there be and hereby is declared from the surplus profits of the Corporation, a dividend of One Dollar and Fifty Cents (\$1.50) per share on both the preferred and the common stock of the Corporation, payable on the .. day of, 19.., to holders of record of said stock at the close of business on the .. day of, 19.., and the Treasurer is directed and authorized to cause the same to be paid on the date specified.

No. 458

Resolution of directors declaring dividend on preferred and common stock, to be paid by transfer agent.

RESOLVED, That the regular quarterly dividend of (.....¢) Cents per share on the participating convertible stock of this Corporation be and it hereby is declared payable on the .. day of, 19.., to stockholders of record of said stock at the close of business on the .. day of, 19..; and

RESOLVED FURTHER, That a dividend of (.....¢) Cents per share on the common stock of this Corporation be and it hereby is declared, payable on the .. day of, 19.., to stockholders of record of said stock at the close of business on the .. day of, 19..; and

RESOLVED FURTHER, That the Secretary be and he hereby is directed

and authorized to certify these resolutions and to affix the seal of this Corporation hereto; and the Treasurer is directed and authorized to lodge the same with the Transfer Agents of the several classes of stock, and to take such other steps and perform any and all such further acts as may be necessary and proper to carry out the intents and purposes of the foregoing resolutions.

No. 459

Minutes of declaration of cash dividend on preferred and common stock.

WHEREAS, it appears from the report of the Treasurer that the net profits of this Corporation for the three-months' period ending , 19.., after interest charges and reserves have been deducted, amount to the sum of (\$.....) Dollars, and

WHEREAS, it appears from the report of the Treasurer that the surplus (exclusive of Special Surplus account) available for dividends on , 19.., is (\$.....) Dollars, and the Treasurer has reported that the same has not diminished since that date, it is therefore

RESOLVED, That for the purpose of paying the regular quarterly dividend of one and three-quarters ($1\frac{3}{4}\%$) per cent on (\$.....) Dollars preferred stock of the Corporation, there is hereby set apart, out of the surplus net profits arising from the business, the sum of (\$.....) Dollars, and from such sum so set apart the Treasurer is hereby authorized and directed to pay, or cause to be paid, the said regular quarterly dividend of one and three-quarters ($1\frac{3}{4}\%$) per cent on , 19.., to the preferred stockholders of record at the close of business on , 19...

The Treasurer further reported that the present condition of the Special Surplus account complied in all respects with the conditions required by the Certificate of Incorporation to exist for the payment of dividends on the common stock, and that the surplus available for dividends on the common stock on , 19.., after the sum of (\$.....) Dollars, heretofore at this meeting set apart for the payment of the quarterly dividend on the preferred stock, has been deducted, is (\$.....) Dollars.

Upon motion duly made and seconded, it was unanimously

RESOLVED, That for the purpose of paying a quarterly dividend of One (\$1) Dollar per share on (....) shares of the common stock of the Corporation now outstanding, there

is hereby set apart, out of the surplus net profits arising from the business of the Corporation, the sum of (\$.....) Dollars and from such sum so set apart the Treasurer is authorized and directed to pay, or cause to be paid, the said quarterly dividend of One (\$1) Dollar per share on, 19.., to the common stockholders of record at the close of business on, 19...

No. 460

Resolution of directors declaring regular and extra dividend.

WHEREAS, the surplus net earnings of this Corporation are sufficient in amount to warrant the declaration of a larger dividend than the regular quarterly dividend of per cent upon the common stock of this Corporation, and

WHEREAS, it is the opinion of this Board of Directors that it is not advisable at this time to place the common stock definitely on a dividend basis higher than per cent per annum, but that it is advisable to declare the regular quarterly dividend of per cent and an extra dividend of per cent upon the common stock of this Corporation, be it

RESOLVED, That the regular quarterly dividend of per cent and an extra dividend of per cent be and they hereby are declared upon the common stock of this Corporation, payable on the .. day of, 19.., to stockholders of record at the close of business on the .. day of, 19...

No. 461

Resolution of directors turning extra dividend into regular dividend and declaring dividend at new rate.

WHEREAS, this Corporation has paid a regular dividend of \$8 per annum and an extra dividend of \$2 per annum upon its common stock without nominal or par value for the past years, and

WHEREAS, this Board of Directors now deems it advisable to place the common stock without nominal or par value on a regular dividend basis of \$10 per annum, be it

RESOLVED, That it is the policy of this Corporation to place the common stock on a regular dividend basis of \$10 per annum, payable quarterly, on the first days of February, May, August, and November of each year; and

RESOLVED FURTHER, That a regular dividend of \$2.50 per share for the quarterly period ending, 19.., be and it hereby is declared upon all the common stock without nominal or par value

issued and outstanding, said dividend to be payable on the .. day of, 19.., to stockholders of record at the close of business on the .. day of, 19...

No. 462

Resolution of directors declaring dividend from profits after reserving amount required for working capital.

WHEREAS, under the laws of the State of, under which this Corporation was chartered and now exists, the stockholders are entitled to have the accumulated profits of the Corporation, above the amount fixed in good faith by the stockholders for working capital, paid out as dividends, and

WHEREAS, the accumulated profits of the Corporation in excess of the sum of \$....., fixed by the stockholders at a meeting held on the .. day of, 19.., as the working capital of the Corporation, is \$....., be it

RESOLVED, That a dividend of per cent be and it hereby is declared on the outstanding capital stock of this Corporation, the said dividend to be payable on the .. day of, 19.., to stockholders of record at the close of business on the .. day of, 19..; and it is

FURTHER RESOLVED, That the Secretary be and he hereby is authorized and directed to notify said stockholders of the declaration of said dividend, and the Treasurer be and he hereby is authorized and directed to pay said dividend on the date specified.

No. 463

Resolution of directors declaring regular dividend and authorizing deposit of funds for payment.

RESOLVED, That a regular (annual, quarterly, or semiannual) dividend be and it hereby is declared out of the undivided profits of this Corporation, payable on the .. day of, 19.., to the holders of record at the close of business on the .. day of, 19.., as follows: A dividend of (....%) per cent on the outstanding preferred stock, and a dividend of (\$.....) Dollars per share on the outstanding common stock without par value, and

RESOLVED FURTHER, That the sum of (\$.....) Dollars be and it hereby is appropriated from the funds of this Corporation, to be deposited in the Bank for the payment of said dividend, and

RESOLVED FURTHER, That the Treasurer be and he hereby is authorized and directed to send notice of the above dividend to all stockholders entitled thereto, and to publish notice thereof immediately in the (*insert name of newspaper*).

No. 464

Resolution of executive committee recommending declaration of dividend.

RESOLVED, That the Executive Committee hereby recommends to the Board of Directors that there be declared from the surplus profits of this Corporation, a dividend of (\$.....) Dollars per share on both the preferred and the common stock of this Corporation, payable on the .. day of, 19.., to holders of record of said stock at the close of business on the .. day of, 19...

No. 465

Resolution of directors ratifying action of executive committee in declaring dividend.

RESOLVED, That the action taken by the Executive Committee of this Corporation at its meeting on the .. day of, 19.., in declaring a dividend of (\$.....) Dollars per share, payable on the .. day of, 19.., to holders of record of both preferred and common stock of this Corporation at the close of business on the .. day of, 19.., be and the same hereby is in all respects ratified, approved, confirmed, and adopted as the act of the Board of Directors.

No. 466

Resolution of directors authorizing issuance of common stock in settlement of cumulative dividends on preferred stock.

WHEREAS, this Corporation has outstanding certain shares of its preferred stock entitled to cumulative preferential dividends at the rate of seven (7%) per cent per annum, and

WHEREAS, this Corporation is in arrears in the payment of dividends on its outstanding shares of preferred stock, to and including, 19.., in the amount of (\$.....) Dollars, and

WHEREAS, the holders of a large number of the shares of the preferred stock of the Corporation have indicated their willingness to liquidate and discharge their claims for accrued dividends on such shares of preferred stock in the manner hereinafter provided, and

WHEREAS, it is deemed desirable and advisable by the Board of Di-

rectors of this Corporation that the liquidation of such dividends be effected in the manner and on the terms hereinafter stated,

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors as follows:

1. That this Corporation, when its authorized common stock shall have been increased as provided in the amendment to the amended Certificate of Incorporation of the Corporation proposed by resolutions this day adopted by the Board of Directors of the Corporation, shall offer to deliver to the holder of each share of preferred stock of the Corporation (in respect of which the Corporation shall be in arrears in the payment of dividends), shares of common stock of the Corporation without any nominal or par value, at the rate of (\$.....) Dollars per share of such common stock, and to pay in cash any fractional amount of such accrued and unpaid dividends remaining after the delivery of said shares of common stock at the rate aforesaid. Such shares of common stock and cash, when accepted, shall be in lieu and full satisfaction of the accumulated and unpaid preferred dividends, up to and including, 19.., due to such holders of shares of the preferred stock of the Corporation. The proper officers of this Corporation are hereby authorized to cause to be executed and delivered certificates for such shares of common stock of the Corporation, and to be paid such amounts in cash as may be required as aforesaid. The delivery of such dividend payments in common stock and cash shall be made on, 19.., to stockholders of record at the close of business on, 19...

2. That concurrently with the issuance of shares of the common stock of the Corporation as aforesaid, the capital of the Corporation shall be increased by the transfer from the capital surplus to the capital account of the Corporation of the sum of (\$.....) Dollars per share for each such share of common stock so issued, and that all such shares of common stock of the Corporation, when issued as aforesaid, shall be and they are hereby declared to be fully paid and nonassessable.

No. 467

Resolution of directors declaring accumulated dividend payable.

RESOLVED, That all dividends accumulated and unpaid upon the preferred stock of the Company since, 19.., namely, per cent, be and they hereby are declared payable on the .. day of, 19.., from surplus, to holders of such preferred stock, according to the Company's books and

records of transfer and registration at the close of business on the .. day of, 19...

No. 468

Resolution of directors confirming offer for settlement and adjustment of accumulated dividends upon preferred stock, by paying part in cash and issuing preferred stock and common stock for the balance.

WHEREAS, dividends upon the Preferred Stock of this Company which have accumulated and remain unpaid amounted on, 19.., to 33½ per cent, equal to \$7,506,244.50, and

WHEREAS, this Company has heretofore offered to the holders of its Preferred Stock, in full adjustment and settlement of all such deferred dividends thereon, 7½ per cent of the face value of their holdings of Preferred Stock in cash, 14 per cent in Preferred Stock, and 12 per cent in Common Stock, provided that the holders of such an amount of said Preferred Stock as the Company and the committee representing preferred stockholders under a Deposit Agreement dated, 19.., shall deem sufficient should accept said offer by depositing their stock under the plan for such adjustment with the depositary named in said agreement, and

WHEREAS, the holders of 194,336 shares of said Preferred Stock have deposited their stock under said plan with the depositary named in said agreement, and the holders of 1,899 shares of said stock not so deposited have authorized the committee to accept the offer of the Company, and have agreed in writing to be bound by the terms of said plan, and

WHEREAS, the said committee has notified this Company that it accepts said offer in behalf of the holders of said stock, amounting to 196,235 shares of the par value of \$19,623,500, and that it is prepared, upon receipt of the amounts of cash and Preferred and Common Stock deliverable in respect thereof, to cause proper notation to be made upon the certificates of the stock presented by it, of the payment in full of all deferred dividends thereon prior to, 19.., and then to return and to deliver the same with such dividends thereon to the certified holders entitled thereto, and

WHEREAS, in the opinion of the Board of Directors of this Company, the said offer has been accepted by the holders of a sufficient amount of stock to justify the Company in making the plan operative, and

WHEREAS, of the capital stock of the Company originally authorized, there remains unissued 250,000 shares of Preferred Stock and 200,000 shares of Common Stock, an amount which, together with the shares of

Common and Preferred Stock of the Company heretofore issued and now held by the Company in its treasury, will be sufficient to provide the stock required for the adjustment of such deferred dividends, and

WHEREAS, the surplus of this Company accumulated from earnings and representing the value of its assets in excess of the capital stock, funded debt, and other liabilities and reserves, amounted on December 31, 19.., to \$16,238,743, and is at the present time at least equal to the said amount, and

WHEREAS, the surplus of the Company accumulated from earnings prior to March 1, 1913, was on said date more than \$10,769,000,

NOW, THEREFORE, BE IT RESOLVED:

1. That the Company hereby confirms said offer for the settlement and adjustment of the deferred dividends upon its Preferred Stock so accepted by the committee representing the holders of 196,235 shares of said stock, and declares the said offer so accepted to be final and binding upon it, and the plan for the adjustment of said dividends to be operative.

2. That, for the purpose of adjusting and settling in full the deferred cumulative dividends upon the outstanding Preferred Stock of this Company, a dividend of $33\frac{1}{2}$ per cent upon such stock is hereby declared payable, $7\frac{1}{2}$ per cent in cash, 14 per cent in Preferred Stock, and 12 per cent in Common Stock; that such dividend shall be paid to the registered holders of certificates of deposit of such Preferred Stock, of record on June 1, 19.., upon surrender to the Company, depository, of such certificates on or after that date; and that such dividends shall be paid on or after that date to those holders of undeposited Preferred Stock who shall present to the Company their certificates of Preferred Stock to be stamped with a notation thereon to the effect that the accumulated dividends have been settled and paid in full.

3. That, in payment of said dividend, the Company issue, and its officers be and they hereby are authorized and directed to execute, issue, and deliver to those holders of its Preferred Stock who may accept the same and present their certificates for notation of such payment thereon as aforesaid, such amounts of such unissued Preferred and Common Stock or fractional scrip exchangeable into the same, and pay such amounts in cash as may be required to satisfy and discharge said deferred dividends in accordance with said offer.

4. That the Common and Preferred Stock issued on account of such accrued dividends shall be charged against the surplus of the Company derived from earnings which accrued prior to March 1, 1913,

and that the cash paid on account of said dividend shall be charged against the surplus of the Company derived from earnings accrued subsequent to March 1, 1913.

5. That, upon the payment of said dividend to any holder of any Preferred Stock, there shall be stamped, printed, or engraved upon the certificates of Preferred Stock delivered and returned to such stockholder, a statement of such payment in the following form:

"All deferred accrued prior to, 19.., paid in full."

6. That the officers of the Company be and they hereby are authorized to issue, execute, and deliver certificates for fractional amounts of stock which may be required in the payment of said dividend, in such form as they may determine.

7. That application be made to the New York Stock Exchange to have restored to the list, \$18,978,000 par value of Six Per Cent Cumulative Preferred Stock of the Company, and to have listed \$2,557,200 par value additional Common Stock, with authority to add \$6,022,000 Preferred Stock, and that Mr. and/or Mr., counsel for the Company, be and hereby are designated by the Company to appear before the Committee on Stock List of said Exchange, with authority to make such changes in said application or agreements in regard thereto as may be necessary to conform to the requirements for listing.

8. That the form of preferred stock certificate prepared by counsel, being the form of certificate set out in the By-laws of the Company, with the legend "All deferred dividends accrued prior to, 19.., paid in full" stamped, printed, or engraved thereon, and with the letter "S" prefixed to the certificate number, be and the same hereby is approved, and the Trust Company of the City of, Registrar, be requested and directed to cancel all preferred stock certificates which are surrendered to it for cancellation by the Company, by preferred stockholders who have accepted or will accept the adjustment of deferred dividends, and to register, in place thereof, new certificates which have the above legend stamped, printed, or engraved thereon; and that the Registrar be further requested and directed to register the new preferred stock certificates to be issued to preferred stockholders who have accepted the above settlement stamped with the legend aforesaid, the total amount of Preferred Stock to be issued and outstanding being \$25,000,000 par value; and the said Registrar is authorized and directed to register Preferred Stock of the Company up to said amount.

9. That the Trust Company of the City of

....., Registrar, be authorized and directed to register \$2,557,200 par value of additional Common Stock, making the total amount of Common Stock of the Company to be issued and outstanding \$20,000,-000 par value.

10. That the proper officers of this Company are authorized and directed to give such orders and instructions to the Company, depositary, and the Trust Company, Registrar, as to the issuance and delivery of any Common and Preferred Stock of the Company and the payment of cash made in settlement of deferred dividends on Preferred Stock, as may be necessary to carry out the above settlement, including directions as to the registration of the new Common and Preferred Stock.

No. 469

Resolution of directors declaring dividend and authorizing application of dividend to purchase of stock, unless payment in cash is requested.

RESOLVED, That there be and hereby is declared out of the surplus profits or net earnings of the Corporation, a regular quarterly dividend of Sixty (60¢) Cents per share on the outstanding Class A Common Stock of the Corporation without nominal or par value, payable on the .. day of, 19.., to the holders of record of said stock at the close of business on the .. day of, 19..; and further

RESOLVED, That the holders of said Class A Common Stock without nominal or par value of this Corporation can apply such dividend to the purchase of shares of Class A Common Stock without nominal or par value of this Corporation, at the rate of one-fiftieth (1/50) of a share for each share held by them; and further

RESOLVED, That there be issued to each holder of Class A Common Stock without nominal or par value of this Corporation, as of the close of business on, 19.., certificates for Class A Common Stock, fully paid and nonassessable, of this Corporation, and/or non-dividend-bearing scrip certificates therefor, at the rate of one-fiftieth (1/50) of a share for each share held, unless on or before the close of business on, 19.., such stockholders shall advise Bank, (Street), (City), (State), as hereinafter provided, that they do not elect to exercise the right to apply the said dividend to the purchase of additional shares of such Class A Common Stock of the Corporation, and request that said dividend be paid in cash; and further

RESOLVED, That said Bank, as Transfer Agent

of the Class A Common Stock of the Corporation and of the said scrip certificates, is hereby authorized to record in its transfer records and countersign as Transfer Agent, certificates for Class A Common Stock, fully paid and nonassessable, and/or scrip certificates, at the rate prescribed above for the shares of the Class A Common Stock of the Corporation, of record as at the close of business, 19.., and, as Dividend Disbursing Agent, to send such certificates for full shares of such stock, when countersigned by Company of, as Registrar, by first-class mail, and to send such scrip certificates by first-class mail on or after, 19.., to all stockholders of such Class A Common Stock as shall not, on or before, 19.., have advised said Bank that they do not elect to apply the said dividend to the purchase of additional shares of such Class A Common Stock and as shall not have requested that such dividend be paid in cash; and further

RESOLVED, That Company of, as Registrar, is hereby directed to register and countersign upon the original issuance thereof, such certificates for Class A Common Stock as Bank shall from time to time present to it for such purpose, with advice that the same are to be issued pursuant to these resolutions, the shares of Class A Common Stock to be issued pursuant to these resolutions not to exceed in the aggregate, however, one-fiftieth ($1/50$) of the total shares, plus one (1) issued and outstanding at the close of business on, 19..; and further

RESOLVED, That all certificates of Class A Common Stock issued pursuant to these resolutions shall be transferable in the City of New York, New York, or Chicago, Illinois, in like manner as the certificates for Class A Common Stock now outstanding, and the authority of Bank of the City of, and Bank of, Chicago, Illinois, as Transfer Agents, and of Company of New York, and Company, Chicago, Illinois, as Registrars, is hereby expressly extended so as to authorize the transfer, from time to time, of certificates for Class A Common Stock issued pursuant to these resolutions, in like manner as the certificates for Class A Common Stock now outstanding; and further

RESOLVED, That the President or a Vice President, or the Treasurer or an Assistant Treasurer, or the Secretary or an Assistant Secretary of this Corporation be and they hereby are authorized and directed to certify these resolutions, to have the seal of this Corporation affixed thereto, and to lodge the same with the Transfer Agents and Registrars of the Class A Common Stock, and to take any and all such other

steps and perform any and all such further acts as may be necessary and proper to carry out the intents and purposes of the foregoing resolutions; and further

RESOLVED, That for each one-fiftieth ($1/50$) shares of Class A Common Stock issued for the quarterly dividend, there shall be charged to the net earnings or surplus of the Corporation the amount of Sixty (60¢) Cents, exactly as though the dividend had been paid in cash.

No. 470

Resolution declaring dividend and making provision for dividends on unexchanged stock.

RESOLVED, That out of the surplus or net profits of this Corporation, a dividend of \$..... on each share of% Cumulative Preferred Stock of this Corporation be and it hereby is declared, payable, 19.., to stockholders of record at the close of business on, 19...

RESOLVED, That this Corporation set aside and reserve out of its surplus or net profits, a fund equal to the dividends which would be payable as aforesaid on all shares of its% Cumulative Preferred Stock issuable in exchange for the Preferred Stock of Company outstanding and unexchanged on, 19.., if all of said shares had been exchanged for shares of Preferred Stock of this Corporation, pursuant to the agreement of merger of said Company into this Corporation; and that on or subsequent to, 19.., upon surrender of any certificates for shares of said Preferred Stock in exchange for certificates for shares of Preferred Stock of this Corporation, an amount without interest, equal to the dividend so reserved with respect to the shares of% Cumulative Preferred Stock of this Corporation so issued, be paid to the person or persons to whom such shares shall be issued.

No. 471

Resolution of directors declaring dividend payable in property.

WHEREAS, undivided profits of this Corporation, amounting approximately to (\$.....) Dollars, are invested in certain pieces of real estate as follows (*insert description*), and

WHEREAS, said pieces of real estate are not directly used for the purposes for which this Corporation is organized, and

WHEREAS, such undivided profits are not now necessary for the business of this Corporation, and should be divided proportionately among the stockholders by way of dividend, and

WHEREAS, the stockholders of this Corporation have expressed a willingness to accept their proportionate shares of the said real estate in a joint conveyance from the Corporation to the stockholders, instead of having the same reduced to money and divided,

NOW, THEREFORE, BE IT RESOLVED, That the President and the Secretary of this Corporation be and they hereby are authorized, empowered, and directed to convey the real estate hereinbefore described, of the approximate value of (\$.....) Dollars, to the following-named stockholders of this Corporation, being all the stockholders thereof, in the proportions set opposite their respective names, as tenants in common.

.....	10/30
.....	9/30
.....	1/30
.....	9/30
.....	1/30

No. 472

Resolution of directors declaring dividend payable in a commodity.

RESOLVED, That there be and hereby is declared, subject to the terms and conditions hereinafter stated, on the common stock of this Company, to common stockholders of record at the close of business on the record dates as hereinafter defined and fixed, and payable on the dividend date as hereinafter defined and fixed, a dividend in warehouse receipts of one case of whiskey containing twenty-four (24) pint bottles for each five shares of common stock, such whiskey at the time of bottling to have been aged at least fifteen (15) years in the wood, upon terms and conditions to be set forth in such warehouse receipts; and

FURTHER RESOLVED, That there be and hereby is declared on the preferred stock of this Company, to preferred stockholders of record at the close of business on the date which shall be the record date for the determination of the rights of common stockholders to receive the dividend in warehouse receipts declared in the preceding paragraph of this resolution, and payable when and on the dividend date on which such dividend in warehouse receipts to common stockholders shall be paid, an extra cash dividend of Fifty (50¢) Cents a share; and

FURTHER RESOLVED, That the record date for the payment of such dividend in kind on the common stock be and it hereby is defined and fixed as and at, 19.., or at such earlier date as may be hereafter fixed by the Board of Directors of this Company, and that the dividend date for the payment of such dividend in kind to the common stockholders be and hereby is defined and fixed as and at,

19.., or at such earlier date as may be hereafter fixed by the Board of Directors of this Company. In the event, however, of such earlier record and dividend date being hereafter fixed, such dividend date is to be not less than ninety (90) days subsequent to the adoption of any resolution fixing such earlier dividend date, and such record date shall be not more than fifteen (15) days before the dividend date so fixed; and

FURTHER RESOLVED, That it is the intention of the Company and of this Board of Directors in the declaration of the foregoing dividends, that such dividends irrevocably belong to stockholders of record at the close of business on, 19.., or on such earlier record date as may hereafter be fixed by the Board of Directors; that this Company, by action of its Board in this connection, has divested itself of all title to the warehouse receipts necessary to carry distribution of such dividend in kind into effect, and has created a debt to its stockholders as of the close of business on the record date as now or hereafter fixed as to such cash dividend, and it is hereby directed that all necessary entries on the books of this Company be made accordingly, so as to separate such dividends from the corporate assets of the Company.

[*Note.* See *In re Wolfe's Estate*, (1935) 155 N. Y. Misc. 190, 279 N. Y. Supp. 605, in which the above resolution was considered.]

No. 473

Resolution of board of directors declaring extra dividend payable in stock of another corporation.

WHEREAS, this Company is the owner and registered holder of six hundred thousand (600,000) shares of the fully paid nonassessable preferred capital stock of Corporation (a corporation organized under the laws of the State of), of the par value of One (\$1) Dollar for each share, which it acquired by purchase out of its accumulated surplus profits, and

WHEREAS, the Board of Directors of this Company deems it wise to distribute such shares to the shareholders of this Company at their cost value to this Company—viz., One (\$1) Dollar per share,

NOW, THEREFORE, BE IT RESOLVED, That an extra dividend of One (\$1) Dollar per share be and it hereby is declared payable on, 19.., to shareholders of this Company of record at the close of business on, 19.., by the distribution of six hundred thousand (600,000) shares of the fully paid nonassessable preferred capital stock of Corporation, a corporation, of the par value of One (\$1) Dollar for each share, now forming part of the accumulated surplus profits of this Company, in the proportion of one share of the preferred stock of said

Corporation to each share of the present outstanding six hundred thousand (600,000) shares of the stock of this Company, such dividend to be represented by a duly executed stock certificate of Corporation for the number of full shares of such preferred stock to which each shareholder of the Company is entitled under this resolution, and that to that end the shares of such preferred stock now held and owned by this Company be indorsed and transferred by this Company to the respective shareholders of this Company, as they may be severally entitled thereto, and

RESOLVED FURTHER, That the President and Secretary of this Company be and they hereby are authorized and directed to take such other steps and perform any and all further acts as may be necessary and proper to carry out the intents and purposes of the foregoing resolution.

No. 474

Resolution of directors declaring a dividend payable in securities held by corporation.

WHEREAS, this Company has accumulated profits which are not necessary for the conduct of the business for which this Company was chartered and organized and in which it is engaged, which profits are invested in low interest-bearing securities—to wit, United States Government bonds, United States Treasury certificates, Federal Land Bank bonds, and Federal Farm Land Bank bonds—in the sum of (\$.....) Dollars,

NOW, THEREFORE, BE IT RESOLVED, That a dividend be and it hereby is declared upon the outstanding capital stock of this Company in the sum of (....%) per cent, and that said dividend be paid on the .. day of, 19.., to stockholders of record at the close of business on the .. day of, 19, by delivering and transferring to such stockholders the investments held by this Company in bonds and treasury certificates hereinbefore enumerated, in such amounts as the stockholders shall be entitled to under this resolution.

No. 475

Resolution authorizing dividend payable in stock of another corporation, with cash adjustment for fractional shares.

RESOLVED, That a dividend payable in common stock of the Company, now owned by this Corporation, be and the same hereby is declared on the common stock of this Corporation, payable, 19.., to holders of the common stock of this Corpora-

tion of record as of the close of business, 19.., such dividend to be at the rate of 1/20 of one share of the common stock of the Company for each share of the common stock of this Corporation, provided that in no case shall fractional shares of common stock of the Company be distributed; but in lieu of such fractional shares, the officers of this Corporation be and they hereby are authorized to make such cash adjustments as they may deem appropriate with the common stockholders who would otherwise be entitled to receive fractional shares of such stock.

No. 476

Resolution of directors declaring, subject to approval of Securities and Exchange Commission, a dividend based on promissory note to be received as dividend from another corporation.

WHEREAS, this Company is to be the recipient of a dividend on the common stock declared and paid by the Corporation, a corporation, to its common stockholders of record as of the close of business on, 19.., said dividend to be payable on or before, 19.., and

WHEREAS, said dividend is to be received by this Company in the form of a promissory note executed by the Corporation as payor, to this Company as payee, said note to be drawn for the principal amount of (\$.....) Dollars, dated on the .. day of, 19.., due and payable on or before, 19.., to bear interest until paid at the rate of (....%) per cent per annum, payable semiannually, and

WHEREAS, the Board of Directors of this Company is agreed that such dividend note to be received from the Corporation, as set out above, should be received by this Company at face value, and

WHEREAS, the Board of Directors of this Company is of the opinion that the receipt of such note from the Corporation will place this Company in such a position that it would be to the best interests of the Company and of its stockholders that a dividend be declared out of the earnings of this Company in the amount of (\$.....) Dollars per share,

NOW, THEREFORE, BE IT RESOLVED, That there be, and hereby is, declared, subject to the approval and consideration of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935, a dividend in the amount of (\$.....) Dollars per share on all of the outstanding common stock of this Company, payable

on or before, 19.., to the common stockholders of record at the close of business on, 19.., and

BE IT FURTHER RESOLVED, That said dividend shall be paid by assigning a (\$) Dollar interest in and to the said Corporation note to the Bank of (Street), (City), (State), to be held by it in trust for the sole benefit of the stockholders of this Company as of record at the close of business, 19..; the said trustee shall issue beneficial certificates to the various stockholders entitled to participate in this dividend on the basis of (\$) Dollars per share of the common stock held in this Company by such stockholders, and shall receive all payments made or to be made on said note by the Corporation, its successors or assigns, for the benefit of the said certificate holders, and shall distribute such receipts to each of the stockholders in such amount as their proportionate interest may appear.

BE IT FURTHER RESOLVED, That the officers of this Company be and they hereby are authorized and empowered to enter into a trust indenture with the said Bank of (Street), (City), (State), for the purpose set out above, and to assign, without recourse, such interest in the Corporation note to such trustee as shall be necessary to pay and fully discharge this dividend obligation; and further, that the officers of this Company be and they hereby are authorized and empowered to take all such steps as are proper and necessary to carry out the payment of the above specified dividend, and to execute such papers, reports, applications and other documents as are necessary to obtain the approval of the Securities and Exchange Commission of this dividend declaration.

No. 477

Resolution of directors authorizing scrip dividend.

WHEREAS, this Company has hitherto expended, of its earnings, money equal in amount to 80 per cent of the capital stock of the Company, in the purchase of real estate and other properties, with the object of increasing its profits, and

WHEREAS, the several stockholders of the Company are entitled to evidence of such expenditures, and to reimbursement of the same at some convenient future period, now, therefore, be it

RESOLVED, That a certificate, signed by the President and Treasurer of the Company, be issued severally to the stockholders, declaring that such stockholder is entitled to 80 per cent of the amount of the capital

stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the Company, out of its future earnings, with dividends thereon, at the same rate and at the same times as dividends shall be paid on shares of the capital stock of the Company; and that such certificate may be, at the option of the Company, convertible into stock of the Company, whenever the Company shall be authorized to increase its capital stock to an amount sufficient for such conversion.

No. 478

Resolution of directors authorizing redemption of scrip.

RESOLVED, That the scrip heretofore issued by this Corporation in lieu of the cash dividend declared payable on, 19.., be called for redemption on, 19..; and

RESOLVED FURTHER, That the respective officers of this Corporation be and they hereby are authorized and directed to take any and all steps which may be necessary or proper for the redemption of such scrip.

No. 479

Resolution of directors authorizing payment of extra stock dividend (where corporation has sufficient unissued stock to cover the dividend).

WHEREAS, a dividend of 2 per cent upon the first preferred capital stock and 2 per cent upon the common capital stock has this day been declared, and

WHEREAS, the surplus net earnings of the Company are, after the declaration of the said dividend, sufficient in amount to warrant the declaration and payment of an extra dividend of 12½ per cent upon said common capital stock, and

WHEREAS, the Board of Directors deems it advisable to conserve the cash resources of the Company by declaring such dividend in shares of fully paid common stock, rather than in cash,

NOW, THEREFORE, BE IT RESOLVED, That, as an extra dividend upon the outstanding common capital stock of the Company, this Company issue to the holders of such stock, of record at o'clock ..M. on the .. day of .., 19.., common stock of the Company, of a par value equal to 12½ per cent of the par value of the common stock on said date standing in the name of such holders, severally and respectively; and the Board of Directors hereby declares such dividend; and

FURTHER RESOLVED, That the President and the Secretary be and they hereby are authorized to issue, as of the .. day of .., 19.., such additional amount of authorized common stock as shall be necessary for such dividend—namely, (\$.....) Dollars par value—and to execute and deliver certificates of such stock on and after the .. day of .., 19.., without closing the transfer books; and

FURTHER RESOLVED, That, in any and all cases where any amount of stock issuable for such dividend shall be less than one share, the Company shall deliver scrip for such fractions, in a form to be approved by counsel of the Company. Such scrip certificates, when surrendered to the Company in amounts aggregating one full share of stock or multiples thereof, shall be exchangeable for certificates of common stock of the Company with any accumulated dividends on such stock, but, until so exchanged, scrip certificates shall not be entitled to receive any dividends, or to have any voting rights, stock subscription rights, or other rights appertaining to such common stock.

No. 480

Resolution of directors declaring stock dividend from unissued stock, in a close corporation.

WHEREAS, there has been expended for permanent improvements and betterments, including machinery, barges, floats, etc., during the years 19.., 19.., and 19.., the sum of (\$.....) Dollars, all of which sum has been furnished from the net earnings of the Company, and fairly belongs to the stockholders of the Company, be it

RESOLVED, That the President and the Secretary be and they hereby are authorized to issue (.....) shares of the authorized and unissued capital stock of the Company to the present stockholders, to be divided among them in proportion to their present holdings, as follows:

To shares
 shares
 shares

No. 481

Resolution of directors declaring stock dividend from shares held in treasury of close corporation.

WHEREAS, there is now in the treasury of the Company (.....) shares of its capital stock, representing undivided profits invested in said security, and

WHEREAS, it is deemed advisable to divide said stock as a dividend among the present stockholders, be it

RESOLVED, That the President and the Secretary be and they hereby are authorized and directed to distribute the (....) shares of the capital stock of this Company now held in the treasury of the Company to the present stockholders, in proportion to their present holdings, as follows:

To shares
 shares
 shares

No. 482

Resolution of directors recommending increase of capital stock and distribution of stock dividend, and calling meeting of stockholders to vote upon the proposition.

WHEREAS, this Corporation now has a capital stock of Sixty Million (\$60,000,000) Dollars issued and outstanding, and a surplus of Thirty Million (\$30,000,000) Dollars and upwards, and

WHEREAS, it is desirable that said surplus, to the extent of at least Thirty Million (\$30,000,000) Dollars, should be retained by the Corporation as working capital, and that to that end its capital stock should be increased to Ninety Million (\$90,000,000) Dollars, and a stock dividend of Thirty Million (\$30,000,000) Dollars be declared out of such increase,

THEREFORE, BE IT RESOLVED:

First: that it is advisable to increase the capital stock of this Corporation to Ninety Million (\$90,000,000) Dollars;

Second: that it is advisable to declare and pay to the stockholders of the Corporation, out of such increase of stock, a stock dividend of Thirty Million (\$30,000,000) Dollars; and

Third: that no stock certificates be issued for less than full shares, but that, in the case of stockholders entitled to fractions of a share, scrip certificates be issued which will be exchangeable for stock certificates when indorsed and surrendered to the Corporation in amounts aggregating full shares, the form of such scrip certificates to be determined by the Board of Directors; and that until said scrip certificates are duly exchanged for stock certificates, the holder thereof shall have no voting rights thereon, nor any right to dividends declared with respect to the shares of stock represented thereby; and, until such exchange, all dividends with respect to the shares of stock represented by any scrip certificates shall be and become the property of the Corporation.

AND BE IT FURTHER RESOLVED, That the Board does hereby call a

special meeting of the stockholders, to be held at the Corporation's office, at (Street), (City), (State), on the .. day of, 19.., at o'clock in the afternoon, to take action upon the above resolution, and that days' written notice of the said meeting be given to the stockholders by the Secretary, as required by the By-Laws of this Corporation.

No. 483

Resolution of stockholders authorizing increase of capital stock for purpose of declaring stock dividend; scrip certificates for fractional shares.

WHEREAS, by the charter of this Company, it is provided that the capital stock thereof shall be One Million (\$1,000,000) Dollars, with power to increase or decrease the same at any time to such amount as two thirds of the stockholders may deem advisable, and

WHEREAS, the capital stock has heretofore been increased, in pursuance of the said provisions of the charter, to the sum of Sixty Million (\$60,000,000) Dollars, at which figure it now stands, and

WHEREAS, the Company now has a surplus of Thirty Million (\$30,000,000) Dollars and upwards, and it is desirable that such surplus, to the extent of at least Thirty Million (\$30,000,000) Dollars, should be retained by the Company as working capital, and that to that end its capital stock should be increased to Ninety Million (\$90,000,000) Dollars, and a stock dividend of Thirty Million (\$30,000,000) Dollars be declared out of such increase, and

WHEREAS, the Board of Directors, at a meeting held at the office of the Company in the City of, on the .. day of, 19.., passed a resolution declaring that it is advisable to increase the capital stock of this Company to Ninety Million (\$90,000,000) Dollars, and that it is also advisable to declare and pay to the stockholders thereof a stock dividend of Thirty Million (\$30,000,000) Dollars out of such increase of stock,

THEREFORE, BE IT RESOLVED:

First: that the stock of this Company be and the same hereby is increased to the sum of Ninety Million (\$90,000,000) Dollars;

Second: that the officers of the Company be and they hereby are empowered and instructed to file a proper certificate of such increase in the office of the Secretary of State of the State of, within thirty (30) days from this date;

Third: that the directors be and they hereby are authorized and empowered to declare, at such time as they may determine, a stock divi-

dend of Thirty Million (\$30,000,000) Dollars, or fifty (50%) per cent, on the present issued capital stock of this Company, and to issue to the stockholders in payment thereof, certificates for whole shares and scrip certificates for fractional shares of fully paid nonassessable stock of this Company, in the amounts in which such stockholders shall be respectively entitled to the same; and that no stock certificates be issued for less than full shares, but that, in the case of stockholders entitled to fractions of a share, scrip certificates be issued which, when properly indorsed, stamped, and surrendered in amounts aggregating one or more full shares, will be exchangeable for stock certificates of an equal number of shares, the form of such scrip certificates to be determined by the Board of Directors; and that, until such scrip certificates are so surrendered and exchanged for stock certificates, the holders thereof shall have no voting rights thereon nor any right to dividends declared with respect to the stock represented thereby; and until such surrender and exchange, all dividends declared with respect to the stock represented by any scrip certificate shall be and become the property of the Company.

No. 484

Resolution of directors authorizing stock dividend after increase of capital stock for that purpose.

WHEREAS, the resolution passed by the Board of Directors on the .. day of .., 19.., advising the increase of the capital stock of the Company to Ninety Million (\$90,000,000) Dollars and a declaration of a stock dividend of Thirty Million (\$30,000,000) Dollars out of such increase of stock, was approved at a meeting of the stockholders on the .. day of .., 19.., by more than two thirds of the stockholders in interest thereof, and a certificate of such increase was thereupon duly filed in the office of the Secretary of State of the State of ..,

NOW, THEREFORE, BE IT RESOLVED:

1. That the directors declare, and they do now declare, a stock dividend of Thirty Million (\$30,000,000) Dollars, or fifty (50%) per cent, on the present issued capital stock of this Company, payable .., 19.., to the stockholders of record of this Company on the closing of the books on the .. day of .., 19.., out of such increase of stock;

2. That the President and Treasurer be and they hereby are authorized and directed to issue on said .., 19.., to the several stockholders of record on the closing of the books on the said .. day of .., 19.., in payment of stock dividend, stock certificates for as many whole shares of fully paid and nonassessable

stock of this Company as said shareholders shall severally be entitled to under this resolution, together with a scrip certificate in the case of each stockholder entitled to one half of a share under this resolution, which scrip certificate shall be exchangeable for stock certificates when indorsed, stamped, and surrendered to the Company with other like certificates in amounts aggregating full shares, the form of which scrip certificates has been determined by the Board of Directors; and that until such scrip certificates are duly exchanged for stock certificates, the holders of such scrip certificates shall have no voting rights thereon nor any right to dividends declared with respect to the shares of stock represented thereby; and until such exchange, all dividends declared with respect to the shares of stock represented by any scrip certificate shall be and become the property of the Company.

No. 485

Resolution authorizing common stock dividend and scrip certificates for fractional shares, and authorizing transfer agent and registrar to issue and record stock.

WHEREAS, at a special stockholders' meeting held on , 19.., the increase of the common stock of this Corporation from Sixteen Million (\$16,000,000) Dollars to Twenty Million (\$20,000,000) Dollars was authorized, and such increase has become effective, and

WHEREAS, the Capital Issue Committee has approved the issue of One Million Six Hundred Thousand (\$1,600,000) Dollars of common stock of this Corporation, in payment of a dividend of ten (10%) per cent on the common stock of this Corporation, in accordance with the resolution of this Board of Directors adopted , 19..,

RESOLVED, That the officers of this Corporation be and they hereby are authorized and directed to issue an aggregate of One Million Six Hundred Thousand (\$1,600,000) Dollars par value of common stock of this Corporation, in payment of a special dividend of ten (10%) per cent on the common stock of this Corporation, such dividend to be payable in such common stock on , 19.., to the holders of record of the outstanding common stock of this Corporation at the close of business on , 19..; and further

RESOLVED, That the officers of this Corporation be and they hereby are authorized and directed to issue scrip certificates representing fractions of shares to which stockholders will be entitled on the payment of such dividend, such scrip certificates, when surrendered with other like certificates in sums aggregating One Hundred (\$100) Dollars or multiples thereof, to be exchangeable for a certificate of common stock of the Corporation to an amount equal at par value to the aggregate

amount at par value of the scrip certificates so surrendered, and to provide that the holders thereof shall have no right to vote in respect to such scrip certificates and shall not be entitled to the payment of dividends thereon; and further

RESOLVED, That the Company, Transfer Agent, be and it hereby is authorized and directed to issue and record on its transfer books, stock certificates and scrip certificates representing such additional sixteen thousand (16,000) shares of common stock, and the Company, Registrar, be and it hereby is authorized and directed to register stock certificates and scrip certificates representing such additional sixteen thousand (16,000) shares of common stock, making the total number of common shares which said Transfer Agent is to issue and record in its books and which said Registrar is to register, one hundred seventy-six thousand (176,000) shares of common stock.

No. 486

Resolution of directors declaring stock dividend upon stock without par value, and declaring cash dividend upon all stock without par value after increase.

WHEREAS, this Corporation now has an authorized capital stock of (....) shares of stock without nominal or par value, of which (....) shares are issued and outstanding, and

WHEREAS, this Corporation has undivided profits amounting to (\$.....) Dollars, and

WHEREAS, the market value of said stock is now too high to permit widespread distribution and ready marketability, and further declarations of dividends would have the effect of further increasing the market value, and

WHEREAS, in the opinion of this Board of Directors, it is advisable to reduce the market value of each share of stock without nominal or par value of this Corporation by declaring a stock dividend of one hundred (100%) per cent upon the capital stock without nominal or par value issued and outstanding, and to maintain the dividend rate of (....%) per cent per annum upon the increased shares of stock without nominal or par value that will be issued and outstanding upon the payment of such stock dividend, be it

RESOLVED, That a dividend of one hundred (100%) per cent upon the common stock without nominal or par value of this Corporation be and it hereby is declared, payable in shares of common stock without nominal or par value of this Corporation, on the .. day of,

19.., to stockholders of record at the close of business on the .. day of, 19.., and that all stockholders of record at the close of business on said .. day of, 19.., shall be deemed to be holders of said increased capital stock at said time, and the President and Secretary are hereby authorized and directed to issue such additional amount of authorized common stock without nominal or par value as shall be necessary for such dividend, and to execute and deliver certificates of such stock on the .. day of, 19.., without closing the transfer books; and

RESOLVED FURTHER, That a dividend of (....%) per cent upon all the capital stock without nominal or par value issued and outstanding on the .. day of, 19.., be and it hereby is declared payable in cash on the .. day of, 19.., to stockholders of record at the close of business on the .. day of, 19.., and the Treasurer is hereby authorized and directed to cause the same to be paid on the date specified.

No. 487

Resolution of directors authorizing corporation to pay cash for fractional shares upon declaration of stock dividend.

[*Note.* This resolution may be substituted for a provision permitting the issuance of scrip for fractional shares.]

RESOLVED, That, in any and all cases where any amount of stock issuable for such stock dividend shall be less than one share, fractional shares shall not be issued, but an equivalent payment shall be made in cash, the basis of the value of a share being the par value thereof. (If stock is without par value, insert the words "the basis of value of one whole share being (\$.....) Dollars.")

No. 488

Resolution of directors authorizing dividends to be paid only upon fully paid stock.

RESOLVED, That no dividend shall be paid upon any share of preferred stock until said stock has been fully paid for, and that dividends shall be computed only from the time when such stock is paid for in full.

No. 489

Resolution of directors declaring dividend and providing that dividend shall be set off against indebtedness.

RESOLVED, That a regular dividend of per cent be paid on the .. day of, 19.., to all stockholders of record at the close

of business on the .. day of, 19.., without closing the transfer books; and

RESOLVED FURTHER, That the dividend this day declared shall not be paid to any shareholder who may be indebted to the Corporation and whose indebtedness is not fully secured, but the amount of the dividend due to such shareholders under this resolution shall be entered as a credit against the indebtedness.

No. 490

Resolution of directors making dividends payable semiannually rather than quarterly.

WHEREAS, dividends on the stock of this Corporation have heretofore been payable quarterly, on the .. day of,, and, and

WHEREAS, the Board of Directors now deems it advisable to have dividends payable semiannually, rather than quarterly, be it

RESOLVED, That dividends shall be payable semiannually on the .. day of and, when and as declared by the Board of Directors.

No. 491

Resolution of directors stating corporation's dividend policy.

RESOLVED, That it is the dividend policy of the Company to place the capital stock of the Company on a dividend basis of \$.... per annum, payable in equal quarterly installments on the first days of,, and, should the earnings of the Company warrant the same, subject to the declaration of the said dividends from time to time by the Board of Directors.

No. 492

Resolution of stockholders requesting directors to declare a dividend.

WHEREAS, it appears from the yearly reports of the Railroad Company that dividends on the preferred issues have been earned for several years past,

THEREFORE, BE IT RESOLVED, That the directors be requested to declare, within thirty (30) days from this date, dividends on both preferred issues in such proportions as are warranted, provided that the same shall have been earned.

No. 493

Resolution of directors "passing" a dividend.

WHEREAS, it is the desire of the directors to improve the financial condition of the Company, be it

RESOLVED, That no dividends be declared on the stock of the Company for the year 19.., and that the earnings of the Company for the year 19.. be credited to the Surplus Account.

No. 494

Resolution of directors "passing" a dividend (another form).

RESOLVED, That the quarterly dividend of (....¢) Cents per share on the Preferred Stock of the Corporation be not at present declared.

No. 495

Resolution of directors authorizing closing of transfer books for payment of dividends.

RESOLVED, That, for the purpose of paying dividends this day declared, the stock transfer books of the Company be closed from, 19.., at o'clock ..M., until, 19.., at o'clock ..M.

No. 496

Resolution of directors revoking dividend.

WHEREAS, an extra dividend equal to (....%) per cent of the capital stock of this Corporation was declared by the Board of Directors at a meeting held on the .. day of, 19.., payable on the .. day of, 19.., to stockholders of record on the .. day of, 19.., and

WHEREAS, the stockholders of this Corporation have not been notified of the declaration of said dividend, and notice of said dividend has not been made public, and

WHEREAS, no fund has been set aside for the payment of said dividend, and

WHEREAS, since the declaration of said dividend, the Corporation has been notified that it must vacate the premises at (Street), (City), (State), now occupied by this Corporation, and the removal of the Corporation will involve expenses not heretofore contemplated, and

WHEREAS, it is the opinion of this Board of Directors that the best

interests of the Corporation require the revocation of the said extra dividend,

NOW, THEREFORE, BE IT RESOLVED, That the extra dividend equal to (....%) per cent of the capital stock of this Corporation, declared by the Board of Directors on the .. day of, 19.., to be paid on the .. day of, 19.., to stockholders of record at the close of business on the .. day of, 19.., be and the same hereby is rescinded, revoked, and canceled.

No. 497

Resolution of directors revoking stock dividend on recommendation of executive committee.

RESOLVED, That, upon the statement of conditions and operations of the Corporation, submitted this day, and upon the recommendations of the Executive Committee, the stock dividend equal to (....%) per cent of the capital stock of this Corporation, declared by the Board of Directors on the .. day of, 19.., to be paid on the .. day of, 19.., to stockholders of record at the close of business on the .. day of, 19.., be and the same hereby is rescinded, revoked, and canceled.

No. 498

Resolution rescinding scrip dividend.

RESOLVED, That the action taken at the meeting of the Board of Directors held on the .. day of, 19.., declaring a scrip dividend of fifty (50%) per cent, be and the same hereby is rescinded.

No. 499

Resolution of directors appropriating emergency fund to adjust inequities in dividends resulting from refunding.

WHEREAS, under the plan for refunding outstanding 6% Preferred Stock of this Corporation and funding the accumulated dividends thereon, by the issue of 7% Preferred Stock to the extent of one and three tenths of such new 7% Preferred Stock for each share of old 6% Preferred Stock, as set forth in a resolution adopted by this Board of Directors at its meeting held on, 19.., the 6% Preferred Stockholders surrendering their 6% Preferred Stock for exchange prior to, 19.., received in exchange therefor, on and after, 19.., 7% Preferred Stock drawing 7% dividends from, 19.., and

WHEREAS, the time for exercising the privilege of exchange has been extended from time to time, and

WHEREAS, stockholders who surrendered their 6% Preferred Stock subsequent to , 19.., became entitled to receive 7% Preferred Stock on the quarterly dividend date next succeeding the date of the surrender of the 6% Preferred Stock, and

WHEREAS, several 6% stockholders, through no default or negligence of their own, were unable to make the exchange prior to , 19.., and

WHEREAS, this Board is of the opinion that the resulting inequalities should be rectified insofar as is practicable and deserved,

NOW, THEREFORE, BE IT RESOLVED, That an emergency fund of an amount not to exceed (\$.....) Dollars be set aside and put at the disposal of the executive officers of this Corporation, to be used, in their discretion, for the purpose of adjusting any inequities or inequalities which, in their opinion, may have occurred in connection with the exchange of the 6% Preferred Stock for the 7% Preferred Stock of this Corporation.

No. 500

Resolution authorizing special fund for dividend and interest payments.

The President stated that in order to facilitate the disbursement of dividends and note and bond interest payments, it was desired to create special deposit accounts by the withdrawal from the general fund, from time to time, of sums sufficient to meet the different interest and dividend requirements, each such withdrawal to be accomplished by a check drawn and signed in accordance with the By-laws, and to comprise a separate and distinct deposit to cover the exact amount of one full interest payment, and that he had, subject to the approval of the Board, appointed as Deputy Treasurer, with full power, in conjunction with, Coupon or Dividend Clerk, to sign checks against this special deposit account, for the purpose of making the payment in question; whereupon

Upon motion duly seconded, it was

RESOLVED, That the appointment of as Deputy Treasurer of this Company with power, in conjunction with, to disburse special funds set apart for the payment of dividends and notes and bond interest, be and the same hereby is ratified, approved, and confirmed.

No. 501

Resolution of directors appointing dividend disbursing agent.

RESOLVED, That the Trust Company, Transfer Agent of this Corporation, be and it hereby is appointed Dividend

Disbursing Agent for the Capital Stock of this Corporation, and it hereby is authorized and directed to pay such dividends as may be declared by the Board of Directors of this Corporation, after the Corporation has lodged with said Trust Company, certified copies of the resolution of the Board of Directors declaring such dividends, and deposited with said Trust Company an amount sufficient for the payment of such dividends at least two days before each dividend date.

No. 502

Resolution of directors authorizing transfer of profits to Undivided Profits account and Surplus account.

RESOLVED, That (\$.....) Dollars of the profits for the year 19... be transferred to the Undivided Profits account, and (\$.....) Dollars be transferred to the Surplus account.

No. 503

Resolution of directors authorizing reappraisal of fixed assets.

WHEREAS, it is the opinion of this Board of Directors that the real estate, plants, equipment, and other fixed assets owned by this Corporation are carried on the books of the Corporation at a value considerably below their true market value, and

WHEREAS, it is the desire of this Board of Directors to have the value of said assets appraised, and to increase the Surplus account by the difference between the aggregate value of the fixed assets, as they at present appear on the books of the Corporation, and the aggregate value determined after an appraisal has been made by a disinterested and reputable firm of engineers, be it

RESOLVED, That the President be and he hereby is authorized and directed to obtain the services of a reputable firm of engineers to appraise the value of the real estate, plants, equipment, and other fixed assets owned by this Corporation, and to cause the proper entries to be made on the books of the Corporation to reflect the present value of the real estate, plant, equipment, and other fixed assets of the Corporation as appraised.

No. 504

Resolution of directors authorizing adjustment in surplus after reappraisal of assets.

RESOLVED, That the report submitted by Corporation, on the .. day of .., 19..., appraising the value of the real estate, plants, equipment, and other fixed assets owned by this Corporation, be accepted and spread upon the record of this meeting.

Upon motion duly made, seconded, and unanimously carried, the following resolution was adopted:

WHEREAS, the report submitted by Corporation on the .. day of, 19.., indicates that the real estate, plants, equipment, and other fixed assets owned by this Corporation have an aggregate true market value of (\$.....) Dollars, and

WHEREAS, the said assets, more particularly described in the report hereinbefore mentioned, are carried on the books of the Corporation at an aggregate value of (\$.....) Dollars, and

WHEREAS, it is the desire of this Board of Directors to have the fixed assets owned by this Corporation carried on the books of the Corporation at their present true market values, and to increase the Surplus account by the difference between the aggregate value of the fixed assets, as shown by the report of the Corporation, and the aggregate value of said assets, as it at present appears upon the books of the Corporation,

NOW, THEREFORE, BE IT RESOLVED, That the values indicated in the report of the Corporation as the true market values of the real estate, plants, equipment, and other assets owned by this Corporation, and more particularly described in the report of said Corporation, be and they hereby are accepted as the values at which said assets shall be carried upon the books of the Corporation; and

FURTHER RESOLVED, That..... and, auditors of the books of this Corporation, be and they hereby are authorized to make the necessary entries to show that the values of the fixed assets owned by this Corporation are those indicated in the report of the Corporation, and to increase the Surplus account by the sum of (\$.....) Dollars, which amount is the difference between the aggregate value of the real estate, plants, equipment, and other fixed assets, as they are at present valued on the books of the Corporation, and the aggregate reappraised value of said assets, as shown by the report of said Corporation.

No. 505

Resolution of directors authorizing elimination of deficit by writing up asset goodwill.

WHEREAS, this Corporation was created in the year 19.., for the purpose of (*insert purpose*); and

WHEREAS, at the close of the fiscal year ending, 19.., the profit and loss statement for the first fiscal year showed a deficit of (\$) Dollars; at the close of the fiscal year ending, 19.., the profit and loss statement for the second fiscal year showed a deficit of (\$) Dollars; and at the close of the fiscal year ending, 19.., the profit and loss statement for the third fiscal year showed a net profit of (\$) Dollars; and

WHEREAS, it is the opinion of this Board of Directors that the deficit of (\$) Dollars appearing on the books of the Corporation at the close of the fiscal year ending, 19.. represents the cost of bringing this Corporation to the point where it is a going concern, operating at a profit; and

WHEREAS, the reputation of this Corporation in the field has become established, and it is the opinion of this Board of Directors that the Corporation is reasonably certain of continuing to operate at a profit from year to year; and

WHEREAS, it is the opinion of this Board of Directors that it is for the best interests of this Corporation and its stockholders that the goodwill of this Corporation, represented by the cost of bringing this Corporation to the point where it is a going concern operating at a profit, be evaluated and included among the assets of this Corporation; be it

RESOLVED, That the goodwill of this Corporation be and it hereby is evaluated at (\$) Dollars; and

RESOLVED FURTHER, That the auditors of this Corporation be and they hereby are authorized and directed to make the necessary entries upon the books of the Corporation to include goodwill, in the amount of (\$) Dollars, among the assets of this Corporation, and to credit the Surplus account with the sum of (\$) Dollars, thus eliminating the deficit of (\$) Dollars appearing upon the books of this Corporation at the close of the fiscal year ending, 19..

No. 506

Resolution of directors fixing reserves.

RESOLVED, That the following sums be reserved for depreciation of the following fixed assets:

Furniture and Fixtures	\$
Investments

No. 507

Excerpt of minutes of directors' meeting authorizing writing off of bad debts.

A list of the bad accounts of the Company, resulting during the period from, 19.., to, 19.., was submitted to the directors by the Treasurer, who reported that the usual methods of collection pursued by the Company had been useless in the collection of the accounts and that he had consulted with, attorneys for this Company, as to the possibilities of collection by suit and had been informed by them that collection by legal action was inadvisable. After due consideration it was concluded that the following accounts must be regarded as completely worthless:

(Here insert list of accounts.)

Thereupon, the following resolution was unanimously adopted:

WHEREAS, the accounts listed above are deemed by the directors to be worthless, be it

RESOLVED, That the accounts above listed, totaling (\$.....) Dollars, be charged to the Profit and Loss account.

No. 508

Resolution of directors authorizing writing off of goodwill.

WHEREAS, the intangible asset goodwill is carried on the books of this Corporation at a value of (\$.....) Dollars, and

WHEREAS, it has been the policy of this Corporation to write off from year to year a part of said intangible asset, with a view to eliminating said account from the books of the Corporation, and

WHEREAS, the surplus of the Corporation, as shown by the books of account at the close of the fiscal year ending, 19.., is sufficiently large to warrant writing off the entire asset goodwill at this time, be it

RESOLVED, That the asset goodwill be written off the books of the Corporation by debiting the Surplus account with the sum of (\$.....) Dollars, and crediting the Goodwill account with the same amount, and that the asset goodwill be carried upon the books of this Corporation at the value of One (\$1) Dollar.

No. 509

Resolution of directors authorizing conversion of unnecessary reserves to surplus.

WHEREAS, in each of the years 19.. to 19.., inclusive, there was charged to the Depreciation of Buildings account, and credited to the Reserve for Depreciation of Buildings account, (\$.....) Dollars, or (.....%) per cent of the book value of the buildings owned by this Corporation, and there is now credited to the Reserve for Depreciation of Buildings account the sum of (\$.....) Dollars, and

WHEREAS, the value of said buildings on the .. day of .., 19.., was conservatively estimated by (*insert name of appraiser*) to be (\$.....) Dollars, and, in view of said valuation, said reserve for depreciation of buildings appears to be excessive to the extent of (\$.....) Dollars, and

WHEREAS, it is the opinion of this Board of Directors that it is to the best interests of this Corporation and its stockholders that said unnecessary reserve in the amount of (\$.....) Dollars be converted to surplus and made available for distribution to stockholders in the form of dividends, at such time or times as the Board of Directors may declare dividends, be it

RESOLVED, That the auditors of this Corporation be and they hereby are authorized and directed to transfer (\$.....) Dollars from the Reserve for Buildings account to the Surplus account.

No. 510

Resolution of directors authorizing increase in surplus by writing up asset goodwill and declaring dividend out of surplus.

WHEREAS, in the year 19.., this Corporation operated at a deficit, owing to drastic declines in the market value of commodities sold by this Corporation, and at the close of the fiscal year ending .., 19.., the balance sheet of this Corporation showed a deficit of (\$.....) Dollars, and

WHEREAS, in each of the (.....) years following said year 19.., this Corporation earned net profits aggregating (\$.....) Dollars, which profits have been sufficient to wipe out the deficit and leave a surplus of (\$.....) Dollars, and

WHEREAS, it is the opinion of this Board of Directors that the stockholders of this Corporation are entitled to a distribution of profits as a return upon their capital investment, and

WHEREAS, the goodwill of this Corporation has been carried on the books of this Corporation at a nominal value of One (\$1) Dollar, and

WHEREAS, it is the opinion of this Board of Directors that it is now advisable to carry the intangible asset goodwill at a higher value, in order that the surplus may be increased to an amount sufficient to permit the payment of a dividend of (.....%) per cent upon the capital stock of this Corporation, be it

RESOLVED, That the goodwill of this Corporation be and it hereby is valued at (\$.....) Dollars, and

RESOLVED FURTHER, That the auditors of this Corporation be and they hereby are authorized and directed to make the necessary entries upon the books of the Corporation to include goodwill, in the amount of (\$.....) Dollars, among the assets of this Corporation, and to credit the Surplus account with the sum of (\$.....) Dollars, and

RESOLVED FURTHER, That there be and hereby is declared, out of the surplus of the Corporation, a dividend of (.....%) per cent upon all the capital stock issued and outstanding, payable on the .. day of, 19.., to stockholders of record at the close of business on the .. day of, 19.., and the Treasurer is hereby authorized and directed to cause the same to be paid on the date specified.

No. 511

Dissent of director to declaration of dividend, entered upon minutes of meeting.

Mr., director of this Corporation, opposed the motion made at this meeting to declare a dividend of per cent (or \$..... per share, if stock is without par value) upon all the outstanding capital stock of this Corporation, on the ground that said dividend would impair the capital stock of this Corporation and was therefore in violation of the laws of the State of, and, upon passage of the motion and declaration of the dividend without his vote, demanded that his dissent from the declaration of said dividend be entered upon the minutes of this meeting of the Board of Directors. This entry is made to satisfy the demands of Mr.

No. 512

Protest of director against declaration of dividend.

WHEREAS, a motion was made at this meeting of the Board of Directors to declare a dividend of per cent (or \$..... per share, if

stock is without par value) upon all the outstanding common stock of this Corporation, and

WHEREAS, I opposed said motion on the ground that said dividend would impair the capital stock of this Corporation and would therefore violate the laws of the State of, and

WHEREAS, said motion was seconded and passed, and said dividend was declared without my vote,

Now, THEREFORE, BE ADVISED, That I dissent from the declaration of said dividend and demand that my dissent be entered upon the minutes of the meeting of the Board of Directors, held on the .. day of, 19...

No. 513

Notice of dividend on common stock having par value.

THE COMPANY
..... STREET
..... CITY,
..... CONSECUTIVE COMMON DIVIDEND

A dividend of 4 per cent (\$2 a share) has been declared upon the common stock of the par value of \$50 a share of Company, payable in cash on, 19..., to stockholders of record at the close of business on, 19... Checks will be mailed.

.....
Treasurer

Dated, 19..

No. 514

Notice of dividend upon preferred and common stock.

....., 19..

THE COMPANY
OFFICE OF THE SECRETARY
..... CITY, STATE

The Board of Directors this day declared, for the three (3) months ending, 19..., from the net profits of the Company, a dividend of one per cent (1%) on the preferred stock of the Company.

The Board also declared, from the surplus profits of the Company, a dividend of one and one-half per cent (1½%) on the common stock of the Company.

Both dividends are payable, 19.., to stockholders of record at the close of business on, 19...

The transfer books will not be closed.

.....
Secretary

No. 515

Notice of regular and extra dividend upon preferred stock.

DIVIDEND NOTICE
..... CORPORATION
CUMULATIVE PARTICIPATING PREFERRED STOCK

At a meeting of the Board of Directors of the Corporation, held this day, it was resolved that this Corporation declare and pay to the holders of its \$6.50 Cumulative Participating Preferred Stock of record at the close of business on , 19.., a dividend of One Dollar and Sixty-two and One-Half Cents (\$1.62½) per share, being the regular quarterly dividend on said Preferred Stock, and also an extra dividend of Twelve and One-Half (12½¢) cents per share, payable, 19...

.....
President

Dated, 19..

No. 516

Notice of dividend and declaration of dividend policy.

..... , 19..
The Executive Committee of the Board of Directors of this Company has declared a dividend of one and one-half per cent (1½%) on preferred capital stock of this Company, payable, 19.., to shareholders of record at the close of business, 19...

This declaration, with the two and one-half (2½%) per cent paid, 19.., is to be construed as placing the stock upon a four (4%) per cent basis.

The transfer books will not be closed.

.....
President

No. 517

Notice of cash and stock dividend.

The Board of Directors has today declared a dividend of Twenty-five (25¢) Cents per share, payable in cash, and in addition, a dividend

of two and one-half ($2\frac{1}{2}\%$) per cent, payable in common stock, upon the common stock of Corporation, both payable, 19.., to holders of common stock of record at the close of business on, 19... Checks and stock and/or scrip certificates will be mailed.

.....
Treasurer

No. 518

Notice of dividend, including notice to stockholders who have not exchanged stock.

..... COMPANY
PREFERRED STOCK DIVIDEND No.
COMMON STOCK DIVIDEND No.

There have been this day declared a dividend of one and three-quarters ($1\frac{3}{4}\%$) per cent on the preferred stock and a dividend of One and One-Half (\$1.50) Dollars per share on the common stock without par value, of this Company, payable Thursday,, 19.., to stockholders of record at the close of business Tuesday,, 19...

Those stockholders who have not exchanged, as of said record date, their certificates representing the former common stock of the par value of \$100 per share, shall be deemed the owners of two shares without par value for each share of the par value of \$100, for the purpose of the dividend on the common stock.

Checks will be mailed to stockholders by the
Trust Company of

.....
Vice President
.....
Secretary

Dated, 19..

No. 519

Notice of cash dividend and withholding upon unexchanged stock.

The Board of Directors of the Corporation has this day declared a quarterly dividend of Fifty (50¢) Cents a share on the outstanding stock of the Corporation of the issue of 160,000 shares, provided by an amendment to the Certificate of Incorporation of, 19.., payable, 19.., to the stockholders of record at the close of business on, 19...

The officers of the Corporation are authorized to withhold payment

FORMS RELATING TO DIVIDENDS

of this dividend upon stock of the issue of 800,000 shares until such stock has been exchanged for the new stock. Stockholders who have not exchanged their certificates should do so at once at the
 Company, (Street), (City),
 (State).

.....
 Treasurer

..... Street, City,
, 19..

No. 520

Notice of declaration of cumulative dividends.

..... CORPORATION
 STREET
 CITY,

The Board of Directors, at its meeting held, 19.., declared on the 7 Per Cent Cumulative First Preferred Stock of the Company, a dividend of \$5.25 per share, payable, 19.., to stockholders of record at the close of business on, 19..

In declaring the above dividend, the directors had in mind the cumulative dividend covering payments due on:

....., 19.., of \$1.75 per share
, 19.., of \$1.75 per share
, 19.., of \$1.75 per share

The transfer books will not be closed. Checks will be mailed.

.....
 Treasurer

No. 521

Notice of dividend payable in cash or in right to subscribe to stock.

To the Holders of
 \$6 Dividend Series Preferred Stock
 of Company:

The Board of Directors has declared the quarterly dividend on the \$6 Dividend Series Preferred Stock of \$1.50 per share or $\frac{4}{100}$ ths of one share of Class A Stock for each share held, payable on, 19.., to stockholders of record at the close of business on, 19..

This dividend may be applied to the purchase of Class A Stock at

the price of about \$37.50 per share, whereas the present market price is \$40.50 per share. The stock dividend is equivalent to a rate of about 6½ per cent per annum, yielding \$6.48 per share per annum as compared with the cash dividend of \$6.

A postcard, upon which you may indicate how you wish your dividend to be applied, is enclosed. It also contains a provision by which you may make your directions permanent. It is suggested that you avail yourself of this convenience if you wish to be saved the trouble incident to these quarterly advices. This permanent dividend order can, of course, be changed at any time, if requested in writing.

If there is anything which you do not understand about this arrangement or the Class A Stock, please write us, and we will be pleased to furnish you with further information.

If you wish cash in payment of your dividend, you may disregard this notice and destroy the enclosed postcard.

Very truly yours,

.....
Secretary

No. 522

**Notice of dividend payable in cash or in right to subscribe to stock;
fractional shares payable in cash.**

New York,, 19...

To the Holders of Common Stock, Class A:

At a meeting of the Board of Directors, held, 19..., a dividend of Thirty-Seven and One-Half (37½¢) Cents per share was declared on the Common Stock, Class A, for the quarter ending, 19..., payable, 19..., to holders of record at the close of business on, 19...

By proper action of the Board, the holders of Common Stock, Class A, are given the right to subscribe to additional shares of Common Stock, Class A, at the price of Twenty-five (\$25) Dollars per share to the extent of the dividends receivable on, 19...

The Board of Directors has determined that it is impracticable to issue scrip certificates with reference to the dividend payable on, 19..., on fractional shares, and that such dividend will be paid in cash. In cases where the holders of fractional shares are entitled to a payment of less than ten (10¢) cents, no payment will be made on account of the fractional certificates.

Certificates for full shares of Common Stock, Class A, will be issued

for each Twenty-five (\$25) Dollars of dividends receivable, and non-dividend-bearing scrip certificates will be issued for the amount of any dividend receivable less than Twenty-five (\$25) Dollars, and for the amount by which any dividend receivable exceeds Twenty-five (\$25) Dollars or any multiple thereof.

The Trust Company of New York,
..... Street, New York City, Transfer Agent, has been instructed to issue and forward stock certificates for Common Stock, Class A, or nondividend-bearing scrip certificates therefor, to the stockholders, unless advised, on or before the close of business on, 19.., that the stockholder does not elect to exercise the right to subscribe for additional Common Stock, Class A, and requests that the dividend, at the rate of Thirty-Seven and One-Half (37½¢) Cents per share, be paid in cash. A form for requesting payment of the dividend in cash is enclosed.

.....
President

No. 523

Notice accompanying announcement of dividend payable in cash or stock.

[Note. Those desiring cash should not return this notice.]

Referring to your letter of, 19..,

- ☐ No. 1. Send me stock and/or scrip in payment of dividend.
- ☐ No. 2. Buy for me additional stock to make up a full share.
- ☐ No. 3. Send me full shares only, and sell for me amounts less than a full share.
- ☐ No. 4. Retain scrip until sufficient amount has been accumulated to make a full share.

This is a permanent dividend order until further advised. *Insert a check mark in the spaces above, indicating your wishes.*

.....
(Signature)

Rec'd	Shares
Entitled to	Amount
Buy	Amount
Sell	

The price for the purchase or sale of additional fractional scrip will be at the rate of One (\$1) Dollar above or below, respectively, the last

sale price on the day preceding the receipt of the notice by the Company if received before, 19.., and thereafter the last sale price on the day preceding the receipt of your dividend check or stock.

\$6 DIVIDEND SERIES

No. 524

Request for payment of dividend in cash (sent with form No. 522).

[*Note.* This form, if used, should be returned to the Trust Company of New York, Street, New York City, and not to Corporation.]

The Trust Company of New York
 Street
 New York City

Gentlemen:

The undersigned holder of Common Stock, Class A, of Corporation, does not elect to exercise the right to subscribe for additional Common Stock, Class A, and requests that the dividend payable on, 19.., be paid in cash.

.
 (Name)

 (Address)

No. 525

Notice of election to subscribe to shares to extent of dividends payable (sent with form No. 522).

Date, 19..

The Trust Company of New York
 Street
 New York City, New York

Attention of Stock Transfer Department

Gentlemen:

Until otherwise directed in writing, the undersigned holder of Common Stock, Class A, of Corporation, hereby elects to subscribe to additional shares of Common Stock, Class A, to the extent of dividends receivable thereon, and hereby authorizes and requests you to apply all such dividends to the purchase of additional shares of said stock at the price of \$25 per share, and to issue non-

dividend-bearing scrip certificates for any fractional shares to which the undersigned may be entitled.

.....
(Signature)

This order must be signed by the party in whose name the stock stands, exactly as the name appears on the face of the stock. If it is signed by someone other than the stockholder, documentary evidence is required.

No. 526

Notice of extra cash dividend with right of election, in lieu of cash dividend, to purchase stock in corporation to be organized.

....., 19..

NOTICE TO STOCKHOLDERS

The Board of Directors of the "A" Company has declared an extra dividend of \$10 per share on each of the shares of the common stock, payable out of the surplus of the Company on, 19..., to stockholders of record at the close of business, 19...

The Board of Directors has authorized the payment of this dividend either:

(1) In cash, or (2) in rights to subscribe for shares of the capital stock of the "B" Company, now being organized under the laws of the State of, at \$87.50 per share, but not in amounts exceeding 10% of the holdings of record at the close of business, 19..., and for which capital stock the Board of Directors has subscribed in the name of the "A" Company.

The "B" Company now being formed will have a capital stock issue of 50,000 shares of common stock, par value of \$100 per share, of which 30,000 shares will be presently outstanding, the remainder being reserved for future requirements. The Company is being organized: (1) to take over options which have already been secured in its behalf for the lease under long-term leases or the purchase outright of property situate along the River at City,; (2) to assume the permits already obtained from the Federal Government granting the right to construct a dam across the River at City,, and the erection of a power plant thereat; and (3) to take over the development of the coal mines underlying the property under option, the coal from which will be used for the generation of electric power. The sale of the output of the "B" Company is assured through the action of the Board of Directors of the "A" Company taken on the .. day of, 19..., whereby the said "A" Company agreed to enter into a contract with the "B" Company when its organization had been completed, subject to the

confirmation of its Board of Directors at that time, for the purchase of its entire output for ten (10) years from the date it begins operation, upon equitable terms and conditions.

Stockholders electing to take advantage of their rights hereunder to purchase shares of capital stock of the "B" Company must exercise said rights before 12:00 o'clock on the .. day of, 19..., by delivering a power of attorney, similar to the attached form, to the Secretary of the "A" Company, and granting to the said Secretary power to: (1) receive the cash dividend; (2) exercise the right to subscribe for shares of capital stock of the "B" Company; and (3) apply said cash dividend as a payment on said stock subscription. Delivery of the power of attorney will automatically result in the conversion of the dividend into a payment on the subscription of shares of the "B" Company, the balance due on said subscription, if any, being payable any time prior to, 19... Failure to deliver the power of attorney or otherwise subscribe for shares of stock will operate as a waiver of said right, which right expires at that time and on that date, and will be construed as an election to receive the cash dividend. Checks for the amount of the cash dividend to shareholders who do not exercise their rights hereunder will be mailed immediately after, 19...

.....
President

No. 527

Power of attorney to receive extra dividend and apply it to subscription for shares of company to be organized (sent with form No. 526).

KNOW ALL MEN BY THESE PRESENTS, That I,, a stockholder of (....) shares of the common stock of the "A" Company, do hereby appoint, Secretary of the "A" Company, as my attorney and agent, for me and in my name and behalf: (1) to receive the extra cash dividend to which I am entitled under notice given me by the said "A" Company as of the .. day of, 19..., and to give a receipt therefor; (2) to exercise my right under said notice to subscribe for shares of the Capital Stock of the "B" Company, a company now being organized; and (3) to apply said dividend so received by him on the subscription of shares of stock of the said "B" Company.

Witness my hand and seal this .. day of, 19...
Witnesses:

.....
.....

.....
(Signature of stockholder)
.....
(Address of stockholder)

No. 528

Notice of declaration of regular dividend and extra dividend payable in cash or preferred stock; fractional share warrants to be issued; initial dividend declared on preferred stock; notice of election to take dividends in preferred stock.

To the Shareholders of Co.:

Your Board of Directors, on, 19..., declared a cash dividend upon the common shares of your Company at the rate of Fifty (50¢) Cents per share, payable on or before, 19..., to shareholders of record at the close of business on, 19...

In addition to this cash dividend, the directors declared an extra dividend payable in the alternative of (1) cash at the rate of Fifty (50¢) Cents per share, or (2) preferred shares at the rate of $\frac{1}{200}$ th of a share per each share of present common stock outstanding, payable on or before, 19..., to shareholders of record on, 19... The shareholders may elect to receive this dividend either in cash or preferred shares, or part in cash and part in preferred shares. For example, if a shareholder owned two hundred and ten (210) shares of common stock, he would be entitled to receive one full share of preferred stock and a Fractional Share Warrant representing $\frac{10}{200}$ ths of a share of preferred stock, or one full share of preferred stock and Five (\$5) Dollars in cash. The shareholder must indicate his election as between these alternatives on or before the close of business on, 19... A form is enclosed herewith upon which this election should be indicated. In the absence of such election by the shareholder, he will be deemed to have elected to receive cash. Consequently, shareholders desiring to receive cash need make no response of any kind.

If election is so made by any shareholder as to involve the issuance of a fractional share of preferred stock, the Company will not issue a certificate representing such fractional share, but in lieu thereof will issue a Fractional Share Warrant representing such fraction. The Fractional Share Warrant will entitle the bearer thereof upon surrender of the same, together with other Fractional Share Warrants (acquired on the market or otherwise), making a total in the aggregate of one or more full shares of preferred stock, to receive one or more full shares of such stock. No dividends or interest will be paid on or in respect to such Fractional Share Warrant, and the holder thereof, as such, will not be entitled to any voting or other rights with respect thereto, but any share of stock issued upon the exercise thereof will participate in dividends thereafter paid on the same basis as the preferred shares then outstanding.

A shareholder desiring to receive this extra dividend in preferred shares must, on or before, 19..., deliver to the Bank, at its office, (Street), (City), (State), the enclosed blank properly filled out and signed by him. In the space left for the number of shares, he must insert the number of shares of common stock as to which he desires his dividend in preferred shares. As to all other shares, his dividend will be paid to him in cash.

An initial dividend will be paid upon these preferred shares to holders of record, 19..., payable on or before, 19... This dividend will be payable only upon outstanding full shares of stock and will not be paid upon Fractional Share Warrants. It, therefore, behooves all shareholders to divest themselves of Fractional Share Warrants by sale thereof (which can be accomplished in the market or otherwise), or purchase other Fractional Share Warrants sufficient to aggregate a share of preferred stock, and acquire the same on or before, 19...

..... Co.
By
Secretary

Dated, 19..

No. 529

Election to take dividend in preferred shares (sent with form No. 528).

To Co.: , 19..,

I desire to receive the extra dividend declared by your Company on, 19..., to shareholders of record on, 19..:

┌

┐ (1) *All in preferred shares at the rate of $\frac{1}{200}$ th share of such preferred stock for each share of common stock standing in my name

(2) **In full shares of preferred stock representing dividend on shares of common stock standing in my name and the balance in cash

└

└

.....
(Signature must agree with name on stock certificate)

Notice. Shareholders electing to receive this dividend wholly in cash need not return this form.

Shareholders electing to receive the dividend wholly or partly in preferred shares must return this form, properly signed and filled out, to the office of The Bank, (Street), (City), (State), on or before , 19...

* Shareholders electing to receive the entire dividend in preferred shares should place an "X" in the space left after item "(1)."

** Shareholders electing to receive the dividend partly in preferred shares and partly in cash should place an "X" in the space left after item "(2)," being careful to fill in the blank in item "(2)."

No. 530

Notice of increase in annual rate of dividends on common stock, of declaration of additional dividend, payable in cash or common stock pursuant to such increase, and right to subscribe for additional common stock.

To the Holders of Common Stock:

NOTICE IS HEREBY GIVEN That the Board of Directors of the Corporation, at a meeting held on , 19..., adopted a resolution declaring the policy of the Corporation to place the common stock on a dividend basis of Ten (\$10) Dollars per share per annum, payable Two (\$2) Dollars quarterly in cash, and the remaining Two (\$2) Dollars payable, at such times, quarterly, semi-annually, or annually, as the Board of Directors may from time to time determine, in cash or, at the option of the Corporation and subject to the approval by the stockholders of the Corporation of an increase in the authorized number of shares of common stock of the Corporation at a special meeting of stockholders to be held on , 19..., in shares of common stock of the Corporation without par value taken at such valuation per share as the Board of Directors shall determine at the time each such dividend is declared.

NOTICE IS ALSO HEREBY GIVEN That, pursuant to such policy and to resolutions adopted by the Board of Directors and Finance Committee of the Corporation, at meetings held on , 19..., the Corporation declared the additional dividend of Two (\$2) Dollars per share on the common stock of the Corporation in respect of the current fiscal year, to stockholders of record on , 19..., payable on , 19..., subject to approval by the stockholders of the Corporation of such increase in the authorized number of shares of common stock of the Corporation, in shares of such common stock without par value taken at a valuation of One Hundred (\$100) Dollars per share, or, in the event of the failure of the stockholders to approve such increase, in cash.

NOTICE IS ALSO HEREBY GIVEN That, at the same meeting, the Board also declared the regular quarterly cash dividend upon the

common stock for the quarterly period commencing, 19.., payable on, 19.., to stockholders of record on, 19...

NOTICE IS ALSO HEREBY GIVEN That, pursuant to resolutions adopted by the Board of Directors and Finance Committee of the Corporation at the meetings above mentioned, and subject to the approval by the stockholders of the Corporation of such increase in the authorized number of shares of the common stock of the Corporation without par value above referred to, your Corporation offers to holders of record of its Common Stock at the close of business on, 19.., the right to subscribe, on or before, 19.., for one share of said common stock for each two shares held by such common stockholders (including in the number of shares held the number of shares to which such common stockholder is entitled upon payment of the additional dividend above mentioned), at the price of One Hundred and Seven Dollars and Forty-nine Cents (\$107.49) per share (which price includes the accrued regular quarterly cash dividend for the period from, 19.., to, 19..). Payment of the full subscription price for said stock may be made at the time of subscription, or, at the option of the subscriber, may be made in two installments, the first to accompany the subscription and the second to be made on, 19...

The stock subscribed and paid for in full on or before, 19.., will be dated as of, 19.., and will be entitled to share in all dividends on the common stock of the Corporation declared to holders of record after that date. The stock subscribed and paid for in installments will be issued on or as of, 19.., and will be entitled to share in all dividends on the common stock of the Corporation declared to holders of record after that date.

Subscribers electing to pay the subscription price in installments will be entitled to deduct One Dollar and Twenty-four Cents (\$1.24) per share from the amount of the second installment, such deduction being an adjustment in respect of the regular cash dividend accruing on one share of common stock for the quarterly period commencing, 19...

Subject to the approval by the stockholders of the Corporation of such increase in the authorized number of shares of common stock of the Corporation, there will be mailed on, 19.., or on the earliest practicable date thereafter, to each holder of common stock of the Corporation of record at the close of business on, 19.., one or more subscription warrants specifying the number of shares of common stock to which the stockholder is entitled to subscribe. Subscription warrants will be issued only for full shares, but where a stockholder is entitled to subscribe for a fraction of a share,

a fractional warrant will be issued. No subscription may be made on a fractional warrant, but such fractional warrants with other fractional warrants aggregating in amount one or more full shares will be exchangeable for a subscription warrant or warrants for the aggregate number of full shares represented thereby. Fractional warrants desired by stockholders to complete full shares, or fractional warrants which stockholders desire to dispose of, must be bought or sold in the market, as the Corporation will not sell or purchase such fractional warrants.

Subscription warrants must be returned to the principal office of Trust Company, (Street), (City), (State), on or before , 19.., by the respective stockholders or their assignees, accompanied by payment of the first installment of the subscription price, amounting to Fifty-three Dollars and Seventy-five Cents (\$53.75) per share, or, if full payment is made, then by payment of One Hundred and Seven Dollars and Forty-nine Cents (\$107.49) per share, in New York funds. In case payment of the subscription price is made in installments, the second installment, amounting to Fifty-two Dollars and Fifty Cents (\$52.50) per share [being one half of the full subscription price less a deduction of One Dollar and Twenty-four Cents (\$1.24)], the amount of the adjustment in respect of the regular cash dividend accruing on one share of common stock for the quarterly period commencing , 19.., must be paid at said office of said Trust Company on or before , 19... All checks must be certified and made payable to the order of Corporation. On the back of the subscription warrant will be found two forms, one to be signed to exercise the subscription right, and the other a form of assignment. Holders of subscription warrants authorizing subscription for two or more shares may exchange such warrants for other subscription warrants for lesser amounts but for the same aggregate number of shares. No subscription or assignment of subscription privilege will be recognized unless made on the forms furnished by the Corporation.

Subscription receipts evidencing payment of the first installment of the subscription price will be issued upon payment of such installment. When the second installment is paid, the subscription receipts for the first installment must be surrendered for cancellation, and stock certificates, or full-paid subscription receipts exchangeable for stock certificates on or after , 19.., will then be issued. In case the full subscription price is paid at the time of subscription, stock certificates, or full-paid subscription receipts exchangeable for stock certificates on or after , 19.., will be issued at the time of payment.

No. 531

Notice accompanying dividend.

....., 19..

THE COMPANY
..... STREET
..... CITY,

Enclosed herewith please find a check in payment of the quarterly dividend of six (6%) per cent (\$1.50 per share) on the shares of the capital stock of our Company, standing in your name.

Yours respectfully,

.....
Secretary

No acknowledgment is necessary. Please notify us promptly of any change in your post-office address.

No. 532

Notice accompanying stock dividend and cash payment for fractional shares.

To the Class A Shareholders

..... Corporation:

Re: *Fractional Shares.*

In addition to the enclosed certificate for shares issued as a stock dividend, you are entitled to a fractional share. There is hereby tendered the attached check as payment in full of your rights to a fractional share. Your officers consider this method of settlement of fractions more convenient to the shareholders, as well as more economical to your Corporation, than other methods. The amount of the check represents the current market value of the fraction due you. A corresponding fractional share, together with other fractional shares, will be sold as full shares by the Corporation on the Stock Exchange.

.....
President

No. 533

Notice to stockholders of dividend policy, reduction in dividend rate, and offer of large stockholders to purchase shares of dissatisfied stockholders.

To the Stockholders of Company:

A dividend of one (1%) per cent has been declared payable to

stockholders of record as of, 19... A check for your dividend is enclosed.

The assets of the Company consist exclusively of cash and readily marketable securities. The Company has a small surplus and the market value of the securities owned is in excess of their cost value.

The directors, however, feel that it is advisable to build up a surplus to act as a cushion for any possible decrease in market value of securities, and to take care of any unforeseen contingencies. They have, therefore, decided to discontinue the practice of paying dividends of 1% every other month, or at the rate of 6% a year, and to pay semiannual dividends of 2% on the 15th of April and the 15th of October, or a total of 4% annually. Inasmuch as dividends of 3% have already been paid this year, the directors have decided that the only remaining dividend to be paid this year under this policy would be a 1% dividend on October 15, if declared, making a total of 4% this year.

In adopting this policy, the directors have consulted with the larger stockholders, who have said that if any stockholders prefer to invest their money where it will bring a larger current return than four (4%) per cent, they will purchase any of the Company stock from such stockholders at its par value. Stockholders desiring to sell their stock may send an offer to the Company, at the address of its principal office, (Street), (City), (State). The offer will then be transmitted to the larger stockholders.

No. 534

Letter to stockholders explaining passing of dividend.

To the Stockholders of, Inc.:

Your Company has about completed the first six-months' operations of its fiscal year ending, 19... Business conditions have presented the greatest difficulties for operations that have, in our experience, ever existed. There has been a continuous decline in the price of commodities in the past fifteen (15) months, and with the product that your Company manufactures and sells, this factor affects the operating profits very seriously.

Numerous economies and improvements in organization have been effected in the last six (6) months, which should materially reduce expenses.

Inventories have been priced at current replacement values, and with the first sign of steadying prices and improved market conditions, your Company will be in a favorable position to benefit therefrom.

The financial position of your Company is strong, and it has no funded debt or incumbrances of any kind, but in view of general conditions, and to maintain its current cash position, your directors have deemed it wise to follow the more conservative policy and have, therefore, decided to defer paying any dividend at this time. We are now entering into the second half of the fiscal year, which in our business is always the most profitable period—and there is every reason to believe that this period should prove more profitable to your Company, and your directors feel that by the end of the fiscal year they will be able to make a favorable report on the operating results.

For the directors,

.....
Chairman of Directors
.....
President

..... City,
....., 19..

CHAPTER 25

AMENDMENT OF CHARTER AND BY-LAWS

Introduction. Every substantial change in the powers and privileges of the corporation and in certain phases of its conduct and management is effected by means of an amendment of the charter or of the by-laws of the corporation. This is true whether the change is by way of enlargement, limitation, or other alteration.

The constitutional provisions and the laws of the state in which the corporation is organized, relating to the formation, powers, and rights of corporations, taken together with the articles or certificate of incorporation, constitute the corporation's charter.¹ This charter may be amended by the corporation pursuant to statutory authority granted to the corporation by the state, or indirectly by acts of the state itself. An amendment of the by-laws is always made by the corporation itself.

Amendments of the charter by the state—manner of effecting amendment. The state does not ordinarily amend a corporate charter by passing a special act applicable to a particular corporation. The change in the powers of the corporation is brought about by: (1) an amendment to the state constitution; (2) an amendment to the corporate laws under which the corporation was organized, or to the general laws in force when the corporation was organized; or (3) the passage of laws which, though not in terms called an amendment, change powers granted to the corporation.

Power of state to amend charter. It is universally conceded that the state has no power to alter or to amend a charter after it

¹ *Keller v. Wilson & Co.*, (1935) 21 Del. Ch. 13, 180 A. 584, rev'd on other grounds, (1936) 21 Del. Ch. 391, 190 A. 115, comment, 34 *Mich. Law Review*, (Apr. 1936) 860; *Kreicker v. Naylor Pipe Co.*, (1940) 374 Ill. 364, 29 N. E. (2d) 502, aff'd (1941) 312 U. S. 659, 61 S. Ct. 735; *Milwaukee Sanitarium v. Swift*, (1941) 238 Wis. 628, 300 N. W. 760; *Asbury Hospital v. Cass County*, (1943) 72 N. D. 359, 7 N. W. (2d) 438; *Goldman v. Postal Telegraph*, (1943) 52 F. Supp. 763; *De Mello v. Dairyman's Co-operative Creamery*, (1946) 73 Cal. App. (2d) 746, 167 P. (2d) 226.

has been granted, unless the right to do so has been reserved by the state. The right may be reserved by: (1) the state constitution; (2) a provision of the general laws or statutes in force when the corporation is organized; or (3) the terms of the charter granted to the corporation.

If the right has not been retained, the state cannot restrict or enlarge the corporate powers except with the consent of all the stockholders.² However, a state that grants an original charter without reserving the right of amendment can acquire that right by subsequent legislation. The power to amend in that case applies to a corporation obtaining extension of its existence.³

Where the power to amend is reserved, the reservation becomes one of the terms of the contract between the state and the corporation, binding not only the corporation, but its stockholders as well.⁴ While the power reserved by the state to amend a charter which it has granted is usually expressed in very comprehensive and sweeping terms, it is not without limitation. On this point the courts are agreed. However, the decisions are conflicting as to the *extent* of the restraint upon the state's power to amend. Without attempting to reconcile the numerous cases in the various states upon the subject, we may say, as a general rule, that the following attributes are requisite to render an amendment valid under the reserved power to amend:

1. The amendment must be reasonable; it cannot be arbitrary.⁵
2. It must be made in good faith and without fraud.⁶
3. No injustice must be done to incorporators.⁷
4. The amendment must not destroy a vested or an accrued right.⁸

² Louisville & N. R. Co. v. State ex rel. Gray, (1907) 154 Ala. 156, 45 So. 296.

³ Fower v. Provo Bench Canal & Irrigation Co., (1940) 99 Utah 267, 101 P. (2d) 375, cert. denied, (1941) 313 U. S. 564, 61 S. Ct. 841.

⁴ Hollender v. Rochester Food Products Corporation, (1923) 207 N. Y. 319, 124 N. Y. Misc. 130; Asbury Hospital v. Cass County, (1943) 72 N. D. 359, 7 N. W. (2d) 438.

⁵ Hammond Packing Co. v. State of Arkansas, (1909) 212 U. S. 322, 29 S. Ct. 370; Long Island R. Co. v. Department of Labor, (1931) 138 N. Y. Misc. 612, 247 N. Y. Supp. 278; Wm. Warnock Co. v. H. D. Hudson Mfg. Co., (1937) 200 Minn. 196, 273 N. W. 710.

⁶ McKee v. American Trust Co., (1924) 166 Ark. 480, 266 S. W. 293.

⁷ McKee v. American Trust Co., *supra* (Note 6). See also Phillips Petroleum Co. v. Jenkins, (1936) 297 U. S. 629, 56 S. Ct. 611, *aff'g* 82 S. W. (2d) 264, rehearing denied, 298 U. S. 691, 56 S. Ct. 745; Harvey v. National Drug Co., (1937) 30 Pa. D. & C. 318.

⁸ Berea College v. Commonwealth of Kentucky, (1908) 211 U. S. 45, 29 S. Ct.

Vested rights under state's power to amend charter. The limitation that the amendment by the state must not destroy a vested or an accrued right of the corporation has been the chief subject of litigation. While it is universally agreed that the state cannot exercise its power so as to destroy vested rights, the question as to what rights are to be deemed vested and within the protection of the Constitution of the United States prohibiting the impairment of the obligations of contracts has often troubled the courts.⁹ It may be said, generally, that amendments which change the remedy for the enforcement of certain rights do not impair the obligations of contracts, for there is no vested right as to a particular remedy. The legislature may give additional remedies to creditors and even prescribe that they shall be exclusively pursued. Such a law in no sense destroys the right of property, but merely prescribes a method of procedure.¹⁰

The following are examples of statutes that have been held not to impair the obligation of a contract:

1. Requiring a corporation to change its name so as to include the words "trust company."¹¹

2. Amending statutory provisions relating to extension of corporate existence, subsequent to the time of formation of a corporation, provided the change is not arbitrary or unreasonable.¹²

The following are examples of statutes that have been held to divest stockholders and creditors of a vested interest:

1. Taking away or impairing the rights of stockholders and creditors with respect to a distribution of the corporation's property.¹³

33. See also *In re Opinion of the Justices*, (1938) 300 Mass. 607, 14 N. E. (2d) 468; *Kreicker v. Naylor Pipe Co.*, (1940) 374 Ill. 364, 29 N. E. (2d) 502; *Patterson v. Henrietta Mills*, (1940) 216 N. C. 728, 6 S. E. (2d) 531; *Clark v. Henrietta Mills*, (1941) 219 N. C. 1, 12 S. E. (2d) 682. A corporate charter is a contract within the meaning of the clause of the Federal Constitution prohibiting the impairment of the obligations of contracts by the state. *Ware Lodge No. 435, etc. v. Harper*, (1938) 236 Ala. 334, 182 So. 59.

⁹ It has been claimed that the only real and valid limitation on the state's right to amend corporate charters is the due process clause of the Federal Constitution, 44 *West Va. Law Qu.* 224 (1938), discussing *Marshall County Bank v. Wheeling Dollar Savings Trust Co.*, (1937) 119 W. Va. 383, 193 S. E. 915.

¹⁰ *Persons v. Gardner*, (1899) 42 N. Y. App. Div. 490, 59 N. Y. Supp. 463.

¹¹ *McKee v. American Trust Co.*, (1924) 166 Ark. 480, 266 S. W. 293.

¹² *Wm. Warnock Co. v. H. D. Hudson Mfg. Co.*, (1937) 200 Minn. 196, 273 N. W. 710, discussed in 22 *Minn. Law Review* (1937) 108; *Drew v. Beckwith, Quinn & Co.*, (1941) 57 Wyo. 140, 114 P. (2d) 98, rehearing denied, (1941) 57 Wyo. 140, 115 P. (2d) 651.

¹³ *Lothrop v. Stedman*, (1875) 42 Conn. 583.

2. Authorizing the making of noncallable stock callable.¹⁴

3. Authorizing a corporation to change the terms of issued or unissued shares of any class of stock so as to permit alteration of the terms of a contract made by a corporation with its shareholders prior to the date of enactment of the statute.¹⁵

Extent of state's power to amend charter. There is much diversity of opinion in the various states as to whether the reserved power of the state shall be restricted to those amendments in which the state has a public interest. Some decisions hold that the right is reserved for the benefit of the state and of the public, and that the power can be used only to the extent that the matters are of public concern.¹⁶ The attempt of the state to use the power of amendment for a purpose other than one in which it has a public interest has been severely criticized as contrary to law and the spirit of justice.¹⁷

Acceptance of state's amendment to charter—who may accept. Though the state may reserve the power to amend and may lawfully effect a modification of a charter within the limitations outlined, it cannot impose an amendment on a corporation. The corporation itself must decide whether it will accept it.¹⁸ But the corporation cannot refuse to accept a lawful amendment and still continue in business. If the corporation does continue after the change is effected, it will be deemed to have accepted the amendment.¹⁹

The power to accept usually rests with the stockholders. The stockholders have the right to delegate it expressly to the directors or trustees, and the unauthorized acceptance by the directors may also be ratified by the stockholders. Where the original charter declares that all corporate powers are to be vested in and

¹⁴ *Breslav v. New York & Queens Elec. L. & P. Co.*, (1936) 249 N. Y. App. Div. 181, 291 N. Y. Supp. 932.

¹⁵ *Wheatley v. A. I. Root Co.*, (1946) 79 Ohio App. 93, 72 N. E. (2d) 482, aff'd in part and rev'd in part, (1946) 147 Ohio St. 127, 69 N. E. (2d) 187.

¹⁶ *Garey v. St. Joe Mining Co.*, (1907) 32 Utah 497, 91 P. 369. See also *Hinkley v. Schwartzchild & Sulzberger Co.*, (1905) 177 N. Y. App. Div. 470, 95 N. Y. Supp. 357, discussed in 44 *West Va. Law Q.* 125 (1938); *Marshall County Bank v. Wheeling Dollar Sav. & T. Co.*, (1937) 119 W. Va. 383, 193 S. E. 915, discussed in 44 *West Va. Law Q.* 224 (1938).

¹⁷ *Avondale Land Co. v. Shook*, (1911) 170 Ala. 379, 54 So. 268.

¹⁸ *Citrus Growers' Dev. Ass'n v. Salt River W. Users' Ass'n*, (1928) 34 Ariz. 105, 268 P. 773. The statutes effecting a change in the corporate charter may fix a time within which the corporation may signify its refusal to be bound by the amendment. See *Muller v. Theo. Hamm. Brewing Co.*, (1936) 197 Minn. 608, 268 N. W. 204.

¹⁹ *Bank of Blytheville v. State*, (1921) 148 Ark. 504, 230 S. W. 550.

exercised by the board of directors, the board has the power to accept.²⁰

A wide difference of opinion exists as to how large a vote is needed to declare the corporation's assent. If the legislature has not reserved the power to amend, the unanimous consent of the stockholders is, of course, necessary. If, on the other hand, the state has reserved such power, the nature of the amendment determines what proportion of the stockholders must consent.

If the amendment is a fundamental one and radically changes the character of the corporation, it has been held that a majority of the stockholders cannot bind a minority by an acceptance, even though the amendment may be beneficial to the corporation.²¹ If, however, the new powers conferred by the state are identical in kind with those originally given and merely enlarge the general objects and purposes of the corporation, without converting it into a different legal being, the change is deemed not fundamental, and a majority may bind a minority by an acceptance.²² Authority may be found for the view that the majority of the stockholders may bind a minority even where there has been a fundamental change,²³ but this rule has not been favored by the courts and the text writers.

Manner of acceptance of state's amendment of charter. An amendment of the charter may be accepted by the corporation:

1. At a general meeting of stockholders at which a resolution is passed requesting the amendment.
2. At a meeting of stockholders at which a resolution is passed accepting the amendment.

Where the corporation itself applies for the amendment, no further act of acceptance is necessary after the amendment has been granted. The meeting should be held on notice to all the stockholders, advising them of the proposed amendment.

An acceptance may be established by implication either for or against a corporation. It is an accepted rule that acts of user

²⁰ *Venner v. Atchison T. & S. F. R. Co.*, (1886) 28 F. 581.

²¹ *Citrus Growers' Dev. Ass'n v. Salt River W. Users' Ass'n*, (1928) 34 Ariz. 105, 268 P. 773.

²² See *The Buffalo & N. Y. City R. R. Co. v. Dudley*, (1856) 14 N. Y. 336, where it was held that changing the name of a corporation, increasing its capital stock, and extending its road were not fundamental changes. See also *Mower v. Staples*, (1884) 32 Minn. 284, 20 N. W. 225 (in which it was held that a change in the number of directors was not fundamental); *Port Edwards v. Arpin*, (1891) 80 Wis. 214, 49 N. W. 828.

²³ This is called the Massachusetts and New York doctrine. See *Durfee v. Old Colony & Fall River Railroad Company & Others*, (1862) 5 Allen (Mass.) 230.

by a corporation which would indicate an adoption of an amendment are sufficient to bind the corporation and its members even without a formal acceptance. So, the acceptance of the benefits of a law which is of such a nature that it may become applicable to the corporation if it so desires, operates as a complete acceptance of all the provisions of the amendatory law.²⁴ The use of a new name and the exercise of additional powers granted, without objection by any director or stockholder for a long period of time, has been held tantamount to an acceptance.²⁵

Who is bound by state's amendment of charter. The charter is a contract not only between the state and the corporation, but also between the state and the stockholders. Where the reservation of power to amend is established by the laws in force when the charter is granted, or by the charter itself, and the amendment is lawfully made pursuant to that power and accepted by a corporation, a dissenting stockholder cannot object.²⁶ He is charged with notice of the reservation, which becomes one of the terms of the corporate contract.²⁷

When a stockholder signs a subscription, he agrees to be bound by the regulations of the charter of the corporation. If the original charter expressly authorizes the acceptance by the corporation of a subsequent altering act of the legislature, the article becomes part of the original contract between the corporation and its shareholders, and no individual shareholder may be heard to complain if an acceptance of the state's amendment takes place.²⁸

A stockholder may be estopped by his own acts from questioning the validity of an amendment. If he takes part in person or by proxy in the passage or acceptance of an amendment, he cannot contest its lawfulness.²⁹

If a corporation has, without authority, accepted a material amendment, a dissenting stockholder may be relieved of liability on his subscription.³⁰

²⁴ *Louisville & N. R. Co. v. State ex rel. Gray*, (1907) 154 Ala. 156, 45 So. 296.

²⁵ *Pocomoke City Nat. Bank v. Crockett*, (1924) 145 Md. 435, 125 A. 712.

²⁶ *Winfrey v. Riverside Cotton Mills*, (1912) 113 Va. 717, 75 S. E. 309.

²⁷ *Wilson v. Cherokee Drift Mining Co.*, (1939) 14 Cal. (2d) 56, 92 P. (2d) 802; *Kreicker v. Naylor Pipe Co.*, (1940) 374 Ill. 364, 29 N. E. (2d) 502.

²⁸ *Citrus Growers' Dev. Ass'n v. Salt River W. Users' Ass'n*, (1928) 34 Ariz. 105, 268 P. 773.

²⁹ *Venner v. Atchison T. & S. F. R. Co.*, (1886) 28 F. 581.

³⁰ See Chapter 11, page 359, for discussion of release of subscriber upon alteration of charter.

Amendment of charter by the corporation.³¹ The corporation has no inherent right to amend its charter; it may do so only if the state has expressly granted the authority to amend. However, in every state the statutes make some provision for amendment of the corporate charter. These statutory provisions are as effectively a part of the corporate charter as though printed therein.³² Most of these statutes specify what amendments may be made, the proportion of stockholders who must consent to the amendment, and the procedure required to effect the amendment. In making any amendment of the charter, therefore, these statutes must be examined, as well as the provisions of the corporation's charter and by-laws with respect to amendments.

The articles of incorporation are most commonly amended by the corporation to effect the following:

1. Change of name.
2. Change of location of principal office.
3. Change of powers and purposes.
4. Change in number of directors.
5. Renewal or extension of corporate existence.
6. Increase of capital stock.
7. Decrease of capital stock.
8. Classification of stock.
9. Reclassification of stock.

Each of these changes will be treated separately in this chapter.

In some of the states there is a general provision permitting such other amendments, alterations, or changes of the corporate charter as may be desired. In many instances, the statutes contain a statement to the effect that the articles may be amended in any respect which could lawfully have been provided in the original certificate.³³

Where an amendment is tendered to the Secretary of State for filing, he must see that it contains all the information prescribed by statute. Where it appears from the face of the amendment that required statements of fact and information are not included, or where the amendment provides for the exercise of powers contrary to express or implied provisions of

³¹ In the discussion of charter amendment by the corporation, the word "charter" is used to denote the articles or certificate of incorporation.

³² *Johnson v. Bradley Knitting Co.*, (1938) 228 Wis. 566, 280 N. W. 688, discussed in 6 *Univ. of Chicago Law Rev.* 104 (1938); *Milwaukee Sanitarium v. Swift*, (1941) 238 Wis. 628, 300 N. W. 760.

³³ *Seaman v. Ironwood Amusement Corporation*, (1938) 283 Mich. 220, 278 N. W. 51.

law, the Secretary of State must refuse to file the amendment.³⁴

Procedure for amendment of charter by corporation. While scarcely two states prescribe exactly the same methods to effect an amendment of the articles of incorporation, the procedures outlined generally include the following requirements:

1. *Consent of stockholders.* The statute usually prescribes the percentage of stockholders who must consent to a charter amendment. The charter may provide a greater, but not lesser, percentage. If it does provide for a greater percentage, the consent of that percentage is necessary for an amendment. Thus, a charter amendment changing "voting powers" of preferred stockholders cannot be lawfully adopted by a percentage of votes prescribed by the general corporation law when the charter calls for a greater percentage.³⁵

The interests of dissenting stockholders are guarded in some states by allowing them to receive payment for their stock if they so desire. Although a stockholder dissenting to a charter amendment by a corporation may be able to assert that the majority has no power to bind him by amendment, he may lose his right to relief through acquiescence by ratification or laches.³⁶ But a stockholder's acquiescence in previous amendments does not estop him from asserting his rights when a subsequent article is amended that materially affects his interests.³⁷

2. *Filing of certificate of amendment with designated state and county authorities.*

The most common procedure, and the one dictated by good practice where no definite method is outlined by statute, is as follows:

1. *Directors' recommendation.* The board of directors, at a meeting duly called, adopts a resolution recommending the proposed amendment of the certificate of incorporation, and calling a meeting of the stockholders to consider the proposed amendment.

2. *Notice of stockholders' meeting.* Notice of a meeting of stockholders to consider the proposed amendment of the charter, together with a copy of the directors' resolution, is given to all

³⁴ *Kansas Milling Co. v. Ryan*, (1940) 152 Kan. 137, 102 P. (2d) 970.

³⁵ *Sellers v. Joseph Bancroft & Sons Co.*, (1938) 23 Del. Ch. 13, 2 A. (2d) 108, discussed in 37 *Mich. Law Review*, (Mar. 1939) 803, on final hearing, (1941) 25 Del. Ch. 268, 17 A. (2d) 831.

³⁶ *Bay Newfoundland Co. v. Wilson & Co.*, (1944) (Del.) 37 A. (2d) 59.

³⁷ *Hueftle v. Farmers Elevator*, (1944) 145 Neb. 424, 16 N. W. (2d) 855.

stockholders entitled to vote on the amendment,³⁸ in the manner prescribed by the statute, charter, or by-laws. Some statutes specifically give non-voting stock a right to vote on the adoption of certain amendments. The notice prescribed by statute is for the benefit of the stockholders, and may be waived by them.³⁹ Requirement as to notice is waived where all the stockholders meet and the requisite number vote in favor of the proposal.⁴⁰

3. *Adoption of amendment by stockholders.* At the meeting of stockholders, the proposed amendment is presented in the form of a resolution. A vote is taken, and if the proportion of stockholders prescribed by statute pass the resolution, the amendment is adopted. In almost all the states, the statutes provide that charter amendments may be adopted by less than all the stockholders. These statutes form a part of the stockholders' contract with the corporation. The remedy provided by statute of fair compensation to stockholders who object to such amendment is exclusive.⁴¹ Under statutes that merely empower the corporation to adopt amendments, but do not specify whether or not the approval of less than all the stockholders is sufficient, the rule is that a majority of the stockholders may make amendments of an auxiliary nature, but that unanimous vote is essential for changes of a fundamental character.⁴² A change in the name of a corporation is an "auxiliary" change.⁴³ An increase or decrease of stock is a "fundamental" change.⁴⁴ The renewal of corporate existence is not such a material or fundamental change as to require unanimous consent of the stockholders.⁴⁵

4. *Filing of certificate of amendment.* The officers of the

³⁸ Some statutes contain provisions specifically giving to non-voting stock a right to vote on the adoption of certain amendments. See statutory provisions in each state, collected in *Prentice-Hall Corporation Service*.

³⁹ *Garnett v. State ex rel. Bank Commissioner*, (1933) 162 Okla. 195, 19 P. (2d) 375.

⁴⁰ *Harris v. State ex rel. Bank Commissioner*, (1932) 162 Okla. 203, 19 P. (2d) 381; *State ex rel. Bank Commissioner v. McConnell*, (1933) 162 Okla. 202, 19 P. (2d) 382; *State ex rel. Bank Commissioner v. Clarkson*, (1933) 162 Okla. 202, 19 P. (2d) 383.

⁴¹ *Williams v. National Pump Corporation*, (1933) 46 Ohio App. 427, 188 N. E. 756. See also *Haggard v. Lexington Utilities Co.*, (1935) 260 Ky. 261, 84 S. W. (2d) 84; *Vulcan Corporation v. Westheimer & Co.*, (1938) (Ohio App.) 34 N. E. (2d) 278.

⁴² See *Johnson v. Tribune-Herald Co.*, (1923) 155 Ga. 204, 116 S. E. 810.

⁴³ *Cathcart v. Cathcart Van & Storage Co.*, (1932) 175 Ga. 196, 165 S. E. 58.

⁴⁴ *Macon Gas Co. v. Richter*, (1915) 143 Ga. 397, 85 S. E. 112.

⁴⁵ *Loeffler v. Federal Supply Co.*, (1940) 187 Okla. 373, 102 P. (2d) 862.

corporation file the certificate of amendment with the Secretary of State or some other designated public official,⁴⁶ and any other papers required by statute to effect the amendment. Express authority to do so is usually granted by the stockholders' resolution.

5. *Publication.* Publication of the amendment is sometimes required.

Some variations in procedure. The written assent of a proportion of the stockholders may, under some statutes, dispense with the necessity of a meeting to pass upon the proposed amendment. In some states the amendment may be effected without any action on the part of the directors. The stockholders pass a resolution at a duly convened meeting authorizing the amendment and directing the officers to file the necessary certificate. In some instances, the action of the stockholders in resolving to amend the articles of incorporation must be approved by the board of directors. In other states, the stockholders must authorize the directors to apply to the Secretary of State for an amendment to the charter; or the statute may require application for amendment to be directed to the court.

It will be seen from the brief outline above that, in order to effect an amendment, the statute of each particular state must be carefully examined and minutely followed. Resolutions applicable to the methods indicated will be found in the chapter following, and may be adapted to fit the particular statutory requirements.

Strict compliance with statutory requirements for amendment of charter. It is well established that the corporation, having but a statutory existence, can exercise its powers only in the manner prescribed by the law under which it was organized.⁴⁷ If the charter or statute indicates the manner of amendment, it must be complied with, and an amendment in a different manner may be ineffective.⁴⁸ Thus, where the statute prescribed the requisites for an amendment to increase stock, failure to carry out the details rendered the stock absolutely void.⁴⁹ In another

⁴⁶ *Kansas Milling Co. v. Ryan*, (1940) *supra* (Note 34).

⁴⁷ *McNulta v. Corn Belt Bank*, (1897) 164 Ill. 427, 45 N. E. 954.

⁴⁸ *United Hosiery Mills Corp. v. Stevens*, (1921) 146 Tenn. 531, 243 S. W. 656. See also *In re Horace Keane Aeroplanes, Inc.*, (1920) 194 N. Y. App. Div. 873, 185 N. Y. Supp. 163; *Charter Oak Council v. Town of New Hartford*, (1936) 121 Conn. 466, 185 A. 575; *Imperial Trust Co. v. Magazine Repeating Razor Co.*, (1946) 138 N. J. Eq. 20, 46 A. (2d) 449.

⁴⁹ *Farmers' and Traders' Bank v. National Laundry & Linen Supply Co.*, (1917) 30 Idaho 788, 168 P. 670.

case, a statute expressly prohibited an increase of capital stock unless the consent of the persons holding the larger amount in value of the stock was obtained at a meeting called for that purpose upon sixty days' public notice. The court held that, though all the stockholders were present at the meeting and consented in writing to the proposed increase, the increase was invalid because the public notice specified had not been given.⁵⁰ A statutory provision requiring charter amendments to be filed in the office of the register of the county where the corporation's principal office was located was held to be mandatory.⁵¹

In amending the articles of incorporation under a power granted by the laws of any state, the particular statute in force in that state should be closely followed. The importance of complying strictly with the statutory provisions cannot be too strongly emphasized.

Change of name. A corporation has no power, unless authorized by law, to change its name.⁵² But a statute conferring power to amend the corporate charter in general terms may be sufficient to include a change of name.⁵³ Most of the states provide by statute the manner in which corporations may change their names and indicate the procedure to be followed. In many of them, the alteration is brought about by an amendment of the articles of incorporation. Directions outlined must be strictly followed,⁵⁴ and the statutes of the respective states should be carefully scrutinized in order that no omission may render the amendment invalid. While complete compliance is required, it has been held that, where the corporation failed to file a certificate changing its name as required by the statute, it could not avail itself of its own wrong so as to avoid contracts made either under the old or the assumed names.⁵⁵ So, too, it was held that where a resolution authorizing a change of name was adopted at a meeting at which all the stockholders were present, and was concurred in by all of them, the amendment was binding upon the corporation and the stockholders, although the meeting of stockholders was not held at the proper place.⁵⁶

⁵⁰ *Navajo Mining & Development Co. v. Curry*, (1905) 147 Cal. 581, 82 P. 247.

⁵¹ *Whittaker v. Bacon*, (1933) 17 Tenn. 97, 65 S. W. (2d) 1083.

⁵² *American Elementary Electric Co. v. Normandy*, (1917) 46 App. Cas. (D. C.) 329.

⁵³ *Cathcart v. Cathcart Van & Storage Co.*, (1932) 175 Ga. 196, 165 S. E. 58.

⁵⁴ *Maxwell v. Eureka Mutual Benefit Corp.*, (1931) 262 Ill. App. 342.

⁵⁵ *Pilsen Brewing Co. v. Wallace*, (1919) 291 Ill. 59, 125 N. E. 714.

⁵⁶ *Smith v. Hedenberg*, (1940) 189 Ga. 678, 7 S. E. (2d) 234. See also *Glenwood Lumber & Coal Co. v. Hammers*, (1939) 226 Iowa 788, 285 N. W. 277.

It has been repeatedly decided that the mere change of name does not alter the character of the corporation,⁵⁷ and that, in fact, it has no more effect on its identity than any revision in the name of a natural person.⁵⁸ It is simply the same corporation with another name.⁵⁹ The change in name does not create a new corporation, nor does it affect any rights or avoid any liabilities that accrued before modification.⁶⁰ The corporation continues as before, responsible in its new name for liabilities previously contracted or incurred, and has the right to sue on contracts made before the alteration.⁶¹ In order to create a new corporation, there must be a change of name accompanied by a substantial change in the scope, rights, and powers of the corporation.⁶² A stockholder who subscribed to shares and opposed an amendment changing the name of the corporation is not relieved from his liability as a stockholder.⁶³

Where a corporation changes its name, and the corporation law is silent as to what to do with the outstanding certificates, the general, and safer, practice is to call in the certificates and imprint the new name with a rubber stamp, and then return the certificates to the stockholders. No tax problem is involved.

Checklist of changes resulting from change of name. When the corporate name has been officially changed, it is usually necessary for the directors to authorize the proper officers to perfect all other changes made necessary by the adoption of a new name. The following checklist may help remind officers of matters to be attended to.

Items to be considered when company name is changed.

1. Change bank accounts.
2. Change bank records as regards loan authorizations.

⁵⁷ *Paulk v. Calvert Mortg. Co.*, (1925) 160 Ga. 7, 127 S. E. 134.

⁵⁸ *Stewart v. Preston*, (1920) 80 Fla. 473, 86 So. 348.

⁵⁹ *Board of Com'rs of Mattamuskeet Drainage Dist. et al. v. Wills & Sons et al.*, (1916) 236 F. 362.

⁶⁰ *J. M. Huber Petroleum Co. et al. v. Quillin*, (1933) (Tex. Civ. App.) 60 S. W. (2d) 261; *Ozan Lumber Co. v. Davis Sewing Mach. Co.*, (1922) 284 F. 161, *aff'd*, (1923) 292 F. 135; *Sealcell Corporation v. Berry*, (1933) 112 Fla. 342, 150 So. 634; *Nelson v. Detroit & Security Trust Co.*, (1933) (Tex. Comm. App.) 56 S. W. (2d) 860, *aff'g* 38 S. W. (2d) 360; *Union Guardian Trust Co. v. Kowalsky*, (1934) 267 Mich. 110, 255 N. W. 171.

⁶¹ *Stewart v. Preston*, *supra* (Note 58).

⁶² *Commonwealth v. Belknap Hardware & Mfg. Co.*, (1918) 182 Ky. 155, 206 S. W. 277.

⁶³ *German-American Mercantile Bank v. Foster*, (1921) 116 Wash. 313, 199 P. 314.

3. Change corporate seal.
4. Change contracts:
 - (a) Advertising.
 - (b) Freight or traffic consultants.
 - (c) Insurance consultants.
 - (d) Haulers.
 - (e) Rodent or insect control.
 - (f) Roof or building maintenance and service.
5. Change leases.
6. Change deeds to real property.
7. Change insurance policies and indemnity bonds.
8. Change property registration at tax offices:
 - (a) Local.
 - (b) County.
 - (c) Special school or road district.
9. Change checks:
 - (a) Pay roll.
 - (b) Petty cash.
 - (c) General fund.
 - (d) Work fund.
 - (e) Bond account.
10. Change check protector.
11. Change postage meter.
12. Change trade-mark, copyright, and patent or patent application registry in Patent Office.
13. Change shipping cases, cartons, and labels. Also embossing dies and stamps used on product.
14. Change window and door lettering.
15. Change stationery:
 - (a) Letterheads.
 - (b) Inter-office memorandum forms.
 - (c) Envelopes.
 - (d) Credit memoranda.
 - (e) Invoices.
 - (f) Statements.
 - (g) Bills of lading.
 - (h) Receiving reports.
 - (i) Shipping memoranda.
 - (j) Purchase order forms.
 - (k) Salesmen's order form.

- (l) Production and cost control forms.
- (m) Master forms for any of the above when duplicating machines are used.
- 16. Change Social Security account number listing.
- 17. Change State Unemployment Compensation account number listing.
- 18. Change rubber stamps for check endorsement, mail receiving daters, and other rubber stamps wherever they may be found, in office or plant.
- 19. Notify all customers.
- 20. Notify all suppliers.
- 21. Notify credit agencies.
- 22. Notify District Director of Internal Revenue.
- 23. Notify proper state agency for state income tax, and all other state agencies with which you are required to register.
- 24. Notify U. S. Department of Commerce, Bureau of Census.
- 25. Notify post office departments.
- 26. Notify trade agencies, and publishers of trade directories in which you may be listed.
- 27. Write stockholders to send in stock certificates.

Gummed stickers in 1" x 3" dimension, bearing new name and correct post office address, are of considerable help in making name changes on envelopes and certain forms, minimizing waste and obsolescence.

Change in location of principal office. The general corporation laws of most of the states require the certificate or articles of incorporation to state the principal office or place of business of the corporation. Some statutes require that, in addition to stating the location of the principal office or place of business of the corporation, the certificate or articles of incorporation must state the place at which the operations of the company are to be carried on. Substantial compliance with these statutory provisions is required.

In some states, in order to effect a change in location of the principal place of business, the articles of incorporation must be amended.⁶⁴ If the certificate of incorporation permits the cor-

⁶⁴ See *United States Fidelity & Guaranty Co. v. Lawrence*, (1937) 184 Ga. 83, 190 S. E. 346, rev'g 53 Ga. App. 111, 184 S. E. 922.

poration to do business only in the state of incorporation, it may be amended so as to allow it to operate outside the state or outside the United States. The provisions of the statute must, in these cases, as in the amendment to effect a change in name, be strictly complied with.⁶⁵ The usual procedure for amendment of the charter is followed generally; that is, the directors pass a resolution that it is deemed advisable to amend the articles so as to change the principal place of business of the corporation, and call a meeting of the stockholders, upon notice, to consider the question. The stockholders then adopt a resolution authorizing the amendment and directing the officers to do all acts required by statute in order legally to effect the change. In some cases the written consent of a proportion of the stockholders will eliminate the necessity for a stockholders' meeting.

A change in location may sometimes be effected simply by a resolution of the board of directors and the filing of a certificate with some designated authority.⁶⁶ In some states, the change in location is effected by a resolution adopted at a duly convened meeting of stockholders, and the filing of a certificate of change with the Secretary of State, signed by the chairman and the secretary of the stockholders' meeting and a majority of the board of directors.⁶⁷

Change of corporate purposes. A corporation possesses such powers only as are expressly or impliedly granted by its charter, or such as are necessary to carry into effect the powers expressly granted. In order, therefore, to enable the corporation to extend these powers, an amendment of the articles of incorporation is necessary.⁶⁸

Some of the states expressly provide by statute that a change in the powers and purposes of the corporation may be effected by an amendment to its articles of incorporation.

Under the old English rule, which has been followed in this country, corporate powers cannot be extended to authorize enterprises or operations different in nature and kind from those

⁶⁵ *United States Fidelity & Guaranty Co. v. Lawrence*, supra (see Note 64); *Hawk & Buck Co. v. Cassidy*, (1942) (Tex. Civ. App.) 164 S. W. (2d) 245.

⁶⁶ See *Canal Bank & Trust Co. v. Greco*, (1933) 177 La. 507, 148 So. 693; *Estes v. Bank of Walnut Grove*, (1935) 172 Miss. 499, 159 So. 104.

⁶⁷ *Ibid.*

⁶⁸ Under the common law, a fundamental or radical change in the purposes of a corporation cannot be accomplished by amendment over the dissent of a single stockholder; non-fundamental or immaterial changes may be made by the ordinary procedure of amendment. *Martin Orchard Co. v. Fruit Growers' Canning Co.*, (1930) 203 Wis. 97, 233 N. W. 603.

comprehended within the terms of the original charter.⁶⁹ A corporation organized for private business cannot, for example, turn itself into one organized for a public purpose.⁷⁰ Whether or not a change is so fundamental as to alter the original purpose of the corporation depends on the facts of each case.⁷¹

The procedure prescribed for a change of corporate purposes must be strictly followed to make the change effective. However, a corporation may have a de facto existence despite failure to file an affidavit of publication of amendment changing the purposes of the corporation as required by statute.⁷²

Corporations in some states may not engage in the conduct of more than one general line of business. If an amendment is effected enlarging the expressed objects of its creation, the changes may not include any powers that could not have been incorporated originally in the charter.

Change in number of directors. The articles of incorporation or charter of a corporation usually fix the number of directors that the corporation is authorized to have. The statutes very often provide that the number shall be stated in the articles, and sometimes even limit the minimum number. If the number is determined by the articles of incorporation, an increase or decrease can be effected only by an amendment to those articles, unless some other method is prescribed by statute. The statutes of many states make specific provision for a change in the number of directors by such an amendment to the articles of incorporation.⁷³

In many states, the statutes authorize the corporation to provide in its by-laws for the number of directors. In that event the stockholders who are competent in the first instance to enact the by-laws may also amend them to increase or to reduce the number of directors. In some states, a change in the number of directors is specifically allowed by an amendment to the by-laws. The certificate of incorporation may, if authorized by statute,

⁶⁹ *Fower v. Provo Bench Canal & Irrigation Co.*, (1940) 99 Utah 267, 101 P. (2d) 375, cert. denied, (1941) 313 U. S. 564, 61 S. Ct. 841.

⁷⁰ *People ex. rel. Cayuga Power Corporation v. Public Service Commission*, (1919) 226 N. Y. 527, 124 N. E. 105; *West Duluth Land Co. v. Northwestern Textile Co.*, (1929) 176 Minn. 588, 224 N. W. 245. See also *Midland Co-operative W. v. Range Co-operative O. Ass'n*, (1937) 200 Minn. 538, 274 N. W. 624, discussed in 36 *Michigan Law Review* 660 (1938).

⁷¹ *Fower v. Provo Bench Canal & Irrigation Co.*, supra (see Note 69).

⁷² *Henry v. Markesan State Bank*, (1934) 68 F. (2d) 55.

⁷³ A change in the method of electing directors is also sometimes effected by an amendment of the charter.

stipulate some other manner of changing the number of directors.

The procedure prescribed by statute for a change in the number of directors must be strictly followed.⁷⁴ If the statute providing for a change in the number of directors states that a transcript of the proceedings shall be filed in the office where the certificate of incorporation is filed, the change in number does not take effect until such record is filed.⁷⁵ But where the statute requires that the change be made by amending the by-laws and that the amendment be filed, specifying no time limit for filing, it has been held that failure to file such amendment for several years does not invalidate the change in number, nor make illegal the election of directors held in compliance with the change.⁷⁶

Where a reduction in number is authorized, but the manner of effecting the decrease is not prescribed, the reduction cannot be accomplished until the terms of the existing directors, or the terms of such number of them as is necessary to meet the change, shall have expired, or until such directors voluntarily resign.⁷⁷

Renewal or extension of corporate existence. The duration of the corporation's existence is generally determined by its charter or by the general law in force in the state in which it is incorporated. Statutes authorizing the creation of corporations often require that a definite period of existence be stated in the articles of incorporation.

The charter of a corporation can be extended beyond the period for which it was created only by legislative authority. The corporation laws of most states contain provisions for the extension of the corporate existence for an additional period by complying with certain prescribed preliminaries,⁷⁸ and the charter itself may authorize a renewal.⁷⁹ The statutes authorizing

⁷⁴ *Pratt-Low Preserving Co. v. Jordan*, (1933) 217 Cal. 676, 18 P. (2d) 676.

⁷⁵ *Cabana v. Holstein-Friesian Assn. of America*, (1920) 112 N. Y. Misc. 262, 182 N. Y. Supp. 658; *Lewis v. Matthews*, (1914) 161 N. Y. App. Div. 107, 146 N. Y. Supp. 424; *Matter of Election of the Directors of Westchester Trust Co.*, (1906) 186 N. Y. 215, 78 N. E. 875, rev'g 114 N. Y. App. Div. 856, 100 N. Y. Supp. 249.

⁷⁶ *Willis v. Lauridson*, (1911) 161 Cal. 106, 118 P. 530.

⁷⁷ *In re Manoca Temple Assn.*, (1908) 128 N. Y. App. Div. 796, 113 N. Y. Supp. 172.

⁷⁸ The constitutionality of a statute authorizing stockholders to amend articles of incorporation to extend corporate existence was upheld in *Keetch v. Cordner*, (1936) 90 Utah 423, 62 P. (2d) 273.

⁷⁹ *McKemie v. Eady-Baker*, (1917) 146 Ga. 753, 92 S. E. 282; *Drew v. Beckwith, Quinn & Co.*, (1941) 57 Wyo. 140, 114 P. (2d) 98, rehearing denied, (1941) 57 Wyo. 140, 115 P. (2d) 651.

extension of corporate existence may require payment to dissenting stockholders of the fair value of their shares.⁸⁰

In some states, the extension of corporate existence is effected by means of an amendment of the articles of incorporation. In others, the renewal is effected by the filing of a certificate with designated authorities, signed by the officers of the corporation upon the authorization of a fixed proportion of the stockholders obtained at a stockholders' meeting.⁸¹ The consent of the stockholders may, in some instances, be procured in writing without a meeting.⁸²

The amendment should be made before the expiration of the life of the corporation.⁸³ A corporation ceases to exist at the end of the term for which it is incorporated. It has been held that if the corporate entity becomes legally extinct, it cannot be revived by a subsequent law without the consent of the stockholders.⁸⁴ The extension of corporate existence does not constitute the formation of a new or a different corporation. Its affairs are not wound up, and there is no break in the continued existence of the corporation.⁸⁵ It is merely a continuation of the life of the old corporation.⁸⁶

⁸⁰ See statutory provisions in each state, collected in *Prentice-Hall Corporation Service*. See also *State v. Leader Co.*, (1934) 97 Mont. 586, 37 P. (2d) 561; *Loeffler v. Federal Supply Co.*, (1940) 187 Okla. 373, 102 P. (2d) 862.

⁸¹ See *Wm. Warnock Co. v. H. D. Hudson Mfg. Co.*, (1937) 200 Min. 196, 273 N. W. 710, discussed in 22 *Minnesota Law Rev.* 108 (1937).

⁸² A statute requiring stockholders voting for a renewal of the corporate charter to buy up the shares of dissenting stockholders was involved in *Terrell et al. v. Ringgold County Mutual Telephone Co.*, (1938) 225 Iowa 994, 282 N. W. 702, discussed in 48 *Yale Law Jour.* 1450 (1939).

⁸³ But see *Loeffler v. Federal Supply Co.*, supra (Note 80), in which a renewal of a corporate charter after expiration of the original period of existence fixed in the charter was upheld. So, too, under the governing statute, a corporation whose articles of incorporation become inoperative for nonpayment of its annual fee and failure to file its annual report was held to be entitled to have revival and renewal of its corporate existence on compliance with statutory requirements. *Beeler & Campbell Supply Co. v. Warren*, (1940) 151 Kan. 755, 100 P. (2d) 700. See also footnote 84.

⁸⁴ *Lyon-Gray Lumber Co. v. Gibraltar Life Ins. Co.*, (1923) (Tex. Civ. App.) 247 S. W. 652. But see *Stott v. Stott Realty Co.*, (1939) 288 Mich. 35, 284 N. W. 635, in which it was held that the legislature has the power to provide by general law for the renewal and revival of the existence of a corporation after the charter has become void. The laws of some states specifically allow revival of corporate existence after dissolution by expiration of the term fixed in the corporate charter. See Schei, "Statutory Revival of Corporate Existence," 28 *California Law Rev.* 195 (1940). See also footnote 83.

⁸⁵ *Ohio Valley Tie Co. v. Bruner*, (1912) 148 Ky. 358, 146 S. W. 749.

⁸⁶ *Ozan Lumber Co. v. Davis Sewing Mach. Co.*, (1922) 284 F. 161, aff'd 292 F. 135.

It is settled that the mere act of succession does not have the effect of canceling the continuing obligations of the corporation.⁸⁷ Nor can persons who have dealt with a corporation as a legal entity and have received something of value from it deny the legality of its existence.⁸⁸

Some states provide that the corporation may have perpetual existence. The articles of incorporation must usually set forth that fact. In such an instance, of course, the question of the extension of the corporate existence may be disregarded.

Increase of stock. The amount of capital stock that a corporation is authorized to issue is fixed by its charter. A corporation can issue stock only to the amount of its authorized capital stock. It cannot issue additional stock when all of its authorized capital stock has been issued.⁸⁹

If a corporation desires to raise additional capital and all of its authorized capital stock has been issued, it must increase its authorized capital stock.

Effect of overissue of stock. Any issue of stock in excess of the charter limit is invalid,⁹⁰ even in the hands of a bona fide purchaser for value.⁹¹ However, when the number of shares named in a certificate of stock exceeds the authorized shares, the certificate is not void as to the amount authorized, but only as to the excess shares.⁹²

To be an overissue, the stock must be issued beyond the amount authorized. A reissue of surrendered, purchased, or forfeited shares does not constitute an overissue. Nor is there an overissue when new certificates of stock are issued to replace lost or destroyed certificates.⁹³

If the first issue of the entire amount of the authorized capital stock is not a real issue, a subsequent issue is not an overissue.

⁸⁷ *First Presbyterian Church v. National State Bank*, (1894) 57 N. J. L. 27, 29 A. 320.

⁸⁸ *Consolidated Textile Corp. v. Exposition Cotton Mills*, (1924) 158 Ga. 747, 124 S. E. 707.

⁸⁹ *First Ave. Land Co. v. Parker*, (1901) 111 Wis. 1, 86 N. W. 604.

⁹⁰ *Scovill v. Thayer*, (1881) 105 U. S. 968; *Pruitt v. Oklahoma Steam Baking Co.*, (1913) 39 Okla. 509, 135 P. 730; *Taylor v. Lounsbury-Soule Co.*, (1927) 106 Conn. 41, 137 A. 159.

⁹¹ *In re R. Rombach & Co.*, (1926) 9 F. (2d) 359, aff'g 3 F. (2d) 46. See also *Garnett v. State ex rel. Bank Commissioner*, (1933) 162 Okla. 195, 19 P. (2d) 375.

⁹² *Larkin v. Maclellan*, (1922) 140 Md. 570, 118 A. 181.

⁹³ *Kinnan v. Forty-Second St. M. & St. N. Ave. Ry. Co.*, (1893) 1 N. Y. Misc. 457, 21 N. Y. Supp. 789, aff'd 140 N. Y. 183, 35 N. E. 498.

Thus, where the first issue was a sham, a second issue was held not to be an overissue.⁹⁴

If the corporation overissues its capital stock, it may be liable in damages to bona fide holders of the certificates.⁹⁵

The corporation, or a stockholder for himself and other stockholders, if the company refuses to act, may sue for the cancellation of certificates of an overissue of stock,⁹⁶ unless barred by laches or estoppel.⁹⁷

What is an increase of stock. Occasionally certain acts of the corporation that may appear to be an increase of capital stock do not constitute such an increase at all. No increase is effected, for example, where a corporation having 50,000 shares of par value stock changes the authorized shares into 100,000 shares of no par stock, but leaves the capital unchanged.⁹⁸ However, increasing the number of shares of capital stock without par value is an increase.⁹⁹ A change of shares with par value to an equal number of shares without par value is not an increase. Nor is the mere act of classifying capital stock without changing the number of shares an increase.¹⁰⁰ This question assumes considerable importance when it is alleged that the procedure required to increase capital stock has not been followed.¹⁰¹

Source of right to increase stock. In each state there are statutory provisions conferring on corporations organized under its laws the right to increase their authorized capital stock. If there were no express statutory authority from the state, a corporation would have no right to increase its authorized capital stock.¹⁰²

⁹⁴ *Gordon v. Cummings*, (1914) 78 Wash. 515, 139 P. 489.

⁹⁵ *Hobson v. Marsh*, (1912) 69 Wash. 326, 124 P. 912; *Davey v. Newell-Morse Royalty Co.*, (1913) 169 Mo. App. 565, 154 S. W. 147; *National Bank of Webb City v. Newell-Morse Royalty Co.*, (1914) 259 Mo. 637, 168 S. W. 699.

⁹⁶ *United States Light & Heat Corporation v. Walker*, (1916) 94 N. Y. Misc. 687, 158 N. Y. Supp. 664, aff'd, (1916) 175 N. Y. App. Div. 929, 161 N. Y. Supp. 1148.

⁹⁷ *Jutte v. Hutchinson*, (1899) 189 Pa. St. 218, 42 A. 123.

⁹⁸ *Hood Rubber Co. v. Commonwealth*, (1921) 238 Mass. 369, 131 N. E. 201.

⁹⁹ *Olympia Theatres v. Commonwealth*, (1921) 238 Mass. 374, 131 N. E. 204. But see *Falk v. Dirigold Corp.*, (1928) 174 Minn. 219, 219 N. W. 82.

¹⁰⁰ *California Telephone & Light Co. v. Jordan*, (1912) 19 Cal. App. 536, 126 P. 598.

¹⁰¹ While such changes may not constitute increases of capital stock, they generally require an amendment of the certificate of incorporation. See discussion under reclassification on page 723.

¹⁰² *Star Pub. Co. v. Ball*, (1922) 192 Ind. 158, 134 N. E. 285.

The authority to increase may be conferred on the corporation:

1. By the general laws under which it was organized.
2. By its charter or articles of incorporation under authority of general laws.

There is no such thing as an implied authority to increase the capital stock.¹⁰³ That authority must be express.¹⁰⁴ In some states the amount of increase in the capital stock is limited.

Who may exercise power to increase stock. The power to increase the capital stock is ordinarily exercised by the stockholders. A change so organic and fundamental as that of enlarging the capital stock of the corporation beyond the limit fixed by the charter cannot be made by the board of directors alone, unless expressly authorized.¹⁰⁵ If it is desired to confer such power on the directors, in order to make their acts binding, it should be expressly conferred.¹⁰⁶ Even where the charter of the corporation fails to state by whom the power to increase its capital stock is to be exercised, its directors have not the power to do so, merely by virtue of their position as directors.¹⁰⁷ In the absence of statutory provision to the contrary, authority to increase the stock may be conferred on the board of directors by charter or by charter amendments.

Method of increasing stock. The general laws under which most corporations are now organized authorize the increase of capital stock and indicate the method to be followed. In many instances the increase must be effected by an amendment of the articles of incorporation. Generally the board of directors passes a resolution at a duly called meeting, recommending the increase and calling a meeting of the stockholders to take action on the amendment of the charter. The stockholders' meeting is ordinarily called upon notice which must set forth the nature of the proposed action. Failure to give notice of the meeting at which an increase of the capital stock is voted invalidates the attempted increase.¹⁰⁸ After the stockholders have authorized the increase, articles of amendment certifying to the increase of stock are filed with the proper state officials.

¹⁰³ *Randall v. Mickle*, (1933) 103 Fla. 1229, 138 So. 14, 141 So. 317.

¹⁰⁴ *Einstein v. Rochester Gas & Electric Co.*, (1895) 146 N. Y. 46, 40 N. E. 631.

¹⁰⁵ *Railway Co. v. Allertown*, (1873) 18 Wall (U. S.) 233.

¹⁰⁶ *Eidman v. Bowman*, (1871) 58 Ill. 444, 11 Am. Rep. 90. See also *Scovill v. Thayer*, (1881) 105 U. S. 143.

¹⁰⁷ *McNulta v. Corn Belt Bank*, (1897) 164 Ill. 427, 45 N. E. 954.

¹⁰⁸ *Danzig v. Lacks*, (1932) 235 N. Y. App. Div. 189, 256 N. Y. Supp. 769.

In some states, instead of amending the articles of incorporation, an instrument, usually called a certificate of increase, is filed. The procedure is substantially the same as in the case of an increase of stock by amendment of the charter except that, instead of filing the articles of amendment, a certificate is recorded with the designated state or county authorities. This certificate, signed by an officer of the corporation, sets forth the details of the increase and certifies that the required vote for authorizing the increase has been obtained.

Under the blue-sky laws in force in some states, authority to issue increased stock must be obtained from some commission or officer of the state. Similarly, under the Federal law, registration of the securities may be required before the increased stock may be sold or offered for sale through the mails or through the channels of interstate commerce.¹⁰⁹

Necessity for strict compliance with statutory requirements for increase of stock. Strict compliance with statutory requirements for effecting an increase of stock is necessary.¹¹⁰ The general rule is that, if the rights of creditors are not involved, omission of essential steps prescribed by the statute authorizing an increase of capital stock will entitle subscribers for the increased stock to avoid their subscriptions.¹¹¹ It has been said that, until the provisions of the statute have been followed, increased stock has no existence.¹¹² A distinction, however, must be drawn between shares which the corporation had no power to issue and shares which the corporation had power to issue, although not in the manner in which, or the terms upon which, the issue was made.¹¹³ Where the corporation has power to issue increased stock, a mere irregularity does not make the stock void, and substantial compliance is sufficient. Thus, whereas overissued stock is void, an irregular increase of stock is merely voidable.¹¹⁴

¹⁰⁹ For full information regarding the Securities Act of 1933, as amended, see *Prentice-Hall Securities Regulation Service*.

¹¹⁰ *Uffelman v. Boillin*, (1935) 19 Tenn. App. 1, 82 S. W. (2d) 545; *Dingle v. Shaab*, (1941) 179 Md. 589, 20 A. (2d) 149.

¹¹¹ *Taylor v. Lounsbury-Soule Co.*, (1927) 106 Conn. 41, 137 A. 159; *In re R. Rombach & Co.*, (1926) 9 F. (2d) 359; *Larkin v. Maclellan*, (1922) 140 Md. 570, 118 A. 181; *Danzig v. Lacks*, (1932) 235 N. Y. App. Div. 189, 256 N. Y. Supp. 769.

¹¹² *Farmers' & Traders' Bank v. National Laundry & Linen Supply Co.*, (1917) 30 Idaho 788, 168 P. 670.

¹¹³ *Scovill v. Thayer*, (1881) 105 U. S. 143; *Garnett v. State*, (1932) 162 Okla. 195, 19 P. (2d) 375.

¹¹⁴ *Garnett v. State*, (1932) 162 Okla. 195, 19 P. (2d) 375; *Harris v. State*, (1932) 162 Okla. 203, 19 P. (2d) 381; *State v. McConnell*, (1933) 19 P. (2d) 382; *State*

Stock which the corporation has power to issue, but which it issues irregularly, is valid as to the holder. In a suit for the payment of the stock, the stockholder may not defend on the ground that the stock was irregularly issued. The state alone may raise the question of irregularity.¹¹⁵ Substantial compliance is sufficient particularly where the stockholder has received benefits or otherwise asserted or enjoyed his rights as a stockholder.¹¹⁶ The failure to file a certificate was held to be a mere irregularity that did not affect the validity of an increase between the corporation and its stockholders or directors who acquiesced and participated in the corporation's act in making the increase.¹¹⁷ As between the corporation and the state, however, the statutory requirements are mandatory, and a strict compliance is essential.

Where the power to increase stock did exist, and there was a way in which the increase could lawfully be made, it was held that the failure to publish the amendment of the charter authorizing the increase did not invalidate the stock issued.¹¹⁸ Where, however, the issue was entirely unauthorized, the stockholders were not estopped from questioning its validity, even where they attended the meetings at which the resolution increasing the stock was passed.¹¹⁹ Since the corporation was absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder could never give it validity nor bind him or the corporation.¹²⁰

Preëmptive right of stockholders upon increase of stock. The courts have recognized the inchoate right of a person holding stock in a corporation to take a proportionate share of the new stock. This subject has been previously treated on page 479. The authorities are not in agreement as to whether a corporation, by amending its articles of incorporation, can deprive stock-

v. Clarkson, (1933) 19 P. (2d) 383; State v. Kahle, (1933) 162 Okla. 202, 19 P. (2d) 383.

¹¹⁵ In re R. Rombach & Co., (1926) 9 F. (2d) 359, aff'g 3 F. (2d) 46; Upton v. Tribilcock, (1875) 91 U. S. 45.

¹¹⁶ Mitchell v. Mitchell Woodbury Co., (1928) 263 Mass. 160, 160 N. E. 539. The only irregularity complained of in this case was that the stock was issued in exchange for other stock, when the certificate filed with the Secretary of State stated that it was to be issued for cash.

¹¹⁷ Jackson v. Pittsburgh, F. W. & C. Ry. Co., (1921) (Ind. App.) 132 N. E. 710.

¹¹⁸ Handley v. Stutz, (1890) 139 U. S. 417, 11 S. Ct. 530.

¹¹⁹ See Tschumi v. Hills, (1897) 6 Kan. App. 549, 51 P. 619, where an increase of stock was attempted to be made by the board of directors without an amendment to the charter.

¹²⁰ Scovill v. Thayer, *supra* (Note 113).

holders of their preëmptive rights. It has been held that a corporation by amending its charter cannot deprive its stockholders of their preëmptive rights.¹²¹ But it has also been held that a corporation by amending its articles can eliminate preëmptive rights without the consent of minority stockholders.¹²²

Reduction in capital stock—power of corporation to reduce. The authorized capital stock is the security upon which creditors and stockholders have a right to rely for the protection of their respective interests. It cannot, therefore, be reduced without authority and without compliance with all regulations.¹²³ The general rules discussed in considering the question of an increase in the capital stock of a corporation apply, in many respects, to a reduction. Authority to reduce is as essential as authority to increase. In the absence of express statutory authority, a corporation is without power to decrease its authorized capital stock.¹²⁴ Authority to reduce cannot even be implied from an authority to increase.¹²⁵ The power usually proceeds from the general authority to amend the articles of incorporation. Some states, however, have separate provisions for the decrease of capital stock.

Who may exercise power to reduce stock. As in the case of an increase of capital stock, the directors have no power to effect a reduction unless authorized by statute, by the articles of incorporation, or by the stockholders. In the absence of a statutory provision, any diminution of the capital stock fixed in the certificate of incorporation is a fundamental change requiring the unanimous consent of the stockholders.¹²⁶ Not even all the stockholders, however, can reduce the authorized capital stock, if the rights of creditors are prejudiced thereby.¹²⁷

¹²¹ *Albrecht, Maguire & Co. v. Gen. Plastics, Inc.*, (1939) 280 N. Y. 840, 21 N. E. (2d) 887, discussed in 25 *Cornell Law Q.* 124 (1940).

¹²² *Milwaukee Sanitarium v. Swift*, (1941) 238 Wis. 628, 300 N. W. 760, following the principle of *Johnson v. Bradley Knitting Co.*, (1938) 228 Wis. 566, 280 N. W. 688, discussed in 6 *University of Chicago Law Review*, (Dec. 1938) 104; 14 *Notre Dame Lawyer*, (Nov. 1938) 23.

¹²³ *Williams v. Davis*, (1944) 297 Ky. 626, 180 S. W. (2d) 874; *State v. Louisiana Navigation & Fisheries Co.*, (1942) (La. App.) 8 So. (2d) 796; *Botz v. Helvering*, (1943) 134 F. (2d) 538; *A. B. Frank Co. v. Latham*, (1945) (Tex. Civ. App.) 190 S. W. (2d) 739, aff'd (1946) 145 Tex. 30, 193 S. W. (2d) 671.

¹²⁴ See *Hildreth v. Western Realty Co.*, (1932) 62 N. D. 233, 242 N. W. 679; *Security Nat. Bank v. Crystal Ice & Fuel Co.*, (1937) 145 Kan. 899, 67 P. (2d) 527.

¹²⁵ *Seignouret v. Home Ins. Co.*, (1885) 24 F. 332.

¹²⁶ *Johnson v. Tribune-Herald Co.*, (1923) 155 Ga. 204, 116 S. E. 810.

¹²⁷ See page 722 as to creditors' rights upon reduction. See also *Sherrard St. Bank v. Vernon*, (1928) 243 Ill. App. 122.

Most of the states require that a reduction in stock be authorized by either a majority or a two-thirds vote of the stockholders at a meeting called upon due notice.

Methods of reducing capital stock. A reduction of capital stock may be effected in several ways, some of which are specifically allowed by statute in the various states. They may be classified as follows:

1. Purchasing shares and canceling or retiring them.¹²⁸ The shares may be acquired by:
 - a. Purchasing shares drawn by lot.
 - b. Purchasing shares pro rata from all the stockholders.
 - c. Purchasing shares in the open market.
 - d. As the result of an agreement between the corporation and stockholder made at the time of the sale.¹²⁹
2. Canceling shares not issued.
3. Canceling shares owned by the corporation.
4. Exchanging shares for decreased number of shares of the same or a different class.
5. Exchanging stock having a par value for stock having no par value. Inasmuch as no-par stock represents a proportionate interest in the net assets of a corporation, the exchange may be made into an equal, a smaller, or a larger number of no-par shares.

For example, assume that a corporation having assets of \$400,000, liabilities of \$200,000, and a deficit of \$200,000 has capital stock of \$400,000, represented by 4,000 shares of the par value of \$100 each. It wishes to reduce its capital to \$200,000. It may effect the reduction by exchanging the 4,000 par value shares for: (1) 4,000 no-par shares, an equal number; (2) 2,000 no-par shares, a smaller number; or (3) 8,000 no-par shares, a larger number. In the first case, each no-par share will be worth \$50; in the second, \$100; and in the third, \$25.
6. Reducing the par value of stock.
7. Reducing the amount of capital represented by shares having no par value.

Procedure for reducing capital stock. The statutes author-

¹²⁸ See *Security Nat. Bank v. Crystal Ice & Fuel Co.*, (1937) 145 Kan. 899, 67 P. (2d) 527; *State v. Stewart Bros. Cotton Co.*, (1939) 193 La. 16, 190 So. 317.

¹²⁹ But see *Botz v. Helvering*, (1943) 134 F. (2d) 538. Under Missouri law, corporation could not effect reduction by carrying out a repurchase contract.

izing a reduction in capital stock generally outline the procedure to be followed in effecting the reduction. An amendment of the charter is generally required.¹³⁰ However, in some states, as in the case of an increase in the capital stock, a decrease may be effected by means of a certificate of decrease rather than by an amendment of the articles of incorporation. The decrease is voted upon at a stockholders' meeting and a certificate filed and recorded with the proper authorities.¹³¹ The written assent of the stockholders is sufficient in some states and no stockholders' meeting is required.

What is a reduction of capital stock. A reduction is effected only when the amount of the authorized and fixed capital stock is diminished. Where the corporation simply reduces the number of par value shares without impairing its capital, there is no real reduction.¹³² For example, if a corporation having a fixed capital stock of \$10,000, divided into 100 shares of the par value of \$100 each, reduces the number of shares to 50 and changes the par value of each share to \$200, no real reduction has been made. The capital stock is still \$10,000.

The mere act of reclassifying capital stock without changing the number of shares cannot be held to be a reduction, any more than an increase.¹³³ Nor does a corporation reduce its stock by purchasing shares, where it does not retire them but sells or transfers them to others, or holds them ready for such sale or transfer.¹³⁴

Stockholders' rights upon reduction of capital stock. In the absence of express statutory provision to the contrary, the right of the individual stockholder to his proportionate voice in the conduct of the affairs of the corporation, and an equitable interest in its property which his stock gives him when he becomes a stockholder, must be preserved. So, if stock is reduced, it must

¹³⁰ For procedure upon amendment of charter, see page 703.

¹³¹ Where upon reduction of capital stock by purchase of its shares, the corporation failed to file the requisite certificate or to make the requisite publication, it was held that the corporation could not later set up its own failure to comply with the statutory requirements in an effort to set aside the purchase. *Security Nat. Bank v. Crystal Ice & Fuel Co.*, (1937) 145 Kan. 899, 67 P. (2d) 527.

¹³² *State ex rel. Radio Corp. of America v. Benson*, (1924) 32 Del. 576, 128 A. 107.

¹³³ *California Telephone & Light Co. v. Jordan*, (1912) 19 Cal. App. 536, 126 P. 598.

¹³⁴ *Ruffner v. Sophie Mae Candy Corp.*, (1926) 35 Ga. App. 114, 132 S. E. 396. See also *Barrett v. W. A. Webster Lumber Co.*, (1931) 275 Mass. 302, 175 N. E. 765; *Scriggins v. Thomas Dalby Co.*, (1935) 290 Mass. 414, 195 N. E. 749; *Starring v. American Hair and Felt Co.*, (1937) (Del. Ch.), 191 A. 887.

be done in such a way that a stockholder has the same proportionate interest in the corporation that he had before the retirement.¹³⁵ Each stockholder should be allowed to surrender such proportion of his stock as the amount of the proposed reduction bears to the whole amount of the capital stock.¹³⁶ If the corporation purchases stock for retirement, it should be acquired ratably from each stockholder who desires to sell.¹³⁷ After a valid reduction, the corporation can require a stockholder to accept a certificate for a fractional part of the shares originally held by him.¹³⁸ If the corporate stock is divided into preferred and common stock, there must be a reduction of both in the proportion that the issue of each bears to the other, unless the statute provides otherwise.¹³⁹ All the stockholders may, however, consent to a reduction in an unequal proportion.¹⁴⁰ These statements have no application, of course, where, under statutory authority, different methods may be pursued to effect a reduction. Upon compliance with the statute, a reduction of any class of stock may be effected even if it results in a change of a stockholder's interest in the corporation.

In some states, the statutes specifically provide that any class of stock may be reduced. The vote of each class of stockholders is sometimes required to effect a reduction.

Creditors' rights upon reduction of capital stock. The capital stock cannot be reduced to the prejudice of existing creditors. The statutes in many states provide, expressly or impliedly, that a reduction in capital stock cannot be made if it will impair the corporation's ability to meet its obligations.¹⁴¹

A reduction of stock cannot relieve those who were stock-

¹³⁵ *Page v. American and British Mfg. Co.*, (1908) 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734; *Hildreth v. Western Realty Co.*, (1932) 62 N. D. 233, 242 N. W. 679.

¹³⁶ *Currier v. Lebanon Slate Co.*, (1875) 56 N. H. 262.

¹³⁷ *General Inv. Co. v. Bethlehem Steel Corp.*, (1917) 87 N. J. Eq. 234, 100 A. 347; *Ocean City Title & Trust Co. v. Strand Properties, Inc.*, (1930) 106 N. J. Eq. 25, 149 A. 817, aff'd 107 N. J. Eq. 594, 153 A. 906. This does not mean, however, that a corporation cannot purchase its own stock in the open market. *Downs v. Jersey Central Power & Light Co.*, (1934) 115 N. J. Eq. 448, 171 A. 306.

¹³⁸ *Perry v. Bank of Commerce*, (1919) 118 Miss. 852, 80 So. 332.

¹³⁹ *Page v. American and British Mfg. Co.*, *supra* (Note 135).

¹⁴⁰ *In Security Nat. Bank v. Crystal Ice & Fuel Co.*, (1937) 145 Kan. 899, 67 P. (2d) 527, a reduction of stock by purchase from a single stockholder was upheld, where the resolution of the stockholders authorizing a reduction contained no provision for method of reduction.

¹⁴¹ For a discussion of the rights of creditors upon the reduction of capital stock, under the various statutes, see 47 *Harvard Law Review* 693 (1933).

holders at the time of the reduction from their liability to creditors for unpaid subscriptions. For example, if a corporation having a fixed capital stock of \$20,000, all of which has been issued and is outstanding, has received payment of only \$10,000 on account from stockholders, the corporation cannot reduce its capital stock to \$10,000 and relieve the stockholders from payment of the balance due from them to the prejudice of creditors. Such a release would be ineffectual as to existing creditors. Subsequent creditors, however, cannot complain of a prior reduction,¹⁴² nor can they hold liable stockholders to whom fully paid stock has been issued.¹⁴³ A corporation cannot reduce its capital stock by purchasing the stock of a delinquent stockholder and excusing him from payment of an assessment on his stock.¹⁴⁴

Distribution of assets after reduction of capital stock. A corporation must, after a reduction of its capital stock, have on hand actual available assets equal to the issued capital stock plus the amount necessary to cover all liabilities. The capital must not be impaired. Where, upon a valid reduction, there is an excess of funds over and above the required amount indicated, it has been held that the corporation may distribute this surplus.¹⁴⁵

Reclassification of stock. A reclassification of stock may be effected by:

1. *The issuance of one or more additional classes of stock.*¹⁴⁶ A corporation that had only common stock was held authorized to change its corporate structure by issuing a smaller amount of common stock and a new issue of preferred stock.¹⁴⁷ Similarly, the issuance of prior preference stock with preference over existing preferred stock has been upheld.¹⁴⁸

¹⁴² *Rice v. Thomas*, (1919) 184 Ky. 168, 211 S. W. 428.

¹⁴³ *In re State Ins. Co.*, (1882) 14 F. 28.

¹⁴⁴ *Currier v. Lebanon Slate Co.*, (1875) 56 N. H. 262.

¹⁴⁵ *Strong v. The Brooklyn Cross-Town Railroad Company*, (1883) 93 N. Y. 426; *Page v. American & British Mfg. Co.*, (1908) 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734; *Benas v. Title Guaranty & Trust Co.*, (1924) 216 Mo. App. 53, 267 S. W. 28; *Chisnell v. Ozier Co.*, (1942) 140 Ohio St. 355, 44 N. E. (2d) 464; *Jay Ronald Co., Inc. v. Marshall Mortgage Corp.*, (1943) 291 N. Y. 227, 52 N. E. (2d) 108, discussed in 29 *Cornell Law Quarterly* 114 (1943).

¹⁴⁶ *Ainsworth v. Southwestern Drug Corp.*, (1938) 95 F. (2d) 172; *In re Kinney*, (1939) 279 N. Y. 423, 18 N. E. (2d) 645, discussed in 52 *Harvard Law Review* (1939) 1011 and in 39 *Columbia Law Review* 1037 (1939); followed in *In re Woodruff*, (1941) 175 N. Y. Misc. 819, 26 N. Y. Supp. (2d) 679.

¹⁴⁷ *Heller Inv. Co. v. Southern Title & Trust Co.*, (1936) 17 Cal. App. (2d) 202, 61 P. (2d) 807.

¹⁴⁸ *General Inv. Co. v. American Hide & Leather Co.*, (1925) 98 N. J. Eq. 326,

2. *Changing the number of shares, the par value, designations, preferences, or relative, participating, optional, or other special rights*¹⁴⁹ *of existing shares, or the qualifications, limitations, or restrictions of such rights.*¹⁵⁰ The probabilities of a dividend payment to a certain class of stock can be reduced by charter amendment creating a class of stock with priority over the existing class, if such an amendment is permitted by statute.¹⁵¹

Not all changes in the corporate structure of a corporation constitute a reclassification of stock. For example, making non-callable stock callable is neither classification nor reclassification. It is the creation of a new right in favor of the corporation, resulting in the destruction of an absolute ownership.¹⁵² Nor is a change of shares of one class into shares of another class necessarily a reclassification under the governing statute.¹⁵³

In some states, the statutes specifically authorize reclassification upon the vote or consent of a fixed proportion of stockholders.¹⁵⁴ An amendment of the charter is generally required

129 A. 244. See also *Shanik v. White Sewing Machine Corp.*, (1940) 25 Del. Ch. 154, 15 A. (2d) 169, aff'd Apr. 18, 1941, discussed in 7 *U. Pittsburgh Law Review* 326 (1941).

¹⁴⁹ For change of voting rights by amendment of charter, see page 407.

¹⁵⁰ A corporation was held to have the right under the statute to amend its charter so as to change 7% cumulative preferred stock to a new 5% stock. *Harbine v. Dayton Malleable Iron Co.*, (1939) 61 Ohio App. 1, 22 N. E. 281, discussed in 6 *Ohio State Law Journal* 313 (1940). See also *Wagstaff v. Holly Sugar Corporation*, (1938) 253 N. Y. App. Div. 616, 3 N. Y. Supp. (2d) 552, aff'g 165 N. Y. Misc. 530, 1 N. Y. Supp. (2d) 36; *Goldman v. Postal Telegraph, Inc.*, (1943) 52 F. Supp. 763; *Brown v. McLanahan*, (1944) 58 F. Supp. 345; *Wessel v. Guantanamo Sugar Co.*, (1944) 134 N. J. Eq. 271, 35 A. (2d) 215, aff'd, (1944) 135 N. J. Eq. 506, 39 A. (2d) 431.

¹⁵¹ *Shanik v. White Sewing Machine Corp.*, (1940) 25 Del. Ch. 154, 15 A. (2d) 169, aff'd (1941) 19 A. (2d) 831, discussed in 7 *U. Pittsburgh Law Review* 326 (1941); *Johnson v. Fuller*, (1940) 36 F. Supp. 744, aff'd 121 F. (2d) 618, discussed in 27 *Va. Law Review* 954 (1941).

¹⁵² *Breslav v. New York & Queens Elec. L. & P. Co.*, (1936) 249 N. Y. App. Div. 181, 291 N. Y. Supp. 932, discussed in 46 *Yale Law Jour.* 1055 (1937). This case was cited in *Albrecht, Maguire & Co. v. General Plastics*, (1939) 256 N. Y. App. Div. 134, 9 N. Y. Supp. (2d) 415, aff'd 280 N. Y. 840, 21 N. E. (2d) 887, holding that under the New York statute authorizing classification and reclassification of shares, a corporation could not by charter amendment take away the preëemptive right of shareholders. The *Albrecht* case is discussed in 25 *Cornell Law Q.* 124 (1940).

¹⁵³ *Davison v. Parke, Austin & Lipscomb*, (1940) 173 N. Y. Misc. 782, 19 N. Y. Supp. (2d) 117, discussed in 16 *Temple University Law Quarterly* 93 (1941).

¹⁵⁴ See the following cases in which reclassification by the required proportion was involved: *Sellers v. Joseph Bancroft & Sons*, (1938) 23 Del. Ch. 13, 2 A. (2d) 108, discussed in 37 *Michigan Law Rev.* 803 (1939); *McQuillen v. National Cash Register Co.*, (1939) 27 F. Supp. 639, aff'd, (1940) 112 F. (2d) 877, cert. denied,

to effect the reclassification,¹⁵⁵ since the various classes into which the capital stock of the corporation is divided are fixed in the charter. In some states, however, as in the case of increase and decrease of stock, reclassification may be effected by filing of a certificate with designated state authorities signed by the officers of the corporation, upon consent of the stockholders at a duly convened meeting. In a few states, a stockholder dissenting from an alteration in the preferential rights attaching to his stock may have an appraisal of his shares.¹⁵⁶

Amendment of charter to eliminate dividend arrearages. The question of whether holders of cumulative preferred stock on which accrued dividends are unpaid¹⁵⁷ can be deprived of such dividend arrearages by charter amendment has been the subject of considerable litigation. Elimination of such dividends has generally been attempted by corporations in the process of

(1940) 311 U. S. 695, 61 S. Ct. 140, rehearing denied, (1940) 311 U. S. 729, 61 S. Ct. 316, discussed in 54 *Harvard Law Review* 754 (1941); *Kamena v. Janssen Dairy Corp.*, (1940) 36 F. Supp. 512, c.c. *Kamena v. Sander*, (1943) 133 N. J. Eq. 214, 31 A. (2d) 200; *Commercial Nat. Bank of Charlotte, N. C. v. Mooresville Cotton Mills*, (1942) 222 N. C. 305, 22 S. E. (2d) 913; *Bailey v. Tubize Rayon Corp.*, (1944) 56 F. Supp. 418; *Kamena v. Janssen Dairy Corp.*, (1943) 133 N. J. Eq. 214, 31 A. (2d) 200, aff'd (1944) 134 N. J. Eq. 359, 35 A. (2d) 894; *Barrett v. Denver Tramway Corp.*, (1944) 53 F. Supp. 198, aff'd (1944) 146 F. (2d) 701, discussed in 54 *Yale Law Journal* 840 (1945).

¹⁵⁵ For general principles relating to an amendment of the charter, see page 702, et seq.

¹⁵⁶ See *In re Silberkraus*, (1929) 250 N. Y. 242, 165 N. E. 279, and *Matter of Seiler*, (1933) 239 N. Y. App. Div. 400, 267 N. Y. Supp. 567, interpreting such a statute. Under such a statute, the creation of a new class of stock with preferences prior to existing preferred stock was held not to be a change in preferential rights. *In re Dresser*, (1928) 247 N. Y. 553, 161 N. E. 779, aff'g 221 N. Y. App. Div. 786, 223 N. Y. Supp. 864. To same effect, *Matter of Kinney*, (1939) 279 N. Y. 423, 18 N. E. (2d) 645, rev'g 254 N. Y. App. Div. 660, 4 N. Y. Supp. (2d) 377, discussed in "Rights of Preferred Stockholder After Recapitalization Under New York Stock Corporation Law," 39 *Columbia Law Rev.* 1037 (1939). This case held, however, that a transfer from capital to surplus did constitute an alteration entitling the stockholder to an appraisal of his shares. See also *Bruckmann v. Bruckmann Co.*, (1938) 12 Ohio Opinions 44; *In re Ehrman* (General Telephone Corp.), (1940) *N. Y. Law Journal*, May 4, 1940; *McNulty v. W. & J. Sloane*, (1945) 184 N. Y. Misc. 835, 54 N. Y. S. (2d) 253, discussed in 20 *N. Y. U. Law Quarterly Review* 509 (1945) and in 54 *Yale Law Journal* 840 (1945).

See 42 *Yale Law Journal* 952, in which the subject of capital reclassification as an alteration of preferential rights under appraisal statutes is discussed.

It has been held that, in absence of fraud or illegality, statutory remedy of stockholder dissenting from amendment of articles of incorporation recapitalizing corporation is exclusive. *Locke v. Standard Supply Co.*, (1939), March 15, 1939, Court of Common Pleas, Scioto County, Ohio.

¹⁵⁷ The right of holders of cumulative preferred stock to accumulated dividends is discussed on page 627.

reclassification of stock or readjustment of the corporate structure.¹⁵⁸ According to the weight of authority, preferred stockholders cannot be directly¹⁵⁹ deprived of accrued accumulated dividends by amendment of the charter¹⁶⁰ in the absence of

¹⁵⁸ See 46 *Yale Law Jour.* 985 (1937), discussing the practical business problems to be met by recapitalization.

¹⁵⁹ It has been pointed out that pressure can be brought indirectly upon dissenters to induce them "voluntarily" to effect an exchange of stock upon reclassification and to forego their right to accrued dividends. Becht, "The Power to Remove Accrued Dividends by Charter Amendment," 25 *Columbia Law Review* 633 (1940).

¹⁶⁰ The Delaware courts have protected accrued dividends of stockholders. See *Morris v. American Public Utilities Co.*, (1923) 14 Del. Ch. 136, 122 A. 696; *Keller v. Wilson & Co.*, (1936) 21 Del. Ch. 391, 190 A. 115, discussed in 3 *U. Chicago L. Rev.* 327 (1937), 36 *Columbia Law Rev.* (1937); *Consolidated Film Industries v. Johnson*, (1937) 22 Del. Ch. 407, 197 A. 489, aff'g 194 A. 844, discussed in 32 *Ill. Law Rev.* 478 (1937) and in 16 *Chi-Kent Rev.* 286 (1938); *Yoakam v. Providence Biltmore Hotel Co.*, (1929) 34 F. (2d) 533; *Dunn v. Wilson & Co.*, (1943) 51 F. Supp. 655; *Frank v. Wilson & Co.*, (1943) (Del.) 32 A. (2d) 277.

In *Federal United Corp. v. Havender*, (1940) (Del.) 11 A. (2d) 331, discussed in 24 *Minn. Law Rev.* 992 (1940), the Delaware Supreme Court distinguished merger from charter amendment, and refused to apply the rule protecting dividend arrearages.

See also *Shanik v. White Sewing Machine Corp.*, (1940) (Del. Ch.) 15 A. (2d) 169, aff'd Apr. 18, 1941, discussed in 7 *U. of Pittsburgh Law Rev.*, (1941) 326; *Ainsworth v. Southwestern Drug Corp.*, (1938) 95 F. (2d) 172.

The New Jersey courts have likewise protected stockholders' rights to accrued dividends. *Colgate v. U. S. Leather Co.*, (1907) 73 N. J. Eq. 72, 67 A. 657, rev'd on other grounds 75 N. J. Eq. 229, 72 A. 126; *Lonsdale Securities Corp. v. Internat'l Mercantile Marine Co.*, (1927) 101 N. J. Eq. 554, 139 A. 50; *General Investment Co. v. American Hide & Leather Co.*, (1925) 98 N. J. Eq. 326, 129 A. 244. But cf. as to mergers, *Windhurst v. Central Leather Co.*, (1930) 105 N. J. Eq. 621, 149 A. 36. See also "The Right to Divest Accumulated Accrued Arrears on Cumulative Preferred Stock upon Corporate Recapitalization," 4 *Univ. of Newark Law Rev.* 323 (1939); *Buckley v. Cuban American Sugar Co.*, (1940) 129 N. J. Eq. 322, 19 A. (2d) 820. Note that the present New Jersey law specifically permits charter amendments to satisfy rights in respect to dividends in arrears, by issuance of stock therefor, or otherwise. See also *Wessel v. Guantanamo Sugar Co.*, (1944) 134 N. J. Eq. 271, 35 A. (2d) 215.

Accrued dividends of stockholders have been protected in other jurisdictions. *Yoakam v. Providence Biltmore Hotel Co.*, (1929) 34 F. (2d) 533; *Patterson v. Durham Hosiery Mills*, (1939) 214 N. C. 806, 200 S. E. 906; *Harbine v. Dayton Malleable Iron Co.*, (1939) 61 Ohio App. 47, 22 N. E. (2d) 280; discussed in 6 *Ohio State Law Journal* 313 (1940); *Patterson v. Mills*, (1940) 216 N. C. 728, 6 S. E. (2d) 531; *Clark v. Henrietta Mills*, (1941) 219 N. C. 1, 12 S. E. (2d) 682; *Western Foundry Co. v. Wicker*, (1948) 335 Ill. App. 106, 80 N. E. (2d) 548.

Prior to 1943, the New York courts had protected stockholders' accrued dividends. See *Roberts v. Roberts Wick Co.*, (1906) 184 N. Y. 257, 77 N. E. 13; *Wiedersum v. Atlantic Cement Products, Inc.*, (1941) 261 N. Y. App. Div. 305, 25 N. Y. Supp. (2d) 496; *Davison v. Parke, Austin & Lipscomb, Inc.*, (1941) 285 N. Y. 500, 35 N. E. (2d) 618, discussed in 16 *Temple University Law Quarterly* 93 (1941); *Longson v. Beaux-Arts Apartments, Inc.*, (1942) 265 N. Y. App. Div. 951, 38 N. Y. S. (2d) 605. But in the leading case of *McNulty v. W. & J. Sloane*,

express statutory provision to the contrary. A few decisions, however, have upheld the right of a proportion of the stockholders to cancel accrued dividends by charter amendment.¹⁶¹ The statutes in some states now explicitly give corporations the power to cancel accrued accumulated dividends by charter amendment, and give dissenting stockholders the remedy of appraisal and payment for their shares. But statutes giving the corporation general powers of amendment do not confer power to alter a previous contract between the corporation and its stockholders in relation to accrued dividends.¹⁶² Even in those states prohibiting elimination of dividend arrearages by charter amendment, it has been held that a stockholder may be barred from asserting his rights to the dividends by circumstances showing acquiescence or laches.¹⁶³ Thus, where a stockholder owns pre-

(1945) 184 N. Y. Misc. 835, 54 N. Y. S. (2d) 253, discussed in 20 *N. Y. U. Law Quarterly Review* 509 (1945), 54 *Yale Law Journal* 840 (1945), the court upheld the constitutionality of an amendment of the N. Y. Stock Corporation Law in 1943 permitting the alteration or cancellation of stockholders' rights to accrued but undeclared dividends by charter amendment.

Court decisions and statutes dealing with the power of corporations to cancel accrued and unpaid dividends by charter amendment, merger, or other method are discussed at length in Meck, "Accrued Dividends on Cumulative Preferred Stocks: The Legal Doctrine," 55 *Harvard Law Review* 77; Dodd, "Fair and Equitable Recapitalizations," 55 *Harvard Law Review* 780; Latty, "Fairness—The Focal Point in Preferred Stock Arrearage Elimination," 29 *Virginia Law Review* 1. See also "Corporate Capitalization," Chester Rohrich, 1 *Vanderbilt Law Review* 533, 561 (June, 1948).

¹⁶¹ The leading case is *McQuillen v. National Cash Register Co.*, (1939) 27 F. Supp. 639, discussed in 88 *Univ. of Pa. Law Rev.* 114 (1939), aff'd (1940) 112 F. (2d) 877, cert. denied, (1940) 311 U. S. 695, 61 S. Ct. 140, rehearing denied, (1940) 311 U. S. 729, 61 S. Ct. 316, discussed in 54 *Harvard Law Review* (March 1941) 754. For a collation of cases, see Dodd, "Dissenting Stockholders and Amendments of Corporate Charters," 75 *U. of Pa. Law Rev.* 723 (1927); Curran, "Minority Stockholders and the Amendment of Corporate Charters," 32 *Mich. Law Rev.* 743 (1933), 35 *Mich. Law Rev.* 620 (1937), 46 *Yale Law J.* 985 (1937).

See also *Blumenthal v. Di Giorgio Fruit Corp.*, (1939) 30 Cal. App. (2d) 11, 85 P. (2d) 581; *Gidwitz v. Armour & Co.*, (1939) (Ill. App.) 20 N. E. (2d) 175; *Johnson v. Lamprecht*, (1938) 133 Ohio St. 567, 15 N. E. (2d) 127, discussed in 33 *Illinois Law Rev.* 212 (1938); *Johnson v. Bradley Knitting Co.*, (1938) 228 Wis. 566, 280 N. W. 688, discussed in 6 *Univ. of Chicago Law Rev.* 104 (1938); *Johnson v. Fuller*, (1940) 36 F. Supp. 744, discussed in 27 *Va. Law Review* 954 (1941); *McNulty v. W. & J. Sloane*, *supra* (Note 160).

¹⁶² *Keller v. Wilson & Co.*, (1936) 21 Del. Ch. 391, 190 A. 115, discussed in 25 *Cornell Law Q.* 431 (1940); *Pronick v. Spirits Distributing Co.*, (1899) 58 N. J. Eq. 97, 42 A. 586; *Wheatley v. A. I. Root Co.*, (1945) 79 Ohio App. 93, 72 N. E. (2d) 482, aff'd in part and rev'd in part 147 Ohio St. 127, 69 N. E. (2d) 187.

¹⁶³ *Frank v. Wilson & Co., Inc.*, (1939) 24 Del. Ch. 237, 9 A. (2d) 82; *Romer v. Porcelain Products*, (1938) 22 Del. Ch. 52, 2 A. (2d) 75. See also *Bay Newfoundland Co. v. Wilson & Co.*, (1939) 24 Del. Ch. 30, 4 A. (2d) 668, in which this principle was recognized, but in which it was held that under the particular cir-

ferred and common shares and exchanges the common stock pursuant to a recapitalization plan, he cannot thereafter complain of the elimination of dividends and other changes in the preferred stock made pursuant to the same plan.¹⁶⁴

Amendment of by-laws—power to amend. A corporation has the inherent power to amend its by-laws as an incident of its existence.¹⁶⁵ Ordinarily the by-laws may be changed at the will of the corporation, provided the amended by-law is:

1. Consistent with law.¹⁶⁶
2. Consistent with the corporate charter.¹⁶⁷
3. Consistent with reason.¹⁶⁸
4. Capable of being complied with.¹⁶⁹
5. Not violative of a vested or contract right.¹⁷⁰

A person who becomes a stockholder does so with knowledge that the corporation's by-laws may be amended. However, while the corporation may so amend its by-laws as to make reasonable changes in the methods of administering its affairs, the manner of conducting its business, and the like, no change can be made

cumstances, the stockholder was not guilty of laches. See also *Trounstone v. Remington Rand, Inc.*, (1937) 22 Del. Ch. 122, 194 A. 95, discussed in 36 *Michigan Law Rev.* 662 (1938); *Clark v. Henrietta Mills*, (1941) 219 N. C. 1, 12 S. E. (2d) 682; *Davison v. Parke, Austin & Lipscomb*, (1941) 285 N. Y. 500, 35 N. E. (2d) 618, discussed in 16 *Temple University Law Quarterly* 93 (1941); 19 *N. Y. U. Law Quarterly Review* 196 (1942).

¹⁶⁴ *Harvey v. National Drug Co.*, (1937) 30 Pa. D. & C. 318.

See Footnote 27, Chapter 33, for decisions upholding the right to eliminate dividend arrearages by merger or consolidation.

¹⁶⁵ *Interstate B. & L. Ass'n v. Wooten*, (1901) 113 Ga. 247, 38 S. E. 738; *Miller v. Farmers' Milling & Elevator Co.*, (1907) 78 Neb. 441, 110 N. W. 995; *Engelhardt v. Fifth Ward Permanent Dime Sav. & Loan Ass'n*, (1896) 148 N. Y. 281, 42 N. E. 710; *Germania Iron Min. Co. v. King*, (1896) 94 Wis. 439, 69 N. W. 181; *Steen v. Modern Woodmen of America*, (1921) 296 Ill. 104, 129 N. E. 546.

¹⁶⁶ *Farrier v. Ritzville*, (1920) 116 Wash. 522, 199 P. 984.

¹⁶⁷ *Bullard v. Nat. Bank*, (1873) 85 U. S. 923, 18 Wall. (U. S.) 589; *Brooks v. State*, (1911) 26 Del. 1, 79 A. 790; *Mutual Fire Ins. Co. v. Farquhar*, (1898) 86 Md. 668, 39 A. 527; *Koloff v. St. Paul Fuel Ex.*, (1892) 48 Minn. 215, 50 N. W. 1036; *Nicholson v. Franklin Brewing Co.*, (1910) 82 Ohio 94, 91 N. E. 991; *Temple v. Dodge*, (1895) 89 Tex. 69, 33 S. W. 222, 32 S. W. 514. An amendment of a by-law may be in fact an amendment of the charter. *Brown v. Little, Brown & Co.*, (1929) 269 Mass. 102, 168 N. E. 521.

¹⁶⁸ *State v. Jessup & Moore Paper Co.*, (1910) 24 Del. 379, 77 A. 16; *Saltman v. Nesson*, (1909) 201 Mass. 534, 88 N. E. 3.

¹⁶⁹ See footnote 168.

¹⁷⁰ *Born v. Beasley*, (1921) 145 Tenn. 64, 235 S. W. 62. See also *Thomson v. Thomson*, (1921) 220 Ill. App. 486; *Cowles v. Cowles Realty Co.*, (1922) 201 N. Y. App. Div. 460, 194 N. Y. Supp. 546; *McConnell v. Owyhee Ditch Co.*, (1930) 132 Ore. 128, 283 P. 755; *Bay City Lumber Co. v. Anderson*, (1941) 8 Wash. (2d) 191, 111 P. (2d) 771; *Hueftle v. Farmers Elevator*, (1944) 145 Neb. 424, 16 N. W. (2d) 855.

which will deprive a stockholder of a substantial right conferred expressly or impliedly by his contract with the corporation.¹⁷¹

Who may amend by-laws. Inasmuch as the stockholders and not the directors constitute the corporation, the stockholders ordinarily are intrusted with the power to amend the by-laws.¹⁷² The charter of the corporation or a statute may, however, vest the power in the directors.¹⁷³ The stockholders themselves may also delegate the power to the directors by resolution.¹⁷⁴ Even if the directors of a corporation may adopt laws for their government, they have no power to amend the regulations adopted by the stockholders, unless such power is expressly given to them.¹⁷⁵

In many of the states the statutes specifically indicate who shall have the power to amend by-laws and prescribe the method of such amendment. The regulations in such instances must be strictly followed in order to render the by-law valid. A common statutory provision is this: that the power to make and alter by-laws is in the stockholders, that the certificate of incorporation may confer that power on the directors, and that the by-laws made by the directors under the conferred power may be altered or repealed by the stockholders.

In some instances both directors and stockholders have power to make and alter by-laws. The directors, in that event, may make necessary by-laws subject to the by-laws, if any, adopted by the stockholders. They cannot change the by-laws adopted by the stockholders.

It is customary to include in the by-laws a provision for their amendment. This provision must be consistent with statutory or charter requirements.¹⁷⁶

Manner of amending by-laws. If the statute prescribes a particular mode of amending a by-law, that mode must be fol-

¹⁷¹ *Farrier v. Ritzville*, supra (Note 166).

¹⁷² *State ex rel. Carpenter v. Kreutzer*, (1919) 100 Ohio St. 246, 126 N. E. 54. Directors cannot adopt by-laws unless specially authorized by statute, charter, or vote of stockholders. *Arizona Southwest Bank v. Odam*, (1931) 38 Ariz. 394, 300 P. 195. See also *S.E.C. v. Transamerica Corp.*, (1946) 67 F. Supp. 326.

¹⁷³ Where a statute provides that by-laws made by directors under power conferred to them by the stockholders may be altered or repealed by the stockholders, the latter have the power to make and alter by-laws, even though the charter gives the directors that power. *Rogers v. Hill*, (1933) 289 U. S. 582, 53 S. Ct. 731, rev'g 62 F. (2d) 1079. *Templeman v. Grant*, (1924) 75 Colo. 519, 227 P. 555.

¹⁷⁴ *Hingston v. Montgomery*, (1906) 121 Mo. App. 451, 97 S. W. 202.

¹⁷⁵ *State ex rel. Carpenter v. Kreutzer*, (1919) 100 Ohio 246, 126 N. E. 54; *In re Buckley, Jr.*, (1944) 183 N. Y. Misc. 189, 50 N. Y. Supp. (2d) 54.

¹⁷⁶ See *Powers v. Marine Engineers' Beneficial Ass'n*, (1921) (Cal. App.) 199 P. 353.

lowed.¹⁷⁷ If it does not specify the manner of amendment, the method is usually fixed in the by-laws themselves. In that case, the by-law regulations as to notice and vote necessary to effect an amendment govern.¹⁷⁸

The states are not in accord as to the number of stockholders' votes necessary to amend a by-law. Some states require a majority vote, others a two-thirds vote. If the statute makes no provision as to the number of votes necessary, the requirements laid down in the by-laws themselves are to be followed.

Subject to certain limitations, a by-law may be amended by custom, usage, or the acquiescence of the stockholders to corporate acts in disregard of the by-law.¹⁷⁹ The unanimous consent by the stockholders to a regular course of action inconsistent with the by-laws may justify the conclusion that an amendment to the by-laws was intended.¹⁸⁰ Non-usage of a by-law may also work its abrogation.¹⁸¹ Likewise, the constant disregard of a by-law by the board of directors with the acquiescence of the stockholders may effect its repeal or modification.¹⁸²

One who contends that a written by-law has been amended by a custom has the burden of establishing the existence of such custom.¹⁸³

¹⁷⁷ See *Noble v. California, etc. Assn.*, (1929) 98 Cal. App. 230, 276 P. 636; *Klein v. Scranton Life Ins. Co.*, (1940) 139 Pa. Super. 369, 11 A. (2d) 770; *Benintendi v. Kenton Hotel, Inc.*, (1943) 181 N. Y. Misc. 897, 45 N. Y. Supp. (2d) 705, aff'd 50 N. Y. Supp. (2d) 843, aff'd in part and rev'd in part, (1945) 294 N. Y. 112, 60 N. E. (2d) 829, followed in *Wohl v. Avon Electrical Supplies*, (1945) (N. Y. S. Ct.) 55 N. Y. Supp. (2d) 252, discussed in 19 *St. John's Law Review* 144 (April 1945); 45 *Columbia Law Review* 960 (Nov. 1945); 20 *N. Y. U. Law Quarterly Review* 513 (Oct. 1945).

¹⁷⁸ Where by-laws required amendments thereof to be made at regular meetings of the board, an amendment adopted at a meeting other than a regular one, with two members absent, was not properly adopted. *Moon v. Moon Motor Car Co.*, (1930) 17 Del. Ch. 176, 151 A. 298.

Where notice of stockholders' meeting did not advise stockholders that amendment of the by-laws classifying directors would be voted upon, it was held that the amendment was invalid, and that directors elected under it were illegally elected. *Klein v. Scranton Life Ins. Co.*, supra (Note 177).

¹⁷⁹ *Bay City Lumber Co. v. Anderson*, (1941) 8 Wash. (2d) 191, 111 P. (2d) 771, discussed in 30 *California Law Review* 195 (January 1942).

¹⁸⁰ *In re Ivey & Ellington*, (1945) (Del. Ch.) 42 A. (2d) 508.

¹⁸¹ *Bay City Lumber Co. v. Anderson*, supra (Note 179); *Elliott v. Lindquist*, (1946) Ct. Com. Pleas, Allegheny Co., Pa., 94 *Pittsburgh Law Journal* 295; *Pomeroy v. Westaway*, (1947) 189 N. Y. Misc. 307, 70 N. Y. S. (2d) 449.

¹⁸² Where directors have power to alter by-laws made by shareholders, contract entered into by board inconsistent with existing by-law operates as amendment of by-laws to extent of the inconsistency. *Hill v. American Co-operative Ass'n*, (1940) 195 La. 590, 197 So. 241, discussed in 3 *Louisiana Law Review* 235 (Nov. 1940).

¹⁸³ *Belle Isle Corporation v. MacBean*, (1946) (Del. Ch.) 49 A. (2d) 5.

How to avoid unnecessary amendments of by-laws. It may often be wiser and far more expedient for a corporation to couch the wording of its by-laws in such general terms that an amendment will not be necessary each time some minor change is desired. Many detailed matters may be safely left to the discretion of the directors to be determined by the adoption of a resolution at the time the particular action is taken. To give one typical illustration of many that may be offered: the by-laws may allow the board to determine by resolution when its regular meetings shall be held instead of definitely fixing a particular meeting date. Should the directors from time to time desire to change the day of meeting an amendment of the by-laws will not be necessary. Of course, the interests of the members of the corporation should be properly safeguarded. In the particular instance mentioned, for example, proper provision should be made in the by-laws for giving all the directors notice of any resolution to be considered thereunder.

CHAPTER 26

RESOLUTIONS RELATING TO AMENDMENT OF CHARTER AND BY-LAWS

No. 535

Resolution of directors recommending amendment of charter and calling stockholders' meeting to consider amendment, setting forth amended certificate of incorporation.

RESOLVED, That the Board of Directors of Corporation does hereby declare it advisable that the Certificate of Incorporation of said Corporation be amended so that, as amended, it shall read as follows:

(Here insert amended certificate of incorporation.)

RESOLVED FURTHER, That a meeting of the stockholders of the Corporation entitled to vote in respect thereof for the consideration of such amendment be and it hereby is called to be held at the office of the Corporation, (*Street*), in the City of, State of, on, 19.., at o'clock in the noon.

RESOLVED FURTHER, That if and when the persons or bodies corporate holding the majority of each class of stock of the Corporation have voted in favor of such amendment, the President or a Vice President, and the Secretary or an Assistant Secretary, of the Corporation be and they hereby are authorized and directed to make, under the seal of the Corporation, a certificate setting forth such amendment, and certifying that such amendment has been duly adopted in accordance with the provisions of Section of Code of the State of as amended, and to file such certificate in the office of the Secretary of State of the State of, and to have a copy thereof certified by said Secretary of State recorded in the office of the Recorder of the County in which the original Certificate of Incorporation of the Corporation is recorded.

No. 536

Resolution of stockholders approving charter amendment recommended by board of directors, and authorizing officers to file certificate, setting forth new provision in full.

WHEREAS, the Board of Directors of the Cor-

poration has declared it advisable that Article, Section, of the charter of the Corporation be changed, amended, and altered, as hereinafter set forth, and

WHEREAS, the stockholders of the Corporation do hereby approve of the said proposed amendment,

RESOLVED, That Article, Section, of the charter of the said Corporation be amended, changed, and altered so as to read as follows:

(Here insert new provision.)

RESOLVED FURTHER, That the Chairman and Secretary of this meeting be and they hereby are authorized and directed to make, execute, and acknowledge a certificate under the corporate seal of this Corporation, embracing the foregoing resolution, and to cause such certificate to be filed and recorded in the manner required by law.

RESOLVED FURTHER, That, upon completion of the proceedings required to effect the amendment hereinabove set forth, a duplicate of the certificate of amendment be set forth in full on the minutes of this meeting.

No. 537

Resolution of stockholders authorizing amendment of certificate of incorporation, setting forth old and new provisions of certificate of incorporation in full.

RESOLVED, That Article First of the Certificate of Incorporation of this Corporation be amended so that said Article, now reading as follows: "First: The name of the Corporation is Company" will, as amended, read as follows: "First: The name of the Corporation is Company"; and further

RESOLVED, That the initial paragraph of Article Fourth of the Certificate of Incorporation of this Corporation be amended so that said paragraph, now reading as follows:

Fourth: The total number of shares of all classes of stock which the Corporation shall have authority to issue is eight hundred seventy-five thousand (875,000), consisting of twenty-five thousand (25,000) shares of 6% Cumulative Convertible Preferred Stock (hereinafter called "Preferred Stock"), of the par value of One Hundred (\$100) Dollars per share, and eight hundred fifty thousand (850,000) shares of Common Stock, of the par value of Ten (\$10) Dollars per share.

will, as amended, read as follows:

Fourth: The total number of shares of all classes of stock which the corporation shall have authority to issue is eight hundred sixty-two thousand three hundred one (862,301), consisting of twelve thousand three hundred one (12,301) shares of 6% Cumulative Convertible Preferred Stock (hereinafter called "Preferred Stock"), of the par value of One Hundred (\$100) Dollars per share, and eight hundred fifty thousand (850,000) shares of Common Stock, of the par value of Ten (\$10) Dollars per share.

RESOLVED, That a certificate setting forth the amendment, certifying that such amendment has been duly adopted in accordance with the provisions of Section of the Corporation Law of the State of, and containing such other statements as may be necessary or advisable, be made under the seal of the Corporation and signed by its President and its Secretary and acknowledged by its said President, and that the said certificate, so executed and acknowledged, be filed in the office of the Secretary of State, and a copy thereof certified by said Secretary of State, be recorded in the office of the Recorder of the County of, in which County the original Certificate of Incorporation is recorded; and further

RESOLVED, That the officers of this Corporation be and they hereby are authorized, empowered, and directed to take any and all further acts or proceedings which they may deem necessary or proper to effectuate the said amendment.

No. 538

Resolution of directors recommending amendment of charter, calling meeting of stockholders to consider amendment, and directing secretary of corporation to serve and publish notice of meeting, setting forth substance of amendment.

RESOLVED, That it is deemed advisable to amend the Articles of Incorporation of this Corporation in the following respects:

1. Reducing the number of its directors from to, and to that end striking out paragraph of said Articles and inserting in lieu thereof "That the number of its directors is"

2. Confirming the change of its principal place of business from (State), to (State), and to that end striking out in paragraph of said Articles the words and inserting in lieu thereof

3. Changing its authorized common stock from shares of the par value of \$. each, to shares of common stock

without par value; and authorizing the issue of shares of such stock without par value for each share of the existing common stock of the par value of \$..... outstanding.

RESOLVED FURTHER, That a special meeting of the stockholders of this Corporation be called to convene on the .. day of, 19.., at o'clock in the noon, in the office of the Corporation in (County), State of, for the purpose of considering the amendment of the Articles of Incorporation in the manner and form hereinabove set forth, and that * the Secretary of this Corporation is hereby directed to serve written notice upon each and every stockholder, stating the time, place, and purpose of said stockholders' meeting as hereinbefore set forth, and specifically stating that an amendment of the Articles of Incorporation in the manner and form aforesaid has been proposed, and to publish the said notice at least once a week in a newspaper published in the county where the principal business of this Corporation is located, for at least days prior to the aforesaid meeting.

No. 539

Resolution of stockholders amending articles of incorporation and providing for publication of amendment, setting forth substance of amendment.

RESOLVED, That the Articles of Incorporation of the Corporation be so amended as to (*insert purpose of amendment here as, for example, to increase or diminish capital stock, increase or decrease the number of directors, change name or location, modify or enlarge business or purposes, or provide anything which might have been provided in the original articles*).

FURTHER RESOLVED, that the President and the Secretary file and record in the time, manner, and place required for filing and recording the original articles, duplicate copies of the aforesaid amendment, with a certificate affixed thereto, signed by the President and the Secretary and sealed with the corporate seal, setting forth the facts required by law, and that they do all other things and acts necessary fully to effect the amendment hereinabove set forth.

FURTHER RESOLVED, that the Secretary of this Corporation be and he hereby is authorized and directed to publish a notice of the aforesaid amendment for the period and in the manner provided by law.

* The following clause may be used instead of the clause given above: "due notice of said meeting be given by the Secretary of this Corporation as required by law."

No. 540

Resolution of stockholders authorizing board of directors to apply for amendment to charter.

WHEREAS, the Board of Directors has duly called a meeting of the stockholders upon days' written notice mailed to each stockholder, to consider the advisability of amending the charter of this Corporation, and

WHEREAS, the stockholders believe that it is to the best interests of the Corporation to amend the charter as hereinafter set forth; it is

RESOLVED, That the charter of the Corporation be amended so as to change Article thereof to read as follows:

(Here insert new article.)

FURTHER RESOLVED, That the Board of Directors be and it hereby is authorized, empowered, and directed to make proper application to the Secretary of State of the State of, for an amendment of the charter in the respects hereinabove mentioned, and to execute, present, and file the applications, petitions, and other documents required by the laws of the State of to effect the aforesaid amendment.

No. 541

Resolution of directors ratifying action of stockholders in amending articles of incorporation.

WHEREAS, at a special meeting of the stockholders of the Corporation, duly called and held in the City of, on the .. day of, 19.., at o'clock, at which meeting shares out of a total of shares of the capital stock of the said Corporation issued and outstanding were represented in person or by proxy, the following resolution was adopted by a majority vote of the said issued and outstanding stock,

RESOLVED, That Article of the Certificate of Incorporation of the Corporation be and the same hereby is amended to read as follows:

(Here insert new provision.)

RESOLVED FURTHER, That the President and Secretary of this Corporation be and they hereby are authorized and directed to make, execute, and acknowledge a certificate under the corporate seal of this Corporation, embracing the foregoing resolution, and to cause such certificate to be filed, recorded, and published in the manner required by law.

AND WHEREAS, the Board of Directors believes it to be to the best

interests of this Corporation that the Articles of Incorporation be amended as recommended by the stockholders,

BE IT RESOLVED, That the resolution of the stockholders hereinabove set forth and said Articles of Incorporation so amended be and they hereby are duly adopted, ratified, and confirmed.

No. 542

Resolution of incorporators to amend certificate of incorporation before payment of capital.

WHEREAS, the original Certificate of Incorporation of this Company was filed in the office of the Secretary of State of the State of, on the .. day of, 19.., and

WHEREAS, a certified copy thereof was duly recorded in the office of the of the State of, in and for the County of, on the .. day of, 19.., and

WHEREAS, no part of the capital of the Company has been paid, it is

RESOLVED, That the said Certificate of Incorporation be modified, changed, and altered so as to read as follows:

(Here insert complete certificate with new provisions.)

FURTHER RESOLVED, That the Chairman of this meeting be and he hereby is authorized and directed to file with the Secretary of State an amended certificate duly signed and acknowledged by the incorporators named in the original Certificate of Incorporation, and to do all other things required by law to effect the aforesaid amendment of the Certificate of Incorporation.

No. 543

Resolution of stockholders approving amendment of certificate of incorporation proposed by directors.

RESOLVED, That the proposal of the Board of Directors that the Certificate of Incorporation of Company be amended by striking out all of the first paragraph of Article Fourth thereof, which reads as follows:

(Here insert old paragraph.)

and by inserting in lieu thereof the following:

(Here insert new paragraph.)

be and the same is hereby approved and adopted, and that the said Certificate of Incorporation be and it is hereby amended accordingly.

No. 544

Resolution of directors calling special meeting of stockholders to pass upon amendment of certificate of incorporation to change corporate name.

RESOLVED, That, in the judgment of the Board of Directors of the Corporation, it is deemed advisable to amend the Certificate of Incorporation so as to change the name of the Corporation from, its present name, to, and that to that end Article be changed to read as follows:

(Here insert new article.)

AND BE IT FURTHER RESOLVED, That a special meeting of the stockholders of this Corporation be and it hereby is called, to be held at the principal office of the Corporation at (Street), (City),, on the .. day of, 19.., at o'clock in the noon, to take action upon the said resolution, and that days' written notice of the said meeting be given personally or by mail to the stockholders by the Secretary of the Corporation.

No. 545

Resolution of directors to institute court proceedings for change of name.

WHEREAS, in the judgment of this Board of Directors, it is to the best interests of this Corporation that its name be changed from, its present name, to

NOW, THEREFORE, BE IT RESOLVED, That the corporate name be accordingly changed to, and that the officers of this Corporation are hereby authorized and directed to take any and all legal steps necessary to institute and complete proceedings as provided by law to accomplish the aforesaid change, and to sign and execute all papers and documents relative and necessary thereto; and

IT IS FURTHER RESOLVED, That the President of the Corporation be and he hereby is authorized and directed to employ, of (Street), (City),, as attorneys of the Corporation for that purpose, and to pay the necessary expenses thereof and disbursements therefor.

No. 546

Resolution of stockholders changing name of corporation.

WHEREAS, by Section of the Act of Assembly incorporating this Company, approved, 19.., it is provided that

“the stockholders of the Company, by and with the consent of the holders of not less than two thirds of the stock, be and they hereby are authorized to change the name and title of the said Company,”

AND WHEREAS, it is now deemed expedient to change the name and title of the Company;

RESOLVED, That the name and title of this Company be changed from the name and title heretofore borne by it—to wit, the Company—to the Company, and that the officers of the Company be and they hereby are empowered and directed to file in the office of the (*designate official and state*) the requisite certificate setting forth the change of name hereby authorized and effected.

No. 547

Resolution of directors amending articles of incorporation to change name, and adopting supplemental articles.

RESOLVED, That the Articles of Incorporation of this Corporation, dated, 19.., and filed in the office of the Secretary of State of the State of, on the .. day of, 19.., and in the office of the Clerk of, on the .. day of, 19.., be amended so as to change the name of the said Corporation from to; that supplemental Articles of Incorporation embodying the said amendment be and they hereby are duly adopted; and that the President and the Secretary of the Corporation be and they hereby are authorized and directed to file, as required by law, the said supplemental Articles of Incorporation and such other notices and documents as are required to effect the aforesaid change of name.

No. 548

Resolution of stockholders authorizing amendment of certificate of incorporation to change principal place of business.

RESOLVED, That the Certificate of Incorporation of the Corporation be amended to change the location of the principal place of business of the Corporation from (*Street*), in the County of, to (*Street*), in the County of, and that the President and the Secretary of the said Corporation are hereby authorized and directed to file all certificates, documents, and papers necessary and to do all the acts required by law to effect the aforesaid amendment.

No. 549

Resolution of directors changing principal place of business on written consent of stockholders, and providing for publication of notice of change.

WHEREAS, the holders of more than two thirds (or such other proportion as may be required by statute) of the issued capital stock of this Corporation—to wit, the holders of shares of the issued capital stock—have consented in writing and authorized and empowered the Board of Directors and officers of this Corporation to change the principal place of business from its present location at (Street), in the County of, State of, to (Street), in the County of, State of, which consent is now on file in the office of this Corporation;

NOW, THEREFORE, BE IT RESOLVED, That the principal place of business of this Corporation be and the same hereby is changed from (Street), in the County of, State of, to (Street), in the County of, State of

FURTHER RESOLVED, That the Secretary of the Corporation is hereby authorized and directed to cause a notice of the aforesaid change to be published at least once a week for three successive weeks (or such other time as is required by statute) in the, a newspaper of general circulation, published in the County of, State of, where the present principal place of business is located.

FURTHER RESOLVED, That the Secretary of the Corporation is hereby authorized and directed to file in each office where the original Articles of Incorporation are, or where any copy thereof is required to be filed, a copy of this resolution, together with a copy of an affidavit showing the above publication, duly certified by the President and the Secretary of the Corporation under the corporate seal;

And the officers of the Corporation be and they hereby are authorized and directed to do any and all other acts necessary in their judgment and required by law to effect the change of the principal place of business of this Corporation as hereinabove provided, in accordance with the laws of the State of

No. 550

Resolution of directors changing location of principal place of business and amending by-laws accordingly.

RESOLVED, That, for the more convenient transaction of its business, the location of the principal office of this Corporation within the state be and the same hereby is changed from (Street),

in the County of, to (Street), in the County of; that the name of the agent therein and in charge thereof, upon whom process against this Corporation may be served, is; and that the officers of the Corporation are hereby authorized and directed to file a copy of this resolution, signed by the President and the Secretary of the Corporation, and sealed with the corporate seal, in the office of the Secretary of State (or of any other official designated by statute).

No. 551

Resolution of stockholders authorizing change of principal place of business.

RESOLVED, That the place where the principal business of the Corporation is to be transacted be and it hereby is changed from (Street), in the County of, to (Street), in the County of, and that the Chairman and the Secretary of this meeting and a majority of the directors of the Corporation are hereby authorized and directed to file the necessary certificate of change of corporate headquarters in the office of the Secretary of State, and to do all other acts necessary to effect the aforesaid change.

No. 552

Resolution of directors calling meeting of stockholders to amend certificate of incorporation to permit business to be done outside the United States.

RESOLVED, That it is advisable to amend the charter of the Corporation as follows:

To amend Article of said charter so as to authorize the Corporation to conduct in any locality outside the United States of America, as well as in the localities now specified in said charter, the carrying on of the business of a telephone, telegraph, cable, and wireless company, and business incidental to such business, as set forth in Subdivision and Subdivision of said Article of said charter, and accordingly to amend said Article so as to read as follows:

To carry on the business of a telephone, telegraph, cable, and wireless company in Cuba, Puerto Rico, and other islands of the West Indies, Mexico, Central America, South America, and Europe, and in any other localities outside of the United States of America, or in any of said localities; to construct, maintain, and operate telegraph, telephone, and cable lines located or to be located in any and

all of said localities; to purchase, acquire, lease, sell, and convey real property and easements, rights of way, or other interest therein, and to construct, maintain, and operate buildings and plants used for or incidental to such purposes, located or to be located in any and all of said localities.

That a meeting of the stockholders of the Corporation to take action upon the amendment advised as aforesaid be and the same hereby is called to convene at the principal office of the Corporation, at
 (Street), City of, State of, on
 (day of week),, 19.., at o'clock
 ..M., and that notice of the said meeting be given as provided by the By-laws.

No. 553

Resolution of directors amending articles of incorporation to change purposes.

RESOLVED, That Section of the Articles of Incorporation be amended so as to extend the business of the Corporation, and to enlarge and change the objects for which it was formed to include the following:

(Here insert purposes in full.)

RESOLVED FURTHER, That a special meeting of the stockholders of the Corporation to take action upon the amendment aforesaid be and it hereby is called, to be held at the principal office of the Corporation at (Street), on the .. day of, 19.., at o'clock in the noon, and that the Secretary of the Corporation be and he hereby is directed to serve the stockholders with notice of the said meeting in the manner provided by the By-laws.

No. 554

Resolution of directors requesting stockholders to approve amendment of charter changing method of electing directors.

WHEREAS, the present Certificate of Incorporation of the Company provides that:

The directors of the Company shall be not less than five (5) and not more than fifteen (15) in number, and shall hold office for five (5) years, and until others are chosen and qualified in their stead. The directors shall be divided as equally as may be into five (5) classes. The seats of the directors of the first class shall be vacated at the expiration of the first year; of the second class, at the expiration of the second year; of the third class, at the expiration of the third year; of the fourth class, at the expiration of the fourth year;

and of the fifth class, at the expiration of the fifth year, so that one fifth ($\frac{1}{5}$) may be chosen every year.

AND WHEREAS, it is considered advisable to amend the Certificate of Incorporation so as to provide for the annual election of not more than nine (9) directors;

THEREFORE, BE IT RESOLVED, That this Board of Directors considers it advisable that the above extract from the Certificate of Incorporation of this Company be stricken out, and in lieu thereof, the following be inserted:

The directors of this Company shall be not more than nine (9) in number, and shall be elected annually by the common stockholders, and shall hold office for one year, and until others are chosen and qualified in their stead.

AND FURTHER RESOLVED, That the officers be requested to call a meeting of the stockholders, to be held at the principal office of the Company, on, 19.., at o'clock in the noon, to take action upon the foregoing resolution.

No. 555

Resolution of stockholders authorizing increase in number of directors and filing by clerk of certificate of change.

WHEREAS, it appears that the number of directors of this Corporation is inconvenient for the transaction of its business, be it

RESOLVED, That the number of directors of Corporation be increased from 5 to 12; and be it further

RESOLVED, That the clerk of said Corporation be and he hereby is authorized and directed to file the required certificate of such change in the number of directors with the Secretary of State of the State of

No. 556

Resolution of stockholders to amend certificate of incorporation to increase or decrease number of directors.

RESOLVED, That the Certificate of Incorporation of the Corporation be amended so as to change the number of directors from to; and that the President (or the Secretary) of the Corporation is hereby authorized to file with the Secretary of State (or with other officials designated by statute) an affidavit of change in the number of directors.

No. 557

Resolution of stockholders extending term of incorporation and authorizing officers to file necessary papers.

WHEREAS, this Corporation was incorporated on the .. day of, 19.., and

WHEREAS, the term of incorporation, according to its Articles of Incorporation, will expire on the .. day of, 19..;

RESOLVED, That the corporate existence of this Corporation be extended for a period of twenty (20) years from and after the date of the expiration of its corporate life, the same being the .. day of, 19.., as aforesaid; and

FURTHER RESOLVED, That the President and the Secretary are hereby authorized and directed to certify this resolution under the corporate seal of the Corporation, to send such certificate to the Secretary of State of the State of, to file duplicate certificates under the seal of the Corporation in the office of the Recorder of Deeds of the County of, State of, and to do all other acts and things necessary and proper to carry into effect the foregoing resolution.

No. 558

Resolution of directors to submit to stockholders proposition extending term of corporate existence, and to obtain stockholders' written assent to extension.

RESOLVED, That it is deemed to be in the best interests of this Corporation to extend the term of its existence for a period of years from the .. day of, 19.., the date of its expiration, and that the proposition so extending the term of the corporate existence be submitted to the stockholders for their written assent.

FURTHER RESOLVED, That, upon obtaining the written assent of stockholders representing two thirds of the capital stock of this Corporation, the President and the Secretary and a majority of the directors of this Corporation be and they hereby are authorized, empowered, and directed to do all acts necessary and proper to carry out the foregoing resolution.

No. 559

Resolution of stockholders amending certificate of incorporation to extend corporate existence.

RESOLVED, as deemed and declared advisable by the Board of Directors of The Company, a corporation of the State

of, at its meeting duly convened and held on
 ..., 19..., that the corporate existence of the Company be extended for
 a period of years from , 19..., to
 ..., 19..., and to that end that Article of the Certificate of
 Incorporation of the Company be amended so as to read as follows:

"Fifth. The period at which the Company shall commence is
 , 19..., and the period at which it shall terminate
 is , 19..."

No. 560

**Resolution of stockholders to amend certificate of incorporation to
 provide for withholding from stockholders of their pre-
 emptive right to subscribe to additional issues of stock.**

RESOLVED, That the Certificate of Incorporation of the
 Corporation be amended by adding the following article:

No holder of any of the shares of the capital stock of the Corpo-
 ration shall be entitled as of right to purchase or to subscribe for any
 unissued stock of any class, or any additional shares of any class, to
 be issued by reason of any increase of the authorized capital stock of
 the Corporation of any class, or bonds, certificates of indebtedness,
 debentures, or other securities convertible into stock of the Corpora-
 tion or carrying any right to purchase stock of any class, but any
 such unissued stock, or such additional authorized issue of any stock,
 or of other securities convertible into stock or carrying any right to
 purchase stock, may be issued and disposed of, pursuant to resolu-
 tions of the Board of Directors, to such persons, firms, corporations,
 or associations and upon such terms as may be deemed advisable by
 the Board of Directors in the exercise of its discretion.

FURTHER RESOLVED, That the officers of this Corporation be and they
 hereby are authorized, empowered, and directed to do all acts neces-
 sary and proper to carry out the foregoing resolution.

No. 561

**Resolution of directors calling special meeting of stockholders to
 take action on amendment of certificate of incorporation
 to increase capital stock.**

RESOLVED, That, in the judgment of the Board of Directors of
 Corporation, it is deemed advisable to amend the
 Certificate of Incorporation so as to increase the capital stock of said
 Corporation, and for that purpose to change Article thereof
 to read as follows:

ARTICLE The total amount of capital stock of this Corporation is eight thousand (8,000) shares, divided into three thousand (3,000) shares of 7 Per Cent Cumulative Preferred Stock of the par value of One Hundred (\$100) Dollars a share (total par value Three Hundred Thousand (\$300,000) Dollars), and five thousand (5,000) shares of common stock without par value.

RESOLVED FURTHER, That a special meeting of the stockholders of this Corporation be and it hereby is called, to be held at the office of the Corporation at (Street), on , 19.., at o'clock in the noon, to take action upon said resolution, and that the Secretary be and he hereby is instructed to notify said stockholders accordingly as required by law.

No. 562

Resolution of directors recommending change in par value of stock and increase in authorized capital stock, additional shares to be used for acquisition of property.

RESOLVED, That, in the judgment of this Board of Directors, it is advisable that the par value of the present authorized common stock of this Company be changed from (\$.....) Dollars per share to (\$.....) Dollars per share, the number of shares into which the same is divided being changed from (.....) shares to (.....) shares, two and one-half shares to be issued for each share of common stock now outstanding;

RESOLVED FURTHER, That, in the judgment of this Board, it is advisable that the authorized capital stock of this Company be increased by (\$.....) Dollars, such increase to consist of (.....) shares of common stock of the par value of (\$.....) Dollars each, so that the total amount of authorized capital stock of the Company will be (\$.....) Dollars, divided into (.....) shares, of which (.....) shares of the par value of (\$.....) Dollars each are preferred stock, and (.....) shares of the par value of (\$.....) Dollars each are common stock; that said additional common shares shall be issued by the Board from time to time for the acquisition of properties for the development and expansion of the Company's business; and that when such shares are so issued, no shareholders shall have subscription rights;

RESOLVED FURTHER, That, in the judgment of this Board, it is advisable, provided that the necessary consent of the stockholders to the change of the par value of the common stock and to the increase in the amount of authorized capital as aforesaid be obtained, that the Certificate of Incorporation be further amended so as to provide that,

upon the dissolution of the Company and the distribution of its net assets, the holders of the preferred stock shall be paid in full the par value of the shares held by them, plus any accumulated dividends unpaid thereon, before any amount shall be distributed among the holders of the common shares, and after such payment to the holders of the preferred shares, the remaining net assets, if any, shall be distributed among the holders of the common stock;

RESOLVED FURTHER, That, in the judgment of this Board, it is advisable to the ends aforesaid that the first paragraph of Article of the Certificate of Incorporation of this Company be amended so that said paragraph as amended shall read as follows:

(Here insert new capital stock clause in full.)

RESOLVED FURTHER, That the aforesaid changes and amendments be submitted to the annual meeting of the stockholders of this Company to be held on the .. day of, 19.., at the principal office of the Company, (Street), (City),, at o'clock in thenoon, and that the Secretary be instructed to give notice of such meeting to all stockholders in the manner provided in the By-laws.

RESOLVED FURTHER, That the Secretary be instructed to cause to be made, at least (.....) days before such meeting, a full, true, and complete list in alphabetical order of all the stockholders entitled to vote at said meeting, such list to be kept at the principal office of the Company, and to be open to the examination of any stockholder at said office at all times during the usual hours of business.

No. 563

Resolution of stockholders authorizing amendment of articles of incorporation to increase capital stock, and directing officers to file papers.

RESOLVED, That the authorized preferred capital stock of this Corporation be increased from the present amount thereof—to wit..... (\$.....) Dollars, consisting of (.....) shares of the par value of (\$.....) Dollars each to (\$.....) Dollars, to consist of (.....) shares of the par value of (\$.....) Dollars each.

RESOLVED FURTHER, That Articles and of the Certificate of Incorporation of this Corporation be amended to read as follows:

(Here insert new articles, showing total capital stock and division into shares.)

RESOLVED FURTHER, That the President and the Secretary of this

Corporation be and they hereby are authorized and directed to make, sign, verify, and acknowledge the certificates of proceedings required by statute, and to cause one of such certificates to be filed in the office of the Secretary of State, and a duplicate original thereof in the office of the Clerk of the County of, and to do all acts and things that may be necessary or proper to carry into effect the foregoing resolution in compliance with the laws of the State of

No. 564

Resolution of directors amending articles of incorporation on written consent of stockholders to increase the capital stock by increasing the number of no-par shares, and fixing price at which increased stock shall be offered for sale.

WHEREAS, the holders of all the issued capital stock of this Corporation have duly consented in writing, and have authorized and empowered this Board of Directors and the officers of this Corporation to increase the capital stock from (.) shares to (.) shares, which consent is now on file in the minute book of this Corporation,

NOW, THEREFORE, BE IT RESOLVED, That the Articles of Incorporation be amended so as to change the amount of the capital stock from (.) shares to (.) shares, and that Article of the Articles of Incorporation of this Corporation be amended to read as follows:

ARTICLE The capital stock of this Corporation shall consist of (.) shares of no-par value stock, which stock may be issued by the Corporation from time to time for such consideration in labor, services, money, or property as may be fixed by the Board of Directors. The Corporation will begin to carry on business upon a capital of (\$) Dollars.

AND IT IS FURTHER RESOLVED, That the officers of this Corporation be hereby authorized, empowered, and directed to take all proper and necessary steps for the consummation of the said amendment to the Articles of Incorporation; and

IT IS FURTHER RESOLVED, That, upon said amendment becoming effective, the said (.) shares of increased capital stock be offered for sale to the present stockholders at not less than (\$) Dollars per share net to the Corporation, in proportion to their present holdings; and that the officers of the Corporation are hereby authorized to effect such sale.

No. 565

Resolution of stockholders authorizing directors to apply for an amendment of the charter so as to increase capital stock.

RESOLVED, That the Board of Directors of this Corporation be hereby authorized, empowered, and directed to apply to the State of, under the general laws of the land, for an amendment to the charter of this Corporation, for the purpose of investing the said Corporation with power to increase its capital stock from (\$) Dollars to (\$) Dollars, and to do all other and further acts necessary to effect the aforesaid increase of the capital stock of this Corporation.

No. 566

Resolution of stockholders increasing capital stock by transfer from surplus to capital account.

RESOLVED, That the capital stock of this Corporation be increased from (\$) Dollars to (\$) Dollars, to be divided into (.) shares of the par value of (\$) Dollars each, and that such increase be paid up by transferring (\$) Dollars from the Surplus account of said Corporation to the Capital account of said Corporation; and

RESOLVED FURTHER, That said increased stock be distributed and taken by the present stockholders in proportion to their present holdings; and

RESOLVED FURTHER, That the directors and officers of this Corporation be and they hereby are authorized, empowered, and directed to do all things and acts necessary and proper to effect the aforesaid increase of the capital stock of the Corporation in the manner hereinabove provided.

No. 567

Resolution of stockholders increasing capital stock by creating new class of stock and increasing number of shares of an existing class.

RESOLVED, That the capital stock of this Corporation be increased from 1,115,000 shares, consisting of 515,000 cumulative shares of Preferred Stock and 600,000 shares of Common Stock, all without nominal or par value, to 1,915,000 shares, consisting of 515,000 cumulative shares of Preferred Stock, 300,000 cumulative shares of \$6 Preferred Stock, and 1,100,000 shares of Common Stock, all without nominal or par value, said increase to be effected by the authorization of 300,000

cumulative shares of \$6 Preferred Stock and 500,000 additional shares of Common Stock.

The designations, rights, privileges, limitations, preferences, voting powers, prohibitions, restrictions, or qualifications of the voting and other rights and powers and the terms as to redemption of the cumulative shares of said \$6 Preferred Stock are as follows:

(Here insert capital stock clauses.)

No. 568

Resolution of stockholders increasing capital stock, converting shares, dividing stock into new classes, and providing for redemption and privileges of preferred stock.

RESOLVED, That the capital stock of this Corporation be increased and changed and converted from 1,915,000 shares, consisting of 515,000 cumulative shares of \$7 Preferred Stock, 300,000 cumulative shares of \$6 Preferred Stock, and 1,100,000 shares of Common Stock, all without nominal or par value, to 3,515,000 shares, consisting of 515,000 cumulative shares of \$7 Preferred Stock, 300,000 cumulative shares of \$6 Preferred Stock, 500,000 cumulative shares of \$5 Preferred Stock, and 2,200,000 shares of Common Stock, all without nominal or par value, and that there be issued 2 shares of said Common Stock without nominal or par value in exchange and conversion for each of the shares of Common Stock of this Corporation now issued and outstanding.

The designations, rights, privileges, limitations, preferences, voting powers, prohibitions, restrictions, or qualifications of the voting and other rights and powers and the terms as to redemption of the cumulative shares of said \$5 Preferred Stock are as follows:

(Here insert capital stock clauses.)

No. 569

Resolution of stockholders increasing capital stock, which consists of preferred stock with par value and common stock without par value, and fixing consideration for stock without par value.

RESOLVED, That the capital stock of this Corporation be increased from the present authorized amount—namely, 100,000 shares of preferred stock having a par value of \$100 each, amounting in the aggregate to \$10,000,000, and 100,000 shares of common stock without par value—to 200,000 shares of preferred stock having a par value of \$100 each, amounting in the aggregate to \$20,000,000, and 200,000 shares of common stock without par value, and that Article

of the Certificate of Incorporation, relating to capital stock be amended to read as follows:

(Here insert new article.)

RESOLVED FURTHER, That the price at which such increase of common stock without par value shall be subscribed and paid for by the stockholders be fixed at (\$.....) Dollars, and that the time and manner of subscription and payment for such increased preferred stock and common stock shall be as follows:

(Here insert time and manner of payment for stock.)

RESOLVED FURTHER, That the directors of this Corporation be and they hereby are authorized to sell, at not less than the price so fixed, any part of such increase not subscribed for by the stockholders, after they have had a reasonable opportunity to make subscription for their proportionate shares thereof.

RESOLVED FURTHER, That the President and the Secretary be and they hereby are authorized and directed to do any and all things necessary or proper to cause said amendment of the Certificate of Incorporation to take effect.

No. 570

Resolution increasing capital stock and authorizing issuance of stock for cash or in exchange for all or majority control of stock of another company.

The Board of Directors of Company, a corporation of, on this .. day of, 19..., does hereby resolve and declare that it is advisable that the capital stock of the Company be increased from One Million (\$1,000,000) Dollars, divided into fifty thousand (50,000) shares of the par value of Twenty (\$20) Dollars each, to Two Million (\$2,000,000) Dollars, divided into four hundred thousand (400,000) shares of the par value of Five (\$5) Dollars each, and that the Charter or Certificate of Incorporation of this Company be amended so that Paragraph Fifth shall read as follows:

Fifth—The amount of capital stock of said Company is Two Million (\$2,000,000) Dollars, divided into four hundred thousand (400,000) shares of the par value of Five (\$5) Dollars each.

BE IT FURTHER RESOLVED, That the Board of Directors of this Company shall have the authority to issue the capital stock of this Company, as increased by the amendment of its charter, in such amounts, at such times, and for such prices as shall seem proper to the Board, and that said stock may be issued by the said Board of Directors either

for cash or in exchange for all or a majority in control of the stock of any company or companies which the Board of Directors shall deem for the best interests of the Company to purchase or acquire, provided said stock shall not be issued for less than its par value.

BE IT FURTHER RESOLVED, That a meeting of the stockholders shall be called to be held at the Company's office, in the City of, on the .. day of, 19.., at o'clock .. M., to take action on the above resolutions.

No. 571

Resolution of directors recommending amendment of articles of incorporation to increase number of shares of stock with par value, and calling stockholders' meeting to act thereon.

RESOLVED, That the Board of Directors of Corporation desires to amend, and recommends to the stockholders that they do amend, the Articles of Incorporation in the following manner:

That the capital stock of Corporation be increased from \$15,000,000, consisting of 1,500,000 shares of common stock of a par value of \$10 each, to \$30,500,000, consisting of 2,000,000 shares of common stock of a par value of \$10 each, and 350,000 shares of convertible preferred stock of a par value of \$30 each.

That all of the designations, and the powers, preferences, and rights, and the qualifications, limitations, or restrictions thereof with respect to the common stock and preferred stock be as follows:

(Here follow designations in full.)

FURTHER RESOLVED, That a special meeting of the stockholders be held at the principal office of the Corporation, and Streets, City of, State of, on, 19.., at o'clock in the noon, Eastern Standard Time; for the purpose of considering the question of adopting said recommendation, and that the proposed amendment to the Articles of Incorporation be submitted to a vote at said meeting;

FURTHER RESOLVED, That notice of said meeting be given to each stockholder of record entitled to vote at said meeting in accordance with the By-laws of this Corporation and the laws of the State of;

FURTHER RESOLVED, That the Board of Directors does hereby fix, 19.., as the record date for the determination of stockholders entitled to notice of or to vote at said special meeting of stockholders.

No. 572

Resolution of board of directors to increase number of shares of common stock without par value to meet conversion of bonds.

WHEREAS, the Corporation, pursuant to authority of its Board of Directors, and with the consent of its stockholders, has issued (*insert description of bonds*) bonds of the Corporation in the aggregate amount of (\$.....) Dollars, all of which are now outstanding and convertible at the option of the holders into common shares without par value of the Corporation, provided that the holders of such bonds shall have given due notice to the Corporation of their election to convert the said bonds on or before the .. day of, 19.., and

WHEREAS, the holders of such bonds in the total amount of (\$.....) Dollars have duly served such notice of their election so to convert the bonds held by them, and

WHEREAS, the Corporation has no common shares without par value available to carry into effect the aforesaid conversion,

NOW, THEREFORE, BE IT RESOLVED, That the number of shares of the common stock of the Corporation be and it hereby is increased from (.....) shares without par value to (.....) shares without par value; and it is

FURTHER RESOLVED, That the additional (.....) shares of common stock without par value hereby authorized shall be issued to the aforesaid bondholders who have given notice of their election to convert, in exchange for (\$.....) Dollars par value of the outstanding bonds of said Corporation, and that the officers of the Corporation are hereby authorized, empowered, and directed to do all the acts necessary and proper to carry this resolution into effect.

No. 573

Resolution of stockholders increasing number of shares, fixing subscription price of additional shares, and limiting subscription rights.

RESOLVED, That the capital of Company be increased from the present amount of \$..... to \$....., and that the number of shares of stock be increased from to; and further

RESOLVED, That newly authorized additional shares of stock be sold and offered for subscription to stockholders at the rate of \$..... per share, each stockholder of record on, 19.., to have the right to subscribe to one share of newly authorized stock for every two shares of stock held as of that date; and further

RESOLVED, That the right of stockholders to subscribe for such newly authorized stock of Company shall expire at o'clock P.M. on , 19.., and that after that date, the directors and officers of said Company be and they hereby are authorized to sell and dispose of said stock as they see fit, and that failure of stockholders to subscribe within the time set herein shall be deemed a waiver by said stockholders of said right to subscribe.

No. 574

Resolution of stockholders amending certificate of incorporation to increase number of shares and reduce par value, without changing authorized capital stock.

RESOLVED, That the capital stock of this Corporation be changed from 1,000 shares of common stock of the par value of \$100 each to 2,000 shares of common stock of the par value of \$50 each, the authorized capital stock of the Corporation remaining at \$100,000 as heretofore, and that the Certificate of Incorporation be amended and altered accordingly so that Article thereof shall read as follows:

Article The amount of the total authorized capital stock of this Corporation is One Hundred Thousand (\$100,000) Dollars, divided into two thousand (2,000) shares of Fifty (\$50) Dollars each.

RESOLVED FURTHER, That the officers of this Corporation be and they hereby are authorized and directed to execute and file all documents and to do all things necessary to effect the foregoing amendment.

RESOLVED FURTHER, That, within months after the date of this meeting, every stockholder of this Corporation shall surrender the shares of stock owned and held by him, and that the officers of this Corporation are hereby authorized and directed to issue to the said stockholder two shares of stock of the par value of \$50 each for every share of common stock of \$100 surrendered by him.

No. 575

Resolution of stockholders increasing number of shares without par value, and amending certificate of organization accordingly.

RESOLVED, That the authorized number of shares of this Corporation without a par or face value be and the same is increased from 3,600,000 shares without a par or face value to 4,850,000 shares without a par or face value, and that the Certificate of Organization of this Corporation be amended to state, in lieu of the statements now required by law as to the amount of the Corporation's capital stock and the number and par value of the shares into which the same is to be divided, that

the number of shares with a par or face value which may be issued by the Corporation is none, and that the number of shares without a par or face value that may be issued by the Corporation is 4,850,000, and that the classes into which said shares are divided are 100,000 shares of \$7 preferred stock, 100,000 shares of \$6 preferred stock, 650,000 shares of participating preferred stock, and 4,000,000 shares of common stock, the designations, preferences, voting powers, restrictions, and qualifications thereof being and to be as fixed and determined in the By-laws, and be it further

RESOLVED, That the clerk of this Corporation be and hereby is authorized and directed forthwith to file with the Secretary of State of the State of a certificate of the action taken by the adoption of the foregoing resolution, and to pay the necessary fees required to be paid in connection with the filing of such certificate.

No. 576

Resolution of directors to amend charter of corporation so as to reduce amount of capital stock by purchasing, calling in, and cancelling preferred and common stock.

RESOLVED, That it is advisable to amend the charter of the Corporation so as to reduce the amount of capital stock now issued and outstanding by purchasing, calling in, and cancelling all the preferred stock of said Corporation now outstanding, and nine hundred and fifty (950) shares of the common stock with a par value of One Hundred (\$100) Dollars per share, having an aggregate par value of Ninety-five Thousand (\$95,000) Dollars, to the end that the entire authorized and outstanding capital stock of said Corporation shall hereafter consist of fifty (50) shares of common stock with a par value of One Hundred (\$100) Dollars per share, having an aggregate par value of Five Thousand (\$5,000) Dollars, and

RESOLVED FURTHER, That a meeting of the stockholders of the Corporation to take action upon the purchase of stock and upon the amendment advised as aforesaid be and the same hereby is called to convene at the principal office of the Corporation in the City of, on the .. day of, 19.., at o'clock in the ..noon.

No. 577

Resolution of stockholders authorizing amendment of certificate of incorporation to reduce capital stock by retirement and cancellation of preferred stock previously purchased.

RESOLVED, That the Certificate of Incorporation of this Corporation be amended and altered so that Articles Third and Fourth thereof will read as follows:

Third. The number of shares of capital stock that may be issued by said Corporation is five hundred thousand (500,000) shares, which shall have no nominal or par value.

Fourth. The right is hereby reserved to create new or additional stock, either preferred or common, at any time, upon proper authorization by the stockholders of the Corporation, pursuant to the provisions of law applicable thereto.

Any new or additional stock, preferred or common, may be issued and sold in such amounts and proportions as shall be determined by the Board of Directors; provided, however, that ownership of preferred stock shall not entitle the holder thereof to subscribe for a pro rata share or any portion of any such new or additional issue of stock, preferred or common, or of any issue of bonds convertible into stock.

RESOLVED FURTHER, That the number of shares which said Corporation may issue be reduced from eight hundred thousand (800,000) shares to five hundred thousand (500,000) shares, all of which shall be shares without any nominal or par value, by the retirement and cancellation of three hundred thousand (300,000) shares of preferred stock of the par value of One Hundred (\$100) Dollars each, all of which preferred stock has been purchased by the Corporation in the exercise of the right reserved in its Certificate of Incorporation.

RESOLVED FURTHER, That the President and the Secretary of this Corporation be and they hereby are authorized and directed to make, sign, verify, and acknowledge the certificates of proceedings required by statute, to cause one of such certificates to be filed in the office of the Secretary of State, and a duplicate original thereof in the office of the Clerk of the County of, and to do all acts and things that may be necessary or proper to carry into effect the foregoing resolution in compliance with the laws of the State of

No. 578

Resolution of stockholders decreasing capital stock by cancelling unissued capital stock.

RESOLVED, That the capital stock issued by the Corporation be reduced from \$100,000 to \$75,000, and that the officers of this Corporation be and they hereby are authorized and directed to give notice to the Secretary of State of the action of this meeting, and it is

FURTHER RESOLVED, That the aforesaid decrease be effected by cancelling the unissued capital stock of this Corporation to the extent of \$25,000.

No. 579

Resolution of stockholders authorizing reduction of capital stock by retirement and cancellation of treasury stock.

RESOLVED, That the Agreement of Association and Articles of Organization of The Company, as previously amended, be and they hereby are further amended by reducing the authorized capital stock of the Company, now consisting of 221,943 shares without par value, divided into 21,943 shares of preferred stock and 200,000 shares of common stock, all without par value, to 221,271 shares without par value, divided into 21,271 shares of preferred stock and 200,000 shares of common stock, all without par value, such reduction to consist of 672 shares of preferred stock without par value, and to be accomplished by the retirement and cancellation of 672 shares of the preferred stock of the Company now held in its treasury.

RESOLVED FURTHER, That the President or Vice President and the Treasurer or an Assistant Treasurer and a majority of the directors of The Company be and they hereby are authorized and directed to file with the proper authorities for the State of such amendment to the Agreement of Association and Articles of Organization, as amended, of The Company as will carry out and effectuate the amendment authorized by the stockholders this day, reducing the authorized capital stock of the Company by the retirement and cancellation of 672 shares of the preferred stock, without par value, of the Company now held in its treasury.

No. 580

Resolution of stockholders amending articles of incorporation to decrease capital stock by reducing the number and par value of outstanding shares.

RESOLVED, That the capital stock of the Corporation be decreased by reducing the par value of the shares of the capital stock of the said Corporation from \$100 to \$50, and reducing the number of shares of the capital stock of the said Corporation from 10,000 to 5,000 shares, and it is

FURTHER RESOLVED, That the Articles of Incorporation be amended to read as follows:

(Here insert new article as to amount of capital stock and classification.)

AND IT IS FURTHER RESOLVED, That the directors and officers of the Corporation be and they hereby are authorized and directed to execute all the affidavits, statements, certificates, and other documents necessary to effectuate the said reduction, and to file them as required.

No. 581

Resolution of stockholders decreasing capital stock by reducing the number and par value of shares, and directing surrender of shares and issuance of proportionately decreased number.

RESOLVED, That the capital stock of the Corporation, consisting of 1,000 shares of the par value of \$100 each, be reduced from \$100,000 to \$25,000, to consist of 500 shares of the par value of \$50 each; and that the officers of this Corporation execute and file all documents and do all things necessary and proper to carry out the said reduction of capital stock, and

RESOLVED FURTHER, That, within three months after the date of this meeting, every stockholder of this Corporation shall surrender the shares of stock owned and held by him, and that the officers of the Corporation are hereby authorized and directed to issue to the said stockholders, in lieu thereof, a proportionately decreased number of shares, so that thereafter each stockholder shall have the same proportion of the whole capital stock as he had before the decrease herein provided for.

No. 582

Resolution of directors authorizing reduction of capital stock by reducing par value of shares.

WHEREAS, the authorized capital stock of this Corporation is \$100,000, divided into 1,000 shares of the par value of \$100 each, and

WHEREAS, in the opinion of this Board of Directors, it will be to the best interests of this Corporation and its stockholders to reduce the capital stock of the Corporation to \$50,000, to be divided into 1,000 shares of the par value of \$50 each, and

WHEREAS, this Corporation has no outstanding indebtedness other than its capital stock liability,

NOW, THEREFORE, BE IT RESOLVED, That the capital stock of this Corporation be and the same hereby is reduced from \$100,000, divided into 1,000 shares of the par value of \$100 each, to \$50,000, to be divided into 1,000 shares of the par value of \$50 each; and it is further

RESOLVED, That the officers of this Corporation be and they hereby are authorized and permitted to submit this resolution to the stockholders of the Corporation, for their consideration, and that, upon obtaining the approval of the proportion of stockholders required by law, the said officers be and they hereby are authorized and directed to execute and file all instruments and to do all acts and things necessary to effect the aforesaid reduction of the capital stock.

No. 583

Resolution of stockholders approving and ratifying action of board of directors in reducing capital stock.

WHEREAS, the Board of Directors of this Corporation, at a meeting duly called and held on the .. day of, 19.., at o'clock in thenoon, adopted a resolution reducing the capital stock of the Corporation as hereinafter set forth, and submitted the said resolution to the stockholders of this Corporation for their consideration, and

WHEREAS, the stockholders believe that it is to the best interests of the Corporation so to reduce the capital stock of this Corporation; therefore be it

RESOLVED, That the stockholders of this Corporation do hereby approve, ratify, and assent to the action of the Board of Directors in adopting the following resolution:

(Here insert resolution of directors, form No. 582.)

FURTHER RESOLVED, That the proper officers of this Corporation be and they hereby are authorized, empowered, and directed to execute and file all documents, certificates, and papers, and to do all things necessary to effect the reduction of the capital stock hereinabove set forth.

No. 584

Resolution of directors authorizing reduction of capital stock and transfer of surplus assets to reserve account for distribution to stockholders.

WHEREAS, this Corporation has on hand available assets in excess of the amount required to cover all its liabilities, and beyond the amount required for working capital,

Now, THEREFORE, BE IT RESOLVED, That the capital stock of this Corporation be and the same hereby is reduced from \$500,000, divided into 5,000 shares of the par value of \$100 each, to \$250,000, divided into 2,500 shares of the par value of \$100 each; and it is

FURTHER RESOLVED, That all capital and surplus assets, however derived, in excess of the aggregate of the said sum of \$250,000, plus the amount necessary to cover all liabilities and the amount required for working capital, be and the same hereby are transferred to a reserve account, subject to distribution to the stockholders of this Corporation by this Board of Directors, in the manner and by the proceedings authorized by law and the By-laws of this Corporation; and it is

FURTHER RESOLVED, That the officers of this Corporation be and they hereby are authorized and directed to submit this resolution to the stockholders for their approval, and that, upon obtaining the approval of the proportion of stockholders required by law, the said officers be and they hereby are authorized and directed to execute and file all instruments and to do all things necessary to carry out the aforesaid reduction of the capital stock.

No. 585

Resolution of directors recommending amendment of certificate of incorporation to change shares of par value to same number of shares without par, decreasing amount of capital, increasing number of shares of stock without par as changed, and giving directors power to issue bonds convertible into stock.

RESOLVED, That the Board of Directors of Corporation, a corporation of the State of, deems it advisable and hereby declares it to be advisable:

That the authorized common stock of said Corporation, consisting of 12,500,000 shares of the par value of \$100 each, be changed into 12,500,000 shares without par value;

That the capital of the Corporation be decreased from \$1,230,606,300 to \$1,013,025,000;

That such change of common stock with par value into common stock without par value shall be effected by changing each share of the presently authorized common stock with par value (including the shares presently issued and outstanding) into one share of common stock without par value;

That such decrease of capital of the Corporation shall be effected by reducing the capital represented by each share of issued and outstanding common stock so changed as aforesaid to \$75;

That certificates for shares of such common stock without par value shall be issued in exchange for certificates for the presently issued and outstanding shares of common stock with par value, share for share;

That the authorized common stock of the Corporation, as so changed, be increased from 12,500,000 shares without par value to 15,000,000 shares without par value, thus making the total authorized capital stock of the Corporation, after such change and increase in the common stock shall have been effected, 4,000,000 shares of preferred stock of the par value of \$100 each and 15,000,000 shares of common stock without par value;

That the shares of common stock without par value, other than the shares into which the presently issued and outstanding shares of common stock with par value shall be changed as aforesaid, may be issued and may be sold by the Corporation from time to time in such manner and for such consideration as from time to time may be fixed by its Board of Directors;

That, in order to give effect to the foregoing change and increase in the authorized capital stock of the Corporation and decrease in its capital, the Certificate of Incorporation of the Corporation, filed in the office of the Secretary of State of the State of on the .. day of, 19..., as heretofore amended, be further amended so that the first paragraph of Article IV thereof shall read as follows:

IV. The amount of the total authorized capital stock of the Corporation is 19,000,000 shares, 4,000,000 of which are to be preferred stock of the par value of \$100 each, and the remaining 15,000,000 shares are to be common stock without par value. The capital represented by the 8,703,252 shares of common stock without par value into which the previously issued and outstanding 8,703,252 shares of common stock of the par value of \$100 each have been changed is \$75 per share, thus decreasing the capital of the Corporation in the amount of \$217,581,300. Such capital is subject to increase from time to time by transfers of surplus or portions thereof to capital account as now or hereafter provided by law. Any or all of said shares of common stock without par value (other than the 8,703,252 shares into which the previously issued and outstanding shares of common stock with par value have been changed) may be issued and may be sold by the Corporation from time to time in such manner and for such consideration as from time to time may be fixed by its Board of Directors.

RESOLVED FURTHER, That the Board of Directors of said Corporation deems it advisable and hereby declares it to be advisable that the Certificate of Incorporation of the Corporation filed in the office of the Secretary of State of the State of, on the .. day of, 19..., as heretofore amended, be further amended by adding thereto a new article, which shall read as follows:

VIII. The Board of Directors shall have power to issue bonds, debentures, or other obligations convertible into the Corporation's common stock upon such terms, in such manner, and under such conditions as may be fixed by resolution of the Board of Directors prior to the issue of such bonds, debentures, or other obligations; subject, however, to the provisions of the fifth paragraph of Article VII hereof with respect to any such bonds, debentures, or other obliga-

tions to be secured by any mortgage on or pledge of any of the real property of this Corporation or any shares of capital stock of any other corporation.

RESOLVED FURTHER, That, in the event of the adoption of the proposed amendments, the Certificate of Incorporation of the Corporation shall read as set forth in the copy thereof submitted to the Board of Directors at this meeting and appended to these minutes, marked Exhibit "A" (identical with the present Certificate of Incorporation, except for the above-stated amendments, which are incorporated in Exhibit "A"), and that, in the event that only one of such amendments shall be adopted, the Certificate of Incorporation shall read as said Exhibit "A," except that the first paragraph of Article IV, if that shall not be amended, shall read as at present and except that Article VIII, if that shall not be adopted, shall not be included therein.

RESOLVED FURTHER, That the foregoing matters shall be submitted to the stockholders for action thereon at their annual meeting for the election of directors to be held at the principal office of the Corporation, (Street), in the City of, County of, State of, on, 19.., at o'clock in thenoon, or at any adjournment thereof; that the proposed change and increase in the authorized common stock of the Corporation and decrease in its capital and the proposed amendment of the Certificate of Incorporation of the Corporation, as heretofore amended, to effect such change, increase, and decrease by amending Article IV of such Certificate shall be submitted to the stockholders for action thereon separately from the proposed amendment to the Certificate of Incorporation to effect the addition thereto of Article VIII as aforesaid, and that the notice of such meeting shall clearly state that action will be taken upon the foregoing matters.

No. 586

Resolution of stockholders changing stock with par value to stock without par value.

RESOLVED, That the authorized number of shares—to wit: (.....) shares having a par value of (\$.....) Dollars each, aggregating (\$.....) Dollars, be changed to an authorized number of (.....) shares without par value, and that the Articles of Incorporation of this Corporation be and the same hereby are amended for that purpose so that Article shall be in the following form:

(Here insert new capital stock clause in full.)

No. 587

Resolution of stockholders authorizing reclassification of stock by exchanging common and preferred stock with par value for common stock without par value.

RESOLVED, That the authorized capital stock of the Corporation, in the amount of \$100,000, consisting of 10,000 shares, 5,000 of which are preferred stock of the par value of \$100 each, and 5,000 of which are common stock of the par value of \$100 each, be reclassified, and that Article of the Certificate of Incorporation of this Corporation be amended, changed, and altered to read as follows:

Article The total number of shares that may be issued by the Corporation is 10,000, all of which shall be of one class, without any nominal or par value, and shall be known as common stock. The capital of the Corporation shall be at least equal to the aggregate par value of all issued shares having par value, plus the aggregate amount of consideration received by the Corporation for the issuance of said shares without par value, and plus such amounts as may from time to time, by resolution of the Board of Directors, be transferred thereto.

FURTHER RESOLVED, That the said 10,000 shares of stock without any nominal or par value shall be substituted for and take the place of the 5,000 outstanding shares of preferred stock, and the 5,000 outstanding shares of common stock with a par value, and the holders of the said outstanding shares of stock with a par value, shall surrender the certificates for the same to the Corporation for cancellation, and shall receive and accept in place of each certificate thereof a certificate of share of stock without any nominal or par value.

FURTHER RESOLVED, That the President and the Secretary of this Corporation be and they hereby are authorized and directed to make, sign, verify, and acknowledge the certificate of proceedings required by statute, to cause one of such certificates to be filed in the office of the Secretary of State, and a duplicate original thereof in the office of the Clerk of the County of, and to do all acts and things that may be necessary and proper to carry into effect the foregoing resolution in compliance with the laws of the State of

No. 588

Resolution of stockholders authorizing change of shares without par value into a larger number of shares of the same class without par value.

WHEREAS, the total number of shares of stock which the Corporation

is now authorized to issue is 15,000,000 shares of stock, classified as follows:

10,000,000 shares of preferred stock of the par value of \$.....
each, and

5,000,000 shares of common stock without par value, and

WHEREAS, the number of shares of each class issued and outstanding is as follows:

9,000,000 shares of preferred stock, and
4,500,000 shares of common stock, and

WHEREAS, 500,000 shares of common stock have not been issued, and

WHEREAS, it is deemed desirable and for the best interest of the Corporation and its stockholders that all the 5,000,000 authorized shares of common stock without par value of the Corporation be changed into 20,000,000 shares of common stock without par value; be it

RESOLVED, That all the 5,000,000 authorized shares of common stock without par value of the Corporation be changed into 20,000,000 shares of common stock without par value, and further

RESOLVED, That the previously authorized 4,500,000 shares of common stock without par value which have been issued and are now outstanding shall be changed into 18,000,000 shares of common stock without par value, on the basis that each such previously authorized share of common stock without par value now issued and outstanding shall be changed into 4 shares of common stock without par value, and that the previously authorized 500,000 shares of common stock without par value which have not been issued shall be changed into 2,000,000 shares of common stock without par value; and

RESOLVED FURTHER, That the Corporation may issue and sell the authorized shares without par value which have not been issued, for such consideration as may from time to time be fixed by the Board of Directors; and

RESOLVED FURTHER, That the designations, preferences, privileges, voting powers, restrictions, and qualifications of each class of shares shall be the same as heretofore; and

RESOLVED FURTHER, That the statement respecting capital, contained in the Certificate of Incorporation of this Corporation, remain unchanged; and

RESOLVED FURTHER, That the officers of the Corporation be and they hereby are authorized and directed to execute and file in the proper

offices a certificate of change of all previously authorized shares of common stock without par value into a different number of shares of the same class without par value, indicating the terms upon which such change is to be made, and stating that the capital is to remain unchanged, and to do all things that may be essential to effectuate such change, all as set forth in the foregoing resolutions.

No. 589

Resolution of stockholders amending certificate of incorporation so as to change the number and par value of shares without changing capital stock.

RESOLVED, That the number of shares of capital stock of Corporation, and the par value thereof, be changed from 10,000 shares of the par value of \$100 each to 20,000 shares of the par value of \$50 each, the authorized capital stock of the Corporation to remain at \$100,000 as heretofore; and

RESOLVED FURTHER, That Article of the Certificate of Incorporation of Corporation be amended, changed, and altered to read as follows:

(Here insert new article.)

RESOLVED FURTHER, That the officers of this Corporation be and they hereby are authorized and directed to execute and to file all documents and to do all things necessary to effect the aforesaid amendment; and

RESOLVED FURTHER, That within months after the date of this meeting, each stockholder of this Corporation shall surrender the shares of stock owned and held by him, and the officers of this Corporation are hereby authorized and directed to issue to such stockholder two shares of stock of the par value of \$50 each for every share of stock of \$100 par value surrendered by him.

No. 590

Resolution of stockholders amending certificate of incorporation to authorize directors to issue stock in series and to fix terms by resolution.

WHEREAS, the Certificate of Incorporation of this Corporation authorizes the issuance of (.....) shares of preferred stock, each share having a par value of (\$.....) Dollars, of which (.....) shares are still unissued, and

WHEREAS, the stockholders deem it advisable to authorize the Board of Directors to issue such unissued shares of preferred stock in series,

with such designations, preferences, and relative participating, optional, or other rights, qualifications, limitations, or restrictions thereof as shall be stated and expressed in a resolution of the Board of Directors, and

WHEREAS, under the provisions of the Certificate of Incorporation of this Corporation, no power is granted to the Board of Directors to issue the said remaining unissued preferred stock in series and to fix the terms of such series by resolution;

NOW, THEREFORE, BE IT RESOLVED, That the Certificate of Incorporation be amended so that Article shall read as follows:

The amount of the total authorized capital stock of this Corporation is (.....) shares of preferred stock of the par value of (\$.....) Dollars per share, amounting in the aggregate to (\$.....) Dollars, and (.....) shares of common stock without nominal or par value, which shares without nominal or par value may be issued from time to time without action by the stockholders, for such consideration as may be fixed from time to time by the Board of Directors, and shares so issued, the full consideration for which has been paid or delivered, shall be deemed fully paid stock, and the holders of such shares shall not be liable for any further payment thereon.

The preferred stock may be issued in series from time to time with such designations, preferences, and relative participating, optional, or other rights, qualifications, limitations, or restrictions thereof as shall be stated and expressed in the resolution or resolutions providing for the issue of such class, classes, or series adopted by the Board of Directors, pursuant to the authority hereby given as provided by statute. Each class or series may be made subject to redemption at such time and at such price or prices as such resolution or resolutions providing for the issue of such stock shall state and express. The holders of the preferred stock of any class or series shall be entitled to receive dividends at such rates, on such conditions, and at such times, and shall be entitled to such rights upon the dissolution of, or upon any distribution of, the assets of the Corporation, and the preferred stock of any class or series may be convertible into or exchangeable for shares of any other class, classes, or series of capital stock of the Corporation, at such price or prices, or at such rates of exchange, and with such adjustments, as shall be stated and expressed in the resolution or resolutions of the Board of Directors providing for the issuance thereof;

RESOLVED FURTHER, That the officers of this Corporation be and they hereby are authorized and directed to file all certificates, documents, and papers, and to do all acts required by law to effect the aforesaid amendment.

No. 591

Resolution of stockholders amending certificate of incorporation to include provision for making and altering by-laws; restriction on power of directors to alter by-law with respect to stock dealings.

RESOLVED, as deemed and declared advisable by the Board of Directors of The Company, a corporation of the State of, at its meeting duly convened and held on, 19.., that the Certificate of Incorporation of the Company be amended by adding a new article Seventh, which shall read as follows:

"Seventh. The directors of the Company shall have power to make and alter the Company's by-laws from time to time. A report respecting by-laws so made or altered by the directors shall be made to the stockholders at their annual meeting held next thereafter. By-laws so made or altered by the directors may be altered or repealed by the stockholders at any time, but if not so altered or repealed shall remain in effect without ratification by the stockholders. Notwithstanding the foregoing provisions of this article, the directors shall not have power to alter the provisions of Article of the by-laws, restricting dealings by the Company and its constituent companies in the stock of the Company and of its constituent companies, which provisions shall continue to be unalterable save by the vote of the holders of a majority of each and every class of stock of the Company, voting thereon, at a meeting called as provided for in the by-laws."

No. 592

Resolution of directors approving amendment of by-laws and calling special meeting of stockholders to pass upon proposed amendment.

RESOLVED, That, in the judgment of the Board of Directors of the Corporation, it is deemed advisable to amend the By-laws of the said Corporation so as to provide (*insert substance of amendments*), and to that end to change Sections and of Article of the said By-laws to read as follows:

(Here insert new by-law in full.)

AND BE IT FURTHER RESOLVED, That a special meeting of the stockholders of this Corporation be and it hereby is called, to be held at the office of the Corporation at (Street), (City), (State), on, 19.., at o'clock in the noon, to consider and take action upon the foregoing

resolution, and that the Secretary of the Corporation be and he hereby is authorized and directed to give due notice of the said meeting to stockholders of the Corporation.

No. 593

Resolution of directors amending a particular by-law upon authorization of stockholders.

WHEREAS, the holders of more than two thirds of the subscribed capital stock of the corporation have, by a resolution adopted at a meeting duly called upon notice, authorized and directed the Board of Directors of this corporation to amend Section of Article of the By-laws, it is

RESOLVED, That the aforesaid Section of Article of the By-laws be amended in accordance with the said resolution of the stockholders, to read as follows:

(Here insert new by-law.)

IT IS FURTHER RESOLVED, That the Secretary of the corporation be and he hereby is authorized and directed to copy the said Section of Article of the By-laws, as amended, in the book of By-laws of the corporation, and properly to certify the same.

No. 594

Resolution of stockholders annulling all by-laws passed by corporation and adopting new by-laws.

RESOLVED, That the By-laws adopted on, 19..., including all By-laws heretofore adopted, be and they are hereby vacated, abrogated, and repealed, and that there be this day adopted as the By-laws of the company the By-laws presented and read to this meeting, and that a copy thereof be spread upon the face of the minutes.

No. 595

Resolution of stockholders giving board of directors unlimited power to amend by-laws.

RESOLVED, That the Board of Directors of the Corporation be and it hereby is authorized and empowered to amend, alter, change, add to, repeal, or rescind any and all By-laws of said corporation from time to time as in its judgment shall be deemed fitting and proper, without action or consent on the part of the stockholders.

No. 596

Resolution of stockholders revoking power given to directors to make and amend by-laws.

RESOLVED, That the power to repeal and amend the By-laws of this corporation and to adopt new By-laws, delegated to the Board of Directors by resolution adopted at a special meeting of stockholders held on the .. day of, 19.., be and the same hereby is revoked.

No. 597

Resolution of stockholders amending by-laws by adding a new provision.

RESOLVED, That the By-laws of the corporation be and they hereby are amended, by addition to Article thereof of a new section numbered, and reading as follows:

(Here insert new by-law in full.)

[*Note.* Where directors have power to amend by-laws without action of stockholders, this resolution may be used by directors without any change in wording.]

No. 598

Resolution of stockholders amending by-laws by substituting one section for another.

RESOLVED, That the By-laws of the corporation be and they hereby are amended by striking out Article, Section, reading as follows:

(Here insert old by-law.)

and substituting therefor the following:

(Here insert new by-law in full.)

CHAPTER 27

BORROWING AND LENDING

Power of a corporation to borrow money. A corporation has the right, as an incident of its existence, to enter into any contract or obligation to further the purposes for which it was organized. It follows, therefore, that whenever a corporation may contract a debt, it may, in the absence of statutory restrictions, borrow money to pay it back and may give the usual evidences and security.¹ The right to borrow exists even if it is not expressly granted by the corporation's charter,² and it applies to practically all corporations whose business renders it necessary to raise funds.³ The power to borrow is expressly conferred by statute in many states.

Who has authority to borrow in behalf of the corporation. The authority to borrow money in behalf of the corporation resides primarily in the board of directors, who are intrusted with the general management of the business.⁴ It may, however, be delegated to an officer or to a general manager or an agent of the corporation, either (1) expressly, by resolution of the board of directors;⁵ or (2) impliedly, by clothing such officer, general

¹ *Jacobs v. Monaton Realty Investment Corp.*, (1914) 212 N. Y. 48, 105 N. E. 968; *J. K. Siphon Ventilator Co. v. Hutton*, (1915) 116 Ark. 545, 175 S. W. 30; *D. Humphreys & Son, Inc. v. Broughton*, (1928) 149 Va. 789, 141 S. E. 764; *Sheffield Chamber of Commerce, Inc. v. Hatch*, (1930) 220 Ala. 601, 127 So. 173; *Stephens v. Brackin*, (1931) 16 La. 272, 134 So. 326; *Howeth v. Coulbourne Bros. Co.*, (1911) 115 Md. 107, 80 A. 916; *Heironimus v. Sweeney*, (1896) 83 Md. 146, 34 A. 823; *Booth v. Robinson*, (1880) 55 Md. 419; *North Hudson Mut. B. & L. Assn. v. First Nat. Bank of Hudson*, (1890) 79 Wis. 31, 47 N. W. 300. See also *Intermountain Building & Loan Assn. v. Gallegos*, (1935) 78 F. (2d) 972; *Hinchliffe v. Nat. Dyeing & Printing Co.*, (1939) 126 N. J. Eq. 386, 8 A. (2d) 710; *Weinberger v. Quinn*, (1942) 264 N. Y. App. Div. 405, 35 N. Y. Supp. (2d) 567.

² *Taylor Feed Pen Co. v. Taylor Nat. Bank*, (1915) (Tex. Civ. App.) 181 S. W. 534; *Provident Stores' Receiver v. Tanner*, (1928) 226 Ky. 364, 10 S. W. (2d) 1077.

³ *Alton Mfg. Co. v. Garrett Biblical Institute*, (1910) 243 Ill. 298, 90 N. E. 704.

⁴ *Alabama Nat. Bank v. O'Neil*, (1900) 128 Ala. 192, 29 So. 688; *D. Humphreys & Son, Inc. v. Broughton*, (1928) 149 Va. 789, 141 S. E. 764; *H. B. Rice & Co. v. Miners' Elkhorn Coal Co.*, (1930) 234 Ky. 580, 28 S. W. (2d) 783.

⁵ *Watson v. Proximity Mfg. Co.*, (1908) 147 N. C. 469, 478, 61 S. E. 273. See *National Surety Co. v. Wingate*, (1932) 153 Okla. 132, 5 P. (2d) 376.

manager, or agent with authority, or by acquiescing in his acts.⁶

An officer has no power, merely by virtue of his office, to borrow money in behalf of the corporation.⁷ The scope of his duties may, however, warrant the inference that he has been intrusted with the power to borrow for corporate purposes.⁸ So, too, the manner of conducting the business of the corporation through agents may be sufficient to bind the corporation by acts of its agents as if express authority had been granted to the agents by the board of directors.⁹ Continued acquiescence by the corporation in the acts of its officers or agents may lead to the inference that such officers or agents had the power to act, and the corporation will be bound by their exercise of authority. But the power of an agent to borrow will not be inferred from a power to collect, deposit, write, or indorse checks, and to act as general manager of the business.¹⁰ The power to negotiate a loan may be implied only when such power is necessarily incident to the performance of the officer's duties within the scope of his general authority.¹¹

Even if an officer or agent has no authority to borrow funds for payment of corporate debts, the corporation cannot disown the unauthorized acts if it retains the benefits of the loan.¹²

See, however, *Smith v. California Thorn Cordage, Inc.*, (1933) 129 Cal. App. 93, 18 P. (2d) 393, in which it was held that directors could not divest themselves of entire control of the finances of the corporation.

In *Sheffield Chamber of Commerce, Inc. v. Hatch*, (1930) 220 Ala. 601, 127 So. 173, it was held that a resolution of the board of directors authorizing officers to negotiate a loan was prima facie evidence of the officers' authority to procure the loan.

⁶ *Cunningham v. German*, (1900) 101 F. 977. See also footnote 9.

⁷ *D. Humphreys & Son, Inc. v. Broughton*, (1928) 149 Va. 789, 141 S. E. 764; *Smoltz v. North Waterloo Meat Co.*, (1929) (Iowa) 224 N. W. 536.

⁸ *Van Denburgh v. Tungsten Reef Mines Co.*, (1937) 20 Cal. App. 463, 67 P. (2d) 360; *Cunningham v. German Ins. Bank*, (1900) 101 F. 977. See also *Victoria Gravel Co. v. Neyland*, (1938) (Tex. Civ. App.) 114 S. W. (2d) 415.

⁹ *Alton Mfg. Co. v. Garrett Biblical Institute*, (1910) 243 Ill. 298, 90 N. E. 704; *D. Humphreys & Son, Inc. v. Broughton*, (1928) 149 Va. 789, 141 S. E. 764; *Gore v. Richard Allen Min. Co.*, (1940) 61 Idaho 622, 105 P. (2d) 735.

¹⁰ *Alton Banking & Trust Co. v. Alton Building & Loan Assn.*, (1937) 289 Ill. App. 177, 6 N. E. (2d) 921.

¹¹ *Madill Oil Cotton Co. v. City Nat. Bank*, (1918) 73 Okla. 322, 193 P. 878; *Guaranty Bank & Trust Co. v. Beaumont Cadillac Co.*, (1920) (Tex. Civ. App.) 218 S. W. 638; *St. James Co. v. Security Trust & Life Ins. Co.*, (1903) 82 N. Y. App. Div. 242, 81 N. Y. Supp. 739.

¹² *Hartley v. Ault Woodenware Co.*, (1918) 82 W. Va. 780, 97 S. E. 137; *D. Humphreys & Son, Inc. v. Broughton*, (1928) 149 Va. 789, 141 S. E. 764; *Warren v. Littleton Orange Crush Bottling Co.*, (1933) 204 N. C. 288, 168 S. E. 226; *Trifeld v. Winchester Development Co.*, (1928) 105 N. J. Eq. 50, 146 A. 873.

Limitations on power of corporation to borrow. A corporation, like an individual, may contract debts to the full extent of its credit, unless restricted by statute or by charter.¹³ Its assets may be of such value as to permit borrowing of funds far in excess of the amount of its capital stock. Statutes in a few states, however, limit the amount of indebtedness that may be incurred by a corporation at any one time to some proportion of the corporation's authorized capital stock. In a few states, the articles of incorporation must specify the maximum amount of indebtedness that a corporation may incur.

Liability for debts in excess of statutory limitations. A corporate debt contracted in excess of the maximum limitation fixed by statute or by the articles of incorporation is not void simply because of the excess,¹⁴ unless the statute specifically declares that it shall be void,¹⁵ and the corporation is therefore ordinarily liable for such debts. If the legislature imposes no statutory penalty declaring invalid a contract increasing the indebtedness of a corporation beyond the prescribed limit, the court may not take it upon itself to do so.¹⁶

The courts make a distinction, in this connection, between two kinds of ultra vires acts. An ultra vires act, in its primary sense, is one done entirely beyond the scope of the corporation's power; such an act is void. But a corporation contracting a debt in excess of the statutory limitation is exercising a legitimate right in borrowing, although the power is exercised in an irregular or excessive manner; such an act, while ultra vires, is merely voidable.¹⁷ According to the weight of authority, a corporation that has received and retained the benefits of such a contract must suffer the consequences of its act, even if the act was in excess of the corporation's authority.¹⁸

A stockholder has the right to resort to a court of equity to restrain the corporation from entering into a contract that will create indebtedness beyond the prescribed limitation, but after the contract has been fully executed, it is enforceable between

¹³ *Sylvester Watts Smyth Realty Co. v. American Surety Co. of New York*, (1922) 292 Mo. 423, 238 S. W. 494.

¹⁴ *Junkin v. Plain Dealer Pub. Co.*, (1917) 181 Iowa 1203, 165 N. W. 339.

¹⁵ *State v. Farmers State Bank of Winside*, (1924) 112 Neb. 597, 200 N. W. 173.

¹⁶ *Grand Valley Water Users' Assn. v. Zumbrunn*, (1921) 272 F. 943; *H. Scherer & Co. v. Everest*, (1909) 168 F. 822.

¹⁷ *Mann v. Mann*, (1929) 57 N. D. 550, 223 N. W. 186; *Gibson et al. v. Kansas City Refining Co. et al.*, (1929) 32 F. (2d) 658.

¹⁸ *Douglass & Co. v. State Bank*, (1919) 77 Fla. 830, 82 So. 593; *Gibson et al. v. Kansas City Refining Co. et al.*, (1929) 32 F. (2d) 658.

the parties, at least to the extent of the consideration received by the corporation.¹⁹

Some courts distinguish those cases where the rights of other creditors whose debts do not exceed the limitation are involved, and hold that, as against such creditors of the corporation, a creditor whose claim exceeds the limitation may not assert it above the amount of indebtedness which the corporation is authorized to incur.²⁰

Liability of directors for debts in excess of statutory limitations. Directors are ordinarily not personally liable to creditors for debts contracted in excess of the statutory limitation, unless the statute specifically makes them liable.²¹ Where such liability is imposed, the directors may also be liable to stockholders, unless the stockholders have by their acts consented to or ratified the creation of the excess indebtedness.²² They are liable, however, only if the corporate assets are insufficient to pay the debt.²³ Ordinarily, to be liable the directors must actually give their consent to the creation of the debt; mere inattention to corporate affairs is not sufficient to hold them liable.²⁴ The assent of a director to the creation of an unauthorized debt must have been given in his capacity as a director, acting concurrently with a majority of the board of directors.²⁵ It has been held that where a director was present at a board meeting in which

¹⁹ *Grand Valley Water Users' Assn. v. Zumbrunn*, (1921) 272 F. 943; *Mann v. Mann*, (1929) 57 N. D. 550, 223 N. W. 186. See also 83 *Univ. of Pa. Law Rev.* 481, at page 492 (1935). It has been said that where no penalty is imposed by the statute placing a limit upon the amount of indebtedness which a corporation may incur, the only remedy for its violation is ouster and dissolution of the corporation at the instance of the state. *Sioux City Terminal R. R. & Warehouse Co. et al. v. Trust Co. of North America*, (1897) 82 F. 124, 133. This argument is answered in *Bell & Coggeshall Co. v. Kentucky Glass Works*, (1899) 106 Ky. 7, 50 S. W. 1092, dissenting opinion 51 S. W. 180.

²⁰ *American Southern Nat. Bank v. Smith*, (1916) 170 Ky. 512, 186 S. W. 482, citing *First National Bank of Covington v. D. Keefer Milling Co.*, (1893) 95 Ky. 97, 23 S. W. 675 and *Bell & Coggeshall Co. v. Kentucky Glass Works*, (1899) 106 Ky. 7, 50 S. W. 1092, 51 S. W. 180; *Vandemark v. Actuating*, (1926) 26 Ohio App. 190, 159 N. E. 852. See also *Oswald v. Minneapolis Times Co.*, (1896) 65 Minn. 249, 68 N. W. 15, holding that, under any view of the law, these debts would be valid up to the limit and invalid only as to the excess.

²¹ These statutes are strictly construed. *Irving Nat. Bank v. Moynihan*, (1903) 84 N. Y. App. Div. 301, 82 N. Y. Supp. 705; *Warren v. Adams*, (1939) 187 Okla. 643, 105 P. (2d) 221, discussed in 7 *Chicago Univ. Law Rev.* 721 (1940).

²² *Mann v. Mann*, (1929) 57 N. D. 550, 223 N. W. 186.

²³ *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, (1895) 95 Tenn. 634, 32 S. W. 1097.

²⁴ *De Witt Grocery Co. v. Ware*, (1915) 89 Vt. 251, 95 A. 537.

²⁵ *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, supra (Note 23).

the creation of the excessive debt was authorized before his election as such director, but did not participate in the meeting, he was not liable.²⁶

Power of corporation to borrow from its stockholders, directors, and officers. A corporation may borrow money from its stockholders, directors, and officers and pay interest upon the loan, unless expressly forbidden to do so by statute, or by charter or by-law provision.²⁷ The directors and officers must, however, act in the utmost good faith,²⁸ and because of the fiduciary relation existing between the corporation and its officers and directors, the transaction will be subject to rigid scrutiny by the courts.²⁹

Stockholders, directors, and officers may become creditors of the corporation either by lending it money directly, or by lending their credit,³⁰ that is, by indorsing notes or other evidence of the corporation's indebtedness. However, a director or officer may not loan money to a corporation at interest³¹ if the corporation is not in need of funds.³²

Generally, a corporation may give a stockholder, director, or officer security for his debt in the same manner as third persons.³³

²⁶ *Judson Mfg. Co. v. Wykoff*, (1922) 60 Cal. App. 305, 213 P. 269; *Russell v. Tenn. & Ky. Tobacco Co.*, (1933) 16 Tenn. App. 561, 65 S. W. (2d) 256.

²⁷ *Twin-Lick Oil Co. v. Marbury*, (1875) 91 U. S. 328; *Wall v. Rothrock*, (1916) 171 N. C. 388, 88 S. E. 633; *In re Knox Automobile Co.*, (1915) 229 F. 241; *Welliver v. Coate*, (1917) 65 Ind. App. 195, 114 N. E. 775; *Gilman v. Bailey Carriage Co., Inc.*, (1928) 127 Me. 91, 141 A. 321; *H. B. Rice & Co. v. Miners' Elkhorn Coal Co.*, (1930) 234 Ky. 580, 28 S. W. (2d) 783; *White v. Staehly*, (1939) 7 Conn. Supp. 71, 7 *Conn. Law Journal* 60; *Gordon v. Hartford Sterling Co.*, (1944) 350 Pa. 277, 38 A. (2d) 229.

²⁸ *Schnittger v. Old Home Consol. Min. Co.*, (1904) 144 Cal. 603, 78 P. 9; *In re Country Club Bldg. Corporation*, (1937) 91 F. (2d) 713.

²⁹ *Wabash R. Co. v. Iowa & S. W. R. Co.*, (1925) 200 Iowa 384, 202 N. W. 595; *Geisenberger & Friedler v. Robert York & Co.*, (1919) 262 F. 739; *Swenson v. G. O. Miller Telephone Co.*, (1937) 200 Minn. 354, 274 N. W. 222; *Federal Mining & Engineering Co. v. Pollak*, (1939) 59 Nev. 145, 85 P. (2d) 1008.

³⁰ *Gilman v. Bailey Carriage Co., Inc.*, (1928) 127 Me. 91, 141 A. 321; *Cory v. Hamilton Nat. Bank et al.*, (1929) 31 F. (2d) 379, *aff'g In re Federal Coal Co.*, (1927) 31 F. (2d) 375.

³¹ See *Silversmith v. Sydeman*, (1940) 305 Mass. 323, 25 N. E. (2d) 215, in which the court held that an officer was not entitled to interest on a loan to the corporation in the absence of any agreement to pay interest.

³² *Consumers' Ice & Coal Co. v. Security Bank & Trust Co.*, (1926) 170 Ark. 530, 280 S. W. 677; *Lydia E. Pinkham Medicine Co. v. Gove*, (1939) 303 Mass. 1, 20 N. E. (2d) 482.

³³ *Cornelius v. C. C. Pictures, Inc.*, (1925) 7 F. (2d) 308; *McClean v. Bradley*, (1924) 299 F. 379; *In re Paul De Laney Co., Inc.*, (1928) 26 F. (2d) 961; *Scully et al. v. Colonial Trust Company et al.*, (1929) 105 N. J. Eq. 309, 147 A. 776; *Hanson v. Bradley*, (1937) 298 Mass. 371, 10 N. E. (2d) 259.

A solvent corporation may even give security for a preëxisting or subsequent debt, in the absence of fraud or intent to delay other creditors, although it thereby effects a preference.³⁴ But where a corporation is insolvent, a stockholder, director, or officer may not obtain a preference for his debt to the disadvantage of other creditors.³⁵ Even an insolvent corporation may, however, borrow from a stockholder, director, or other officer in order to extricate itself from financial difficulties, and may give security for the loan, provided the transaction is entered into in good faith and not for the purpose of obtaining an undue advantage over general creditors.³⁶ Such a transaction will be subject to close scrutiny by the courts. Upon insolvency of a corporation, an officer stands in a fiduciary relation to the creditors as well as to the corporation, and he will not be allowed to use his official position to the detriment of other creditors.³⁷

A stockholder, director, or officer who has made a valid loan to a corporation may enforce payment of his debt in a judicial proceeding against the corporation, like any other creditor.³⁸

Methods of borrowing. Borrowing, in the meaning ordinarily ascribed to the term of procuring money on credit, may be secured or unsecured. If a corporation, by reason of its excellent financial standing, can obtain a loan without furnishing any security, or by the simple expedient of executing a note as evidence of the obligation, the borrowing is unsecured. In loans to individuals, this is a common way of raising funds, for the lender is willing to rely upon the personal obligation and integrity of the borrower. In the case of corporations, however, it is only the rare lender of small sums who will risk a loan to a corporation without some additional assurance of repayment.

The most common methods employed by a corporation to raise money are:

³⁴ *Cory v. Hamilton Nat. Bank et al.*, (1929) 31 F. (2d) 379, aff'g *In re Federal Coal Co.*, (1927) 31 F. (2d) 375; *Cheney v. San Francisco Mines, Inc.*, (1942) 101 Utah 524, 125 P. (2d) 424.

³⁵ *Stuart v. Larson*, (1924) 298 F. 223; *White v. Stachly*, (1939) 7 Conn. Supp. 71, 7 *Conn. Law Journal* 60; *Gordon v. Hartford Sterling Co.*, (1944) 350 Pa. 277, 38 A. (2d) 229.

³⁶ *In re Lake Chelan Land Co.*, (1919) 257 F. 497; *Chattanooga Coffin & Casket Co. v. Whitley*, (1929) 168 Ga. 153, 147 S. E. 392; *Jacobs v. Colcord*, (1929) 136 Okla. 158, 275 P. 649.

³⁷ *In re Salvator Brewing Co.*, (1910) 183 F. 910; *Lytle v. Andrews*, (1929) 34 F. (2d) 252, aff'g 27 F. (2d) 898.

³⁸ *Rylander v. Sheffield*, (1899) 108 Ga. 111, 34 S. E. 348; *Wilson v. Thelen*, (1940) 110 Mont. 305, 100 P. (2d) 923.

1. By mortgage of specific corporate property, both real and personal.
2. By pledge of personal property.
3. By issuance of bonds, secured by a mortgage or pledge of corporate property, or unsecured.
4. By issuance of short-term notes, secured or unsecured.

Mortgage of property, in general. A mortgage has been defined as a conveyance of real or personal property to a creditor as security for repayment of a loan, with a right in the mortgagor to redeem the property by payment of the debt within the time specified in the conveyance.³⁹ In some states, however, the statutes provide that the mortgage merely creates a lien on the property,⁴⁰ which may be foreclosed upon default of the mortgagor, and that title to the property does not pass to the mortgagee.⁴¹ An assignee of the mortgage takes it subject to all equities as between the mortgagor and mortgagee, and it is the assignee's duty to make proper inquiry of the mortgagor as to his liability thereon.⁴²

The statutes in most of the states forbid extinguishment of the mortgagor's right to redeem by strict foreclosure, that is, by cutting off the right to redeem immediately upon default. The right of redemption must be foreclosed either through court proceedings or by sale without intervention of any court, pursuant to statutory authority. In the former case, the court may either decree a sale or limit the time within which the borrower may pay the debt, and thus bar him from subsequently claiming the property. In the latter case, the mortgage itself generally contains a power of sale, and the property is sold in accordance with the terms and upon the notice set forth in the mortgage or provided by statute.

The corporation may offer as security for repayment of its debt, a mortgage covering:

1. Real property owned by the corporation.
2. Personal property owned by the corporation.
3. All the property owned by the corporation at the time of

³⁹ *Brooks v. Butler*, (1939) 184 Okla. 414, 87 P. (2d) 1092.

⁴⁰ See *Fleishbein v. Thorne*, (1937) 193 Wash. 65, 74 P. (2d) 880; *Myers v. Hobbs*, (1939) 100 F. (2d) 822; *In re Title Guaranty Trust Co.*, (1938) (Mo. App.) 113 S. W. (2d) 1053.

⁴¹ See *Greene v. Reconstruction Finance Corporation*, (1938) 24 F. Supp. 181.

⁴² *Wiencke v. Branch-Bridge Realty Corp.*, (1939) 125 N. J. Eq. 135, 4 A. (2d) 415.

execution of the mortgage and to be acquired by it in the future.

A mortgage may be given to secure future advances.⁴³ In that event, the mortgage becomes operative when the advances are actually made. The property, in the meantime and until the lien accrues, may become subject to the claims of creditors.⁴⁴

Authority to mortgage corporate property. A corporation having power to incur a debt has implied authority to mortgage all or a part of its property to secure it.⁴⁵ It may even mortgage its property to secure a debt of a subsidiary or some other corporation to protect its substantial stockholdings in the subsidiary or other corporation.⁴⁶ The statutes in most states expressly authorize the execution of mortgages by corporations.⁴⁷

In the absence of a contrary provision in the charter, the statute, or the by-laws, authority to mortgage is vested in the board of directors.⁴⁸ Officers of the corporation have no power to do so unless authorized by the board of directors.⁴⁹ Where directors alone have power to authorize a mortgage, a resolution of the stockholders directing officers to execute a mortgage is not a sufficient authorization.⁵⁰ The authority to mortgage may be conferred by express resolution of the board of directors, or, like the general power to borrow, may be implied from a course of conduct of the corporate affairs.⁵¹

⁴³ *Boger v. Jones Cotton Co.*, (1939) 238 Ala. 180, 189 So. 737; *In re Metalcraft Corporation*, (1940) 31 F. Supp. 194.

⁴⁴ *Brown v. Guthrie*, (1888) 110 N. Y. 435, 18 N. E. 254.

⁴⁵ *Bell & Coggeshall Co. v. Kentucky Glass Works*, (1899) 106 Ky. 7, 50 S. W. 1092, dissenting opinion, 51 S. W. 180; *City of Williston v. Ludowese*, (1926) 53 N. D. 797, 208 N. W. 82. See also *Tacoma Hotel v. Morrison Co.*, (1938) 193 Wash. 134, 74 P. (2d) 1003; *Appelbaum v. First Nat. Bank of Birmingham*, (1938) 235 Ala. 380, 179 So. 773. A corporate mortgage is a contract; for power of court of equity to revise the contract by a change of security, see 44 *Harvard Law Rev.* 92 (1930).

⁴⁶ *Jesselsohn v. Boorstein*, (1932) 111 N. J. 310, 162 A. 254.

For power to execute mortgage for accommodation, see Curran, "The Validity of Corporate Mortgage Executed for Accommodation," 37 *Michigan Law Rev.* 1001 (1939).

⁴⁷ See statutory provisions in each state, collected in *Prentice-Hall Corporation Service*.

⁴⁸ *First Nat. Bank v. Casselton*, (1919) 44 N. D. 353, 175 N. W. 720; *Peyton v. Sturgis*, (1918) (Tex. Civ. App.) 202 S. W. 205; *Bordy v. Goodman-Buckley Trust Co.*, (1936) 131 Neb. 342, 268 N. W. 286.

⁴⁹ *Blood v. La Serena Land & Water Co.*, (1896) 113 Cal. 221, 226, 45 P. 252.

⁵⁰ *Grafeman Dairy Co. v. Northwestern Bank*, (1921) 290 Mo. 311, 235 S. W. 435; *Flint v. Farwell*, (1922) 192 Ind. 439, 134 N. E. 664; *First Nat. Bank v. Tri-State Repair & Equipment Co.*, (1930) 108 W. Va. 686, 152 S. E. 635; *Bordy v. Goodman-Buckley Trust Co.*, (1936) 131 Neb. 342, 268 N. W. 286; *Lycette v. Green River Gorge, Inc.*, (1944) 21 Wash. (2d) 859, 153 P. (2d) 873.

⁵¹ *Webb v. Duvall*, (1940) 177 Md. 592, 11 A. (2d) 446.

Where a president is exclusively entrusted with the administration of the company's affairs and is held out to the public as possessing the power to perform all acts necessary to the pursuit of the corporate business, his act in mortgaging the property of the corporation may be held binding.⁵² A mortgage, executed by the officers of a corporation having no board of directors and no by-laws, was upheld where the articles of incorporation empowered the officers to manage the affairs of the corporation and the stockholders acquiesced in the acts of the officers.⁵³ However, a mortgage of corporate property by the president was declared invalid where neither the directors nor the stockholders had any knowledge of his act, and where the circumstances failed to reveal a prior course of dealing from which an assumption that the president was authorized to execute a mortgage could be drawn.⁵⁴

When the board of directors authorizes the execution of a mortgage, the resolution should clearly designate the officer upon whom the power to act is conferred.⁵⁵ A corporation cannot deny the validity of a mortgage on the ground that the officers executing said mortgage were not authorized to do so by a resolution, where the corporation accepts the benefits of the mortgage.⁵⁶

The directors may, of course, ratify the act of an officer in executing a mortgage.⁵⁷

Consent of stockholders required for execution of mortgage. In some states, the statutes require consent of a fixed proportion of the stockholders to execution of a mortgage on corporate property.⁵⁸ Such statutes have been held to apply to real estate

⁵² *Maryland Finance Corp. v. Duvall*, (1922) 284 F. 764. But see *In re National Consumers Exchange*, (1922) 280 F. 449.

⁵³ *Bell & Coggeshall Co. v. Kentucky Glass Works*, (1899) 106 Ky. 7, 50 S. W. 1092, dissenting opinion, 51 S. W. 180.

⁵⁴ *In re National Consumers Exchange*, (1922) 280 F. 449. *In re Joseph*, (1931) 46 F. (2d) 324, a chattel mortgage executed by the president without the consent of stockholders was held invalid under Sec. 6 of the New York Stock Corporation Law. See also *Fischer v. Streeter Milling Co.*, (1931) 60 N. D. 362, 234 N. W. 392.

⁵⁵ It is essential to the proper execution of a mortgage by a corporation that it be done in the name and in behalf of the corporation, and under its corporate seal. *Johns v. Gillian*, (1938) 134 Fla. 575, 184 So. 140.

⁵⁶ *Trifeld v. Winchester Dev. Co. et al.*, (1928) 105 N. J. Eq. 50, 146 A. 873; *Dowdle v. Central Brick Co.*, (1934) 206 Ind. 242, 189 N. E. 145; *Federal Mining & Engineering Co. v. Pollak*, (1939) 59 Nev. 145, 85 P. (2d) 1008; *Webb v. Duvall*, (1940) 177 Md. 592, 11 A. (2d) 446.

⁵⁷ *Beaman-Marvell Co. v. Marvell*, (1940) 305 Mass. 246, 25 N. E. (2d) 473.

⁵⁸ Where the statute provides that the consent to a mortgage shall be evidenced

mortgages but not to pledges of personal property.⁵⁹ These statutes must generally be complied with to render the mortgage valid.⁶⁰

A statute prohibiting the sale, lease, or exchange of corporate property without the consent of the holders of two thirds of the stock applies to a mortgage of all the corporate assets, including the goodwill.⁶¹ Statutes requiring the consent of stockholders in executing a corporate real estate mortgage have been held not to apply to mortgages by foreign corporations.⁶²

Some statutes requiring consent of stockholders to execution of a mortgage specifically except purchase money mortgages. Even where stockholders have a right to determine whether corporate property shall be mortgaged, the corporation may assume an existing mortgage on property purchased by it as part of the purchase price, without the stockholders' consent.⁶³

In absence of proof to the contrary, it is presumed that a mortgage has been properly authorized. The burden of proving that a mortgage was executed without the required consent of stockholders, or without property authorization of the corporate officers, must be borne by the persons attacking the validity of the mortgage.⁶⁴

Effect of failure to comply with statutes requiring stockholders' consent to execution of mortgage. In some states, failure to comply with statutory provisions requiring the consent

by a vote appearing on the corporate records, or by written consents filed with the corporation, and no provision is made in the statute for the withdrawal of consent, a withdrawal, in order to be effective, must be by vote at a proper meeting or must be in writing, filed with the corporation. *Stott v. Stott Realty Co.*, (1929) 246 Mich. 261, 224 N. W. 621. See also *Susser v. Cambria Chocolate Co.*, (1938) 300 Mass. 1, 13 N. E. (2d) 609; *Greene v. Reconstruction Finance Corporation*, (1938) 24 F. Supp. 181.

⁵⁹ *R. F. C. v. Eastern Terra Cotta Realty Corp.*, (1943) 266 N. Y. App. Div. 148, 41 N. Y. S. (2d) 569.

⁶⁰ *Maryland Casualty Co. v. Schaefer*, (1930) 141 N. Y. Misc. 629, 253 N. Y. Supp. 709; *Leffert v. Jackman*, (1919) 227 N. Y. 310, 125 N. E. 446; *In re Astell Eng. & Iron Works*, (1922) 284 F. 967; *Metalloid Co. v. Luboil Refining Co.*, (1929) 85 Colo. 146, 274 P. 826; *Cohn v. Gersh Realty Corp.*, (1930) 137 N. Y. Misc. 245, 242 N. Y. S. 671. In *Royal Con. Min. Co. v. Royal Con. Mines*, (1910) 157 Cal. 737, 110 P. 123, a mortgage authorized by directors who owned more than two thirds of the capital stock was considered valid. To the same effect, *Timmer v. Crimmins*, (1933) 262 Mich. 314, 247 N. W. 191. See also *Matter of Endicott Laundry Co., Inc.*, (1926) 128 N. Y. Misc. 413, 219 N. Y. S. 632.

⁶¹ *Commerce Trust Co. v. Chandler*, (1922) 284 F. 737.

⁶² *R. F. C. v. Eastern Terra Cotta Realty Corp.*, *supra*. (See Note 59.)

⁶³ *In re Beaver Knitting Mills*, (1907) 154 F. 320.

⁶⁴ *Denike et al. v. New York and R. Lime, etc. Co. et al.*, (1880) 80 N. Y. 599; *Austin v. Dermott Canning Co.*, (1931) 182 Ark. 1128, 34 S. W. (2d) 773.

of stockholders to execution of a mortgage renders the mortgage invalid and ineffectual to create a lien on the corporate property.⁶⁵ In other states, it renders the mortgage merely voidable.⁶⁶

Since the requirement of obtaining stockholders' consent is intended as a protection to the stockholders themselves,⁶⁷ a failure to comply with it can generally be questioned only by the stockholders.⁶⁸ Where an irregularity in securing the stockholders' consent renders a mortgage voidable, the stockholders may by their conduct validate the mortgage or be estopped from relying on the irregularity.⁶⁹

Thus, if stockholders do not actually vote on the mortgage as required by statute, but acquiesce in its validity by permitting the corporation to receive the benefits of the mortgage, the

⁶⁵ In re Astell Engineering & Iron Works, Inc. (1921) 278 F. 743, aff'd (1922) 284 F. 967; Shapiro v. Peoples' Co-op. Soc., Inc., (1924) 125 Misc. Rep. 839, 211 N. Y. S. 468; In re James, Inc., (1929) 30 F. (2d) 555; Metalloid Co. v. Luboil Refining Co., (1929) 85 Colo. 146, 274 P. 826; Cohn v. Gersh Realty Corp., (1930) 137 Misc. Rep. 245, 242 N. Y. S. 671, and cases cited; In re Lincoln Bakery, Inc., (1937) 18 F. Supp. 998.

⁶⁶ Beecher v. Marquette & Pacific Rolling Mill Co., (1881) 45 Mich. 103, 7 N. W. 695; Bishop v. Kent & Stanley Co., (1898) 20 R. I. 680, 41 A. 255; Eastman v. Parkinson, (1907) 133 Wis. 375, 113 N. W. 649; Dillon v. Myers, (1915) 58 Colo. 492, 146 P. 268; McClean v. Bradley, (1922) 282 F. 1011.

⁶⁷ In re N. Y. Economical Printing Co., (1901) 110 F. 514; Tallassee Oil & Fertilizer Co. v. Royal, (1923) 209 Ala. 439, 96 So. 620; In re Constantine Tobacco Co., (1923) 290 F. 128; Mackenzie v. Taggart, (1937) 101 Colo. 357, 73 P. (2d) 978.

⁶⁸ In re N. Y. Economical Printing Co., supra (Note 67); Tallassee Oil & Fertilizer Co. v. Royal, supra (Note 67); Day v. Jade Contracting Co., (1920) 181 N. Y. S. 740; Metalloid Co. v. Luboil Refining Co., (1929) 85 Colo. 146, 274 P. 826; Gallup v. Pring, (1941) 108 Colo. 277, 116 P. (2d) 202. But see In re James, Inc., (1929) 30 F. (2d) 555, rev'g (1927) 30 F. (2d) 551, permitting the holders of trust receipts to question the validity of a mortgage for failure to obtain consent of stockholders to establish lien on the property.

The various decisions covering the validity of a mortgage not complying with statutory requirements of stockholders' consent are considered in 49 *Harvard Law Review* 481 (1936). See also 51 *Harvard Law Review* 1074 (1938).

⁶⁹ Bishop v. Kent & Stanley Co., (1898) 20 R. I. 680, 41 A. 255; Behrman v. Zelman, (1927) 130 Misc. Rep. 846, 225 N. Y. S. 385; Liverpool & London & Globe Ins. Co., Ltd. v. Aleman Planting & Mfg. Co., (1928) 166 La. 457, 117 So. 554; Mackenzie v. Taggart, (1937) 101 Colo. 357, 73 P. (2d) 978; Gallup v. Pring, (1941) 108 Colo. 277, 116 P. (2d) 202. It has been held that the statutory requirement for consent of stockholders to the mortgage is satisfied if the requisite number have actual knowledge and evidence their consent by the execution and acceptance of the mortgage document. In re Robin Bros. Bakeries, (1937) 22 F. Supp. 662. But it is not satisfied merely by proof that the president dominates the corporation and the other stockholders are accustomed to leave all corporate decisions to him. In re J. A. M. A. Realty Corporation, (1937) 92 F. (2d) 3. See also Wilcox v. Goess, (1937) 92 F. (2d) 8. See also Timmer v. Crimmins, (1933) 262 Mich. 314, 247 N. W. 191; In re Victoria Fusilli Co., (1935) 79 F. (2d) 611.

mortgage is valid.⁷⁰ Failure of stockholders to vote on execution of a mortgage has been held to be remedied by a subsequent resolution ratifying the acts of the board of directors in authorizing the mortgage.⁷¹ Where consent of the stockholders to execution of a mortgage was obtained, but the certificate of consent was not filed and recorded as required by statute, the mortgage was nevertheless held to be valid.⁷² Failure of stockholders to execute written authorization of a mortgage as required by statute was remedied by personal participation of a majority of the stockholders in the act of executing the mortgage.⁷³

General creditors cannot impeach the validity of a mortgage on the ground of informality in the proceedings in which consent was given, where all the stockholders were present at the meeting and voted in favor of execution of the mortgage.⁷⁴

Necessity for recording mortgage. The statutes in most states require that a mortgage shall be recorded.⁷⁵ These statutory requirements are designed for the protection of the mortgagor's creditors as well as subsequent purchasers of and holders of liens on the corporate property, and should be observed.⁷⁶ However, failure to record a mortgage will not invalidate it as between the mortgagor and the mortgagee.⁷⁷

Real estate mortgage. A mortgage on real property of the corporation is called a special mortgage on specific property, as distinguished from a general mortgage which the corporation may place upon all its property, presently owned or after acquired. The real estate mortgage is a common means of raising funds by medium-sized corporations. As a general rule, the

⁷⁰ *In re Paul De Laney Co., Inc.*, (1928) 26 F. (2d) 961. See also *In re Paul De Laney Co., Inc.*, (1929) 33 F. (2d) 945.

⁷¹ *Stott v. Stott Realty Co. et al.*, (1929) 246 Mich. 261, 224 N. W. 621.

⁷² *Karasik v. People's Trust Co.*, (1917) 252 F. 324; *Grand Victory Theatre Co. v. Solomon*, (1923) 224 Mich. 451, 195 N. W. 132.

⁷³ *Liverpool & London & Globe Ins. Co., Ltd. et al. v. Aleman Planting & Mfg. Co.*, (1928) 166 La. 457, 117 So. 554.

⁷⁴ *Wm. Firth Co. v. S. Carolina Loan & Trust Co.*, (1903) 122 F. 569. See also *McCarty v. Nostrand Lumber Co.*, (1931) 232 N. Y. App. Div. 63, 248 N. Y. Supp. 606.

⁷⁵ Under some statutes, an affidavit of consideration must accompany and be recorded with the mortgage. See *Mitschele-Baer, Inc. v. Livingston Sand & Gravel Sales Co.*, (1931) 108 N. J. Eq. 286, 154 A. 752.

⁷⁶ An attorney who failed properly to file certain chattel mortgages was held liable to his client for the negligent discharge of his duties. *Degen v. Steinbrink*, (1922) 202 N. Y. App. Div. 477, 195 N. Y. Supp. 810, *aff'd* in 236 N. Y. 669, 142 N. E. 328.

⁷⁷ *Martin v. Bankers Trust Co.*, (1916) 18 Ariz. 55, 156 P. 87; *Magnuson v. Breher*, (1939) 69 N. D. 197, 284 N. W. 853.

duration of the mortgage is comparatively short. The borrower executes: (1) a mortgage, which is the evidence of the debt, and (2) a bond or a note, which is the evidence of the personal obligation of the borrower.⁷⁸ The real estate mortgage is executed in the same manner as a deed of real property, and in most states must be recorded in the place where the property is situated.

Mortgage of personal property. In the absence of statutory restriction, any personal property of the corporation may be mortgaged. The property may consist of:

1. Chattels, a term ordinarily used in referring to tangible articles, such as furniture, machinery, tools, or a stock of merchandise.

2. Choses in action,⁷⁹ which may be defined as a right to receive payment for a debt or money, as, for example, unpaid subscriptions, bills receivable, or other rights to receive payment for a debt.

In some states, the classes of personal property which may be mortgaged are limited. In several states, property which is not capable of manual delivery may not be mortgaged.

The mortgage of a stock of merchandise has been the subject of frequent statutory regulation. These statutes divide themselves into two groups:

1. Those which declare absolutely void a mortgage of a stock of goods left in the possession of the mortgagor and exposed for sale.

2. Those which require some further act of the parties in order to validate the mortgage, such as notice to creditors, or rendering of periodical statements of merchandise actually sold.

Only such property as is mentioned in the mortgage is covered by the lien. Like the mortgage of real estate, the mortgage of personal property is a special mortgage. A description of the property, so specific as to admit of no dispute as to its identity, should be incorporated in the resolution authorizing the execution of the mortgage, and in the mortgage itself.

Chattel mortgage. The characteristic distinguishing a mortgage covering chattels from other instruments is the condition contained in it that the conveyance is void if the debt is paid on a day specified, and that the transfer is absolute if payment is

⁷⁸ The bond or note is not a necessity. In some states, the mortgage alone is executed.

⁷⁹ The term "chattel" is sometimes used to include a chose in action. 11 Corpus Juris, 384.

not made. In some states, however, the chattel mortgage, like a real estate mortgage, merely creates a lien as security for the debt, and does not transfer title to the property mortgaged. If the debt is not paid when due, or if some other term or condition of the mortgage has not been complied with, the mortgagee enforces his lien by foreclosure sale, upon proper notice to the mortgagor. The mortgagor usually has the right to redeem the property within a fixed time, either before or after sale. In some cases, foreclosure of a chattel mortgage may be effected only through court proceedings.

In many states, in order to render a chattel mortgage valid as against creditors of the mortgagor and subsequent purchasers and encumbrances of the mortgaged property, the instrument must be recorded either in the county where the property is situated or where the mortgagor is located, or there must be an actual delivery to, and continued possession in, the mortgagee.⁸⁰ There are, of course, other circumstances under which a chattel mortgage may be invalid as to present or future creditors, or both. For example, where a mortgage does not actually secure any debt of the corporation for the reason that no consideration for the mortgage has moved to the corporation, but the mortgage in reality amounts to an illegal dividend to the stockholders, it will be invalid as to creditors.⁸¹

An affidavit of good faith, to the effect that the chattel mortgage is made without any design to hinder, delay, or defraud creditors, is sometimes required to be executed.

A chattel mortgage duly authorized by a corporation and signed in its name by its president and secretary is not void for failure to attach the corporate seal.⁸²

Distinction between chattel mortgage and conditional sale. A conditional sale bears a close resemblance to a chattel mortgage. If any doubt exists as to whether an instrument is one or the other, the law will construe it as a chattel mortgage rather than as a conditional sale.⁸³ While the attributes of a conditional

⁸⁰ See the Chattel Mortgage Chart included in *Prentice-Hall Installment and Conditional Sales Service*, outlining the procedure necessary to insure proper execution, and the requirements for filing and recording in the various states.

⁸¹ *In re Bay Ridge Inn, Inc.*, (1938) 98 F. (2d) 85.

⁸² *Armstrong v. Home Service Stores, Inc.*, (1932) 203 N. C. 499, 166 S. E. 321, discussed in 17 *Minnesota Law Review* 543. See also *First Nat. Bank v. Frazier*, (1933) 143 Ore. 662, 22 P. (2d) 325, in which it was held that a chattel mortgage, signed by the president and secretary, constituting a majority of the board, was valid, assent of the signers being assumed.

⁸³ *Jones on Chattel Mortgages* (1933 ed.), § 30.

sale vary according to the statutes and decisions of each state, the feature that differentiates it from a chattel mortgage is this—in the chattel mortgage title passes to the buyer upon the execution of the instrument, while in the conditional sale title is expressly reserved by the seller until the performance of some condition, such as payment of the purchase price.⁸⁴ Some states ignore any distinction between a chattel mortgage and a conditional sale, considering all conditional sales as chattel mortgages.

Under the Uniform Conditional Sales Act, adopted in ten of the states, and one territory,⁸⁵ a conditional sale has been defined as follows:

“1. Any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or

“2. Any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract.”

The instrument, under the act, must be duly filed. Upon the buyer's default in the payment of any sum due, or in the performance of any condition under the contract, the seller may retake possession of the chattels without legal process, if it can be done in a peaceable manner.

The statutes of each state must be carefully examined to determine the features that distinguish the conditional sale from other instruments, the requirements as to execution and recording, and the interest, rights, and remedies of the respective parties to the instrument.⁸⁶

Distinction between chattel mortgage and pledge of property. In some jurisdictions, no distinction is made between a

⁸⁴ *Bice v. Harold L. Arnold, Inc.*, (1925) 75 Cal. App. 629, 243 P. 468. See also *McDaniel v. Chiaramonte*, (1921) 61 Ore. 403, 122 P. 33, holding that, where title passes to the buyer, and a lien is created in favor of the seller, the transaction will be held to be a chattel mortgage.

⁸⁵ Arizona, Delaware, Indiana, New Hampshire, New Jersey, New York, Pennsylvania, South Dakota, West Virginia, Wisconsin, and the territory of Alaska.

⁸⁶ See statutes in each state, collected in *Prentice-Hall Installment and Conditional Sales Service*.

mortgage and a pledge. All obligations conditioned for the payment of money are deemed mortgages. In other jurisdictions, however, the pledge differs from a mortgage in some essential particulars. The chief characteristic that differentiates a pledge from a mortgage is that, in the case of a pledge, there must be delivery of the property given to secure the indebtedness.⁸⁷ The pledge, as a rule, need not be in writing.⁸⁸ A mortgage may be valid without delivery of the property, and is generally formally executed, like a conveyance of property. The pledge never passes title to the pledgee, but merely creates a lien on the property. The property that is deposited as security is taken back upon payment of a certain sum.⁸⁹ While a chattel mortgage, as previously indicated,⁹⁰ may likewise create only a lien, it generally conveys title to the property to the mortgagee, with a right in the mortgagor to redeem upon payment of a certain sum.⁹¹ The intention of the parties determines whether the transaction is a mortgage or a pledge of property. If there is doubt as to whether it is one or the other, the law favors the conclusion that it is a pledge.⁹²

While choses in action, such as stocks, bonds, and accounts receivable, may be the subject of chattel mortgages, they are more often pledged by the borrower, the evidences of indebtedness due the corporation being actually delivered to the creditor as security.

Power to pledge personal property—unissued stock or bonds. The power given to a corporation to mortgage its personal property includes the power to pledge it.⁹³ A pledge of personal property, unlike a real estate mortgage, does not need the statutory consent of the stockholders.⁹⁴

A corporation may pledge its unissued stock as security for a loan, in the absence of any statutory or charter prohibition.⁹⁵

⁸⁷ *People's Bank of Harrisville v. Continental Supply Co.*, (1926) 213 Ky. 44, 280 S. W. 458.

⁸⁸ *Oden v. Vaughn*, (1920) 204 Ala. 445, 85 So. 779.

⁸⁹ *Ibid.*

⁹⁰ See this chapter, page 782.

⁹¹ *Oden v. Vaughn*, *supra* (Note 88).

⁹² *Martin v. Bankers Trust Co.*, (1916) 18 Ariz. 55, 156 P. 87.

⁹³ *Mercer v. Stiel*, (1922) 97 Conn. 583, 117 A. 689; *Schwartz v. Maguire*, (1941) 130 N. J. Eq. 152, 21 A. (2d) 670, modified and *aff'd*, (1942) 131 N. J. Eq. 578, 25 A. (2d) 920.

⁹⁴ *R. F. C. v. Eastern Terra Cotta Realty Corp.*, (1943) 266 N. Y. App. Div. 148, 41 N. Y. Supp. (2d) 569.

⁹⁵ *Granite Brick Co. v. Titus*, (1915) 226 F. 557. See also *Turner v. Tjosevig-Kennecott Copper Co.*, (1921) 116 Wash. 223, 199 P. 312.

Even if a statute prohibits the issuance of stock except for labor done, services performed, or money or property actually received, it has been held that stock, the face value of which exceeds the amount of the indebtedness to be secured, may be pledged as security.⁹⁶ The courts are not agreed as to whether, under such a statutory prohibition, unissued stock may be pledged for an antecedent debt. Although there are decisions to the contrary, the weight of authority supports the view that a corporation may not pledge its unissued stock as collateral to secure the payment of an antecedent debt, in the face of the statutory prohibition mentioned.⁹⁷

The power of a corporation to pledge its bonds, subject to constitutional or statutory regulations, is well established.⁹⁸ Bonds pledged by a corporation are deemed bonds issued, and the rules relative to issuance of bonds apply as well to the pledge of bonds. As to whether bonds may be issued for an antecedent debt, or pledged for a debt less than the face value of the bonds, see pages 800 and 801 of this chapter.

Procedure upon default in contract of pledge. The pledgee does not acquire an absolute title to the pledged property by failure of the pledgor to pay the debt within the time limit. Unlike the chattel mortgage, there is no forfeiture upon default, and the pledgee has no right of strict foreclosure. The pledgee upon default may either: (1) sell the property without judicial process, on reasonable notice to the pledgor, or (2) maintain an action in equity in the nature of a foreclosure, and obtain a decree for the judicial sale of the property. When the claim of the pledgee is satisfied, the surplus, if any, is transferred to the pledgor.

In the absence of any statutory requirement, the pledgee must give public notice of sale of the pledged property.⁹⁹ If the contract of pledge fixes no time within which the property may be redeemed by the pledgor, and the statute does not provide otherwise, the pledgor has a continuing right to redeem until the property is sold. This right remains with him during his lifetime, unless the pledgee in the meantime calls upon him to redeem and sells the property; if the pledgor dies without such

⁹⁶ Granite Brick Co. v. Titus, *supra* (Note 95).

⁹⁷ Central Lumber Co. v. Fall, (1924) (Tex. Civ. App.) 264 S. W. 513.

⁹⁸ Central Trust Co. v. Southern Oil Corp., (1925) 8 F. (2d) 338.

⁹⁹ See Richardson v. Foster, (1918) 100 Wash. 57, 170 P. 321, in which it was held that mailing notice to the pledgor of intended sale of certificate of stock was insufficient.

call and sale having been made, the right descends to his personal representatives.¹⁰⁰ The right of the pledgor cannot be cut off by a simple notice that, if he fails to pay within a specified time, the pledgee will claim the property as his own.¹⁰¹

Power to mortgage after-acquired property. At common law, a corporation had no power to mortgage property which it did not possess.¹⁰² Today, however, under the rules of equity, a mortgage of property to be acquired in the future is allowed. As between the mortgagor and the mortgagee, the mortgage is enforced as an agreement to give a lien upon the property.¹⁰³ The mortgage must expressly provide that the lien shall cover after-acquired property, or it must clearly appear from the language used that such was the manifest intention.¹⁰⁴ A mortgage intended to cover after-acquired property attaches to such property only in the condition in which it comes into the mortgagor's hands.¹⁰⁵

Statutes in some states expressly grant the right to mortgage after-acquired property. This may refer to real property,¹⁰⁶ to chattels or personal property,¹⁰⁷ or to future income.¹⁰⁸

Mortgage of after-acquired real property. In mortgages of

¹⁰⁰ *White River Savings Bank v. Capital Savings Bank*, (1904) 77 Vt. 123, 59 A. 197.

¹⁰¹ *Groeltz v. Cole*, (1905) 128 Iowa 340, 103 N. W. 977.

¹⁰² *Emerson v. European & North American Ry. Co.*, (1877) 67 Me. 387.

¹⁰³ *Titusville Iron Co. v. City of New York*, (1912) 207 N. Y. 203, 100 N. E. 806; *Ithaca Trust Co. v. Ithaca Traction Corp. et al.*, (1928) 248 N. Y. 322, 162 N. E. 93, modifying 221 N. Y. App. Div. 818, 224 N. Y. Supp. 825; *Monmouth County Elec. Co. v. McKenna*, (1905) 68 N. J. Eq. 160, 60 A. 32; *In re 671 Prospect Ave. Holding Corp.*, (1938) 97 F. (2d) 513. See also Goodbar, "Conflicting Corporate Mortgage Indentures and After-acquired Property," 12 *Boston University Law Journal* 648 (1932); Foley and Pogue, "After-acquired Property under Conflicting Corporate Mortgage Indentures," 13 *Minnesota Law Review* 81.

¹⁰⁴ *Chase Nat. Bank of City of New York v. Sweezy*, (1931) 281 N. Y. Supp. 487; *Merchants' & Farmers' Bank v. Pearson*, (1923) 186 N. C. 609, 120 S. E. 210. See also "Property Clauses in Corporate Mortgages" by Donald Hall Hamilton, *Temple Law Quarterly*, Vol. IV, p. 131, Mar. 1930; "Effect of After-acquired Clauses on Property Later Acquired under Charter Amendment," 49 *Harvard Law Review* 947 (1936); "Priorities of Mortgages on After-acquired Properties in Case of Merger," 41 *Yale Law Jour.* 466 (1932); Klooster, "Mortgages of After-acquired Railroad Property," 27 *Illinois Law Rev.* 781, in which it is stated to be settled law that, although the after-acquired clause of a railroad mortgage in equity reaches subsequent additions by the mortgagor, it does not reach additions or extensions constructed by a successor, in effect a purchaser.

¹⁰⁵ *Occidental Life Ins. Co. v. May*, (1938) 194 Wash. 201, 77 P. (2d) 773.

¹⁰⁶ *Cummings v. Consolidated Mineral Water Co.*, (1905) 27 R. I. 195, 61 A. 353.

¹⁰⁷ *Pierce v. Bound Brook Engine & Mfg. Co.*, (1921) 274 F. 221; *Commercial Trust Co. v. L. Wertheim Coal & Coke Co.*, (1917) 88 N. J. Eq. 143, 102 A. 448.

¹⁰⁸ *Atlantic Trust Co. v. Dana*, (1903) 128 F. 209.

after-acquired real property, the mortgagee's lien generally takes effect the moment the property comes into the possession of the mortgagor.¹⁰⁹ However, the lien attaches to the after-acquired property in the condition in which it is acquired, that is, if the property is encumbered with a lien when the mortgagor acquires title, the lien is superior to the rights of the mortgagee.¹¹⁰ For example, assume that *A* mortgages his property to *B*, including real property which *A* may thereafter acquire. Subsequent to the execution of the mortgage *A* purchases a house and lot from *C*. *D*, a mechanic, has a lien upon the house for services performed in remodeling it. *C* has a lien upon the house and lot for the purchase price. Both *C*'s and *D*'s claims will take priority over *B*'s lien under the after-acquired clause.¹¹¹

Mortgage of after-acquired personal property. The general rule is that, in order to make after-acquired personal property subject to the mortgagee's rights as against the creditors of the mortgagor, there must be some new and intervening act, as, for example, taking possession of the property by the mortgagee.¹¹² An exception to this rule is found in the case of public utility corporations. No further act in this instance is required, the lien attaching to all after-acquired property which is necessary for the performance of the public duties of the corporation.¹¹³ So, too, where a mortgage is given on a mechanical establishment covering the entire property and such future improvements and additions as may become appurtenant to the original property, subsequent improvements and additions have been deemed part of the old property, and the lien held to attach to it immediately.¹¹⁴

Mortgage of future earnings or income. Future earnings of the corporation may be included in a mortgage of after-acquired property, in the absence of statutory provision to the contrary. In order that future earnings or income be covered by the mort-

¹⁰⁹ *In re Adamant Plaster Co.*, (1905) 137 F. 251.

¹¹⁰ *United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Mach. Co.*, (1918) 182 Ky. 473, 206 S. W. 806; *Shooters Island Shipyard Co. v. Standard Shipbuilding Corp.*, (1923) 293 F. 706.

¹¹¹ *Cummings v. Consolidated Mineral Water Co.*, (1905) 27 R. I. 195, 61A. 353.

¹¹² *Roebling's Sons Co. v. Nebraska Electric Co. et al.*, (1921) 106 Neb. 255, 183 N. W. 546.

¹¹³ *Pintsch Compressing Co. v. Buffalo Gas Co.*, (1922) 280 F. 830. See also *Commercial Trust Co. v. Chattanooga Ry. & Light Co.*, (1921) 281 F. 856.

¹¹⁴ *Roebling's Sons Co. v. Nebraska Electric Co. et al.*, *supra* (Note 112); *Valdosta & W. R. R. Co. v. Atlantic Coast Line R. R. Co.*, (1918) 148 Ga. 842, 98 S. E. 465.

gage, however, it must be specifically included in the instrument.

The mortgage or pledge of income does not become effective so long as the mortgagor is permitted to remain in possession of its property and to receive and dispose of its earnings. As against creditors of the mortgagor, the mortgagee has no right to the income prior to a default in the payment of the mortgage debt and taking possession of the property. Even after default and taking possession, the lien attaches only to income earned after the entry.¹¹⁵ Any judgment creditor of the mortgagor may have the income applied to the payment of his claim. Upon failure to pay the debt secured by the mortgage, however, the mortgagee may foreclose the mortgage and enforce his lien upon the income by impounding it, that is, by bringing it into court to be distributed to satisfy the mortgage debt.¹¹⁶

Mortgage of franchise. A general mortgage covering all the property of a corporation sometimes expressly includes, in addition to the real and personal property, the franchise of the corporation. This provision is commonly incorporated in mortgages of railroad corporations, and of public utility corporations, such as gas and electric light companies. A distinction must be drawn in this connection between (1) the corporate or primary franchise, that is, the right to exist as an artificial being, and (2) the special or secondary franchise, or the subsidiary rights and privileges which the corporation receives; as, for example, the right to erect poles, or to lay tracks.¹¹⁷ The secondary franchise may ordinarily be mortgaged under a general power granted to a corporation to dispose of its property.¹¹⁸ When a mortgage includes the franchise of the corporation, it is the secondary franchise which is subjected to the lien of the mortgage. The primary franchise, on the other hand, may not be alienated without the express consent of the state.¹¹⁹ The question of a corporation's power to mortgage its primary franchise is of little importance today. There is no reason for attempting to transfer a primary franchise in view of the ease with which a new corporation may be organized.

¹¹⁵ *Zartman v. First Nat. Bank of Waterloo*, (1907) 189 N. Y. 267, 82 N. E. 806.

¹¹⁶ *Atlantic Trust Co. v. Dana*, (1903) 128 F. 209.

¹¹⁷ *Turner v. Turner Mfg. Co.*, (1924) 184 Wis. 508, 199 N. W. 155.

¹¹⁸ *First Union Trust & Sav. Bank v. Mississippi Power Co.*, (1933) 167 Miss. 876, 150 So. 381.

¹¹⁹ *Gulf Refining Co. et al. v. Cleveland Trust Co. et al.*, (1926) (Miss.) 108 So. 158.

Partial release of mortgaged property. When a mortgage has been recorded, the property covered is subject to the lien created upon it. Before the discharge of the mortgage, the corporation may find it advisable to sell part of the mortgaged property. Accordingly, a clause is inserted in almost every mortgage to the effect that part of the property may, under certain conditions, be released from the lien. In order to effect a release under such a clause, the board of directors generally passes a resolution authorizing application to the mortgagee for a release. The mortgagee then executes an instrument, releasing his right, title, and interest in the property to be sold. This release must be filed and recorded in the same manner as the original mortgage. The proceeds of the sale of the property are then deposited with the mortgagee or for his benefit. Instead of placing the proceeds of the sale in trust for the mortgagee, it is often provided that the mortgagor may substitute other property of equal value to replace the property released under a mortgage lien. Releases of property subject to a mortgagee's lien are often desired when the property mortgaged is no longer of use to the mortgagor and a sale might be highly beneficial.

Bond issues. The most common method of raising substantial funds for corporate purposes is through the issuance of bonds. The bonds are generally issued under a trust indenture, pursuant to a resolution of the directors or stockholders. Ordinarily a bond need not be in any particular form.¹²⁰ A trust deed, however, generally requires the bonds to be under the seal of the corporation, and to be certified by the trustee. A bond that lacked the corporate seal and the trustee's certificate has nevertheless been held to be an existing obligation of the corporation, and to constitute an equitable lien upon the property included in the deed of trust.¹²¹ The terms of a bond cannot ordinarily be changed without the bondholder's consent.¹²²

An instrument is not necessarily a bond because it is so labeled.¹²³ On the other hand, an instrument labeled something

¹²⁰ *Cass v. Realty Securities Co.*, (1911) 148 N. Y. App. Div. 96, 132 N. Y. Supp. 1074, *aff'd* 206 N. Y. 649, 99 N. E. 1105.

¹²¹ *Hicks v. Fruen Cereal Co.*, (1930) 182 Minn. 93, 233 N. W. 828. See also *Easton v. Butterfield Live Stock Co.*, (1929) 48 Idaho 153, 279 P. 716.

¹²² *Heider v. Hermann Sons Hall Ass'n*, (1932) 186 Minn. 494, 243 N. W. 699; *Aiken v. Insull*, (1941) 122 F. (2d) 746; *De Met's, Inc. v. Insull*, (1941) 122 F. (2d) 755, *cert. denied*, (1942) 315 U. S. 806, 62 S. Ct. 638; *Rothschild v. Jefferson Hotel Co.*, (1944) 56 F. Supp. 315.

¹²³ *Heider v. Hermann Sons Hall Ass'n*, (1932) 186 Minn. 494, 243 N. W. 699.

else, as, for example, a stock certificate, may be a bond and consequently treated as such.¹²⁴ The test usually applied is this: generally, the special feature of the creditor-debtor relation is the presence of a fixed maturity date at which time the holder can demand payment whether or not there are net earnings. If the instrument has this feature, it is a bond or debenture and not a stock certificate.¹²⁵

The characteristics of bonds are so varied that many classifications may be made. The major grouping, however, may be set forth as: (1) unsecured bonds, and (2) secured bonds.

Unsecured bonds. A bond issued without security is simply a promise of the borrower to pay a certain sum of money at a stipulated time and place, with interest at a fixed rate. Unsecured bonds, unprotected by any lien upon property, are commonly called "debentures."¹²⁶ The bond issue is generally made under a trust deed. This deed is simply an agreement containing the borrower's promises as to the manner of conducting the business, made to the trustee for the benefit of the bondholders,¹²⁷ and defining the rights of the debenture holders. The execution of the trust deed in conjunction with the issuance of the bond is the feature that distinguishes a debenture from the ordinary note of the corporation.

Other forms of unsecured bonds may be issued by a corporation for various purposes, as, for example, the income bond issued

¹²⁴ First Nat. Bank of Binghamton v. Mayor and City Council of Baltimore, (1939) 27 F. Supp. 444.

¹²⁵ This test was applied in Com'r of Internal Revenue v. H. P. Hood & Sons, (1944) 141 F. (2d) 467.

¹²⁶ Mueller v. Howard Aircraft Corp., (1946) 329 Ill. App. 570, 70 N. E. (2d) 203. For cases distinguishing debenture certificates from stock, see Washmont Corp. v. Hendricksen, (1943) 137 F. (2d) 306; Com'r of Internal Revenue v. H. P. Hood & Sons, Inc., (1944) 141 F. (2d) 467.

¹²⁷ Some trust indentures contain clauses, known as "negative pledge" clauses, restricting the corporation against mortgage or pledge of any of its property unless the debenture holders or bondholders are equally or ratably secured by the instrument creating the obligation. A negative pledge clause was considered in Kelly v. Central Hanover Bank & Trust Co., (1935) 11 F. Supp. 497, criticized in 36 *Columbia Law Rev.* 319 (1936). The court in this case construed the negative pledge clause as applicable only to long-term funded loans. In Chase Nat. Bank of City of New York v. Sweezy, (1931) 281 N. Y. Supp. 487, aff'd (1933) 261 N. Y. 710, 185 N. E. 803 and Kaplan v. Chase Nat. Bank of City of New York, (1934) 156 N. Y. Misc. 471, 281 N. Y. Supp. 825, short-term loans were assumed to be within the negative pledge clause. See, also, criticism of the Kelly Case in 49 *Harvard Law Review* 49 (1936), and "Protection for Debenture Holders," 46 *Yale Law Jour.* 97 (1936). Posner, "The Trustee and the Trust Indenture," 46 *Yale Law Jour.* 737, at page 757 (1937).

as a result of financial reorganization in exchange for creditors' claims, the payment of interest on which is made contingent upon the earnings of the corporation. The receiver's certificate issued to raise funds to continue current obligations of the business after it has passed into a receiver's hands is likewise a form of unsecured bond obligation.

Secured bonds. A secured bond is a promise of the borrower to pay, plus a mortgage or pledge of assets under a trust deed or indenture. Under the terms of the trust instrument, the property given as security for the bond issue is transferred to a trustee who holds the property for the benefit of the bondholders.¹²⁸ Upon payment of the entire indebtedness, the conveyance becomes void, and the property given as security reverts to the corporation.

The parties to the trust deed or indenture are the corporation and a trustee who represents all the bondholders. The trust instrument sets forth in detail all the terms and conditions of the bond issue, including the form of the bond, and the rights, duties, and obligations of the corporation, the trustee (or trustees),¹²⁹ and the bondholders.¹³⁰ While these terms and conditions must generally be complied with, the corporation may be estopped from denying the validity of the bonds on the ground that some

¹²⁸ Until some of the bonds secured by the trust deed have been negotiated, the deed is not in force, and the makers and trustees who are the sole parties may modify the terms and conditions of the trust. *American Life Ins. Co. v. Bennett Live Stock Co.*, (1926) 114 Neb. 749, 209 N. W. 743; *Hubbell v. Syracuse Iron-Works*, (1891) 59 Hun. 620, 14 N. Y. Supp. 345.

¹²⁹ *In re Wood's Estate*, (1940) 2 Wash. (2d) 319, 97 P. (2d) 1088.

¹³⁰ The bondholder is a creditor of the corporation. So long as the corporation is not in default, he does not participate in the management of the company's affairs. See *Gay v. Burgess Mills*, (1909) 30 R. I. 231, 74 A. 714. After default, the bondholders' rights are governed by the terms of the trust deed.

The trust deed often contains a provision that no bondholder shall bring suit unless the trustee fails to act after having been requested to do so by the holders of a specified proportion of the outstanding bonds. The validity and effect of such provisions are considered in 41 *Yale Law Jour.* 312 (1931); 33 *Mich. Law Rev.* 604; 33 *Mich. Law Rev.* 1082; 31 *Mich. Law Rev.* 86. See also *Block v. Mansfield Mining & Smelting Co.*, (1938) 23 F. Supp. 700. *Dietzel v. Anger*, (1936) 8 Cal. 373, 58 P. (2d) 217; *Lubin v. Pressed Steel Car Co.*, (1933) 146 N. Y. Misc. 462, 263 N. Y. Supp. 433; *First Trust Co. in Oshkosh v. Maxcy*, (1938) 229 Wis. 284, 282 N. W. 81; *Van Wezel v. McCord Radiator & Mfg. Co.*, (1939) 20 N. Y. Supp. (2d) 91; *Dunham v. Omaha & Council Bluffs Street Ry. Co.*, (1939) 106 F. (2d) 1, rev'g 25 F. Supp. 287; *Livingston v. Blue Creek Coal & Land Co.*, (1940) 338 Pa. 473, 12 A. (2d) 915; *Meyer v. Lowry & Co.*, (1940) 19 N. Y. Supp. (2d) 835; *Perry v. Darlington Fireproofing Co.*, (1945) 76 Ohio App. 101, 63 N. E. (2d) 222.

For protection of investors under Trust Indenture Act of 1939, see page 799.

condition was not met. For example, where the trust deed requires that a certificate be attached to each bond, executed by the trustee, to the effect that it was one issued under the trust deed, and no certificate is attached, the corporation cannot deny the validity of the bonds where it has sold the bonds and kept the proceeds. The provision is considered waived.¹³¹ In case of doubt as to any provision of the trust indenture, it is construed against the corporation and in favor of the bondholder who had no part in preparing the indenture.¹³²

The terms in the trust deed must be read together with the bond to arrive at the intent of the parties.¹³³ In the event of an inconsistency, it has been held that the provisions of the bond prevail over those in the trust deed, for the bond is the instrument upon which the bondholder relies primarily when he purchases his bond.¹³⁴ If the bond refers specifically to the resolution pursuant to which it was issued, and indicates that the bond is issued and accepted subject to the terms, conditions, restrictions, rights, and privileges set forth in the resolution, the bond, the interest coupons attached to it, and the resolution must be construed together. If there is any inconsistency between the bonds, the coupons, and the provisions of the resolution, the

¹³¹ *Easton v. Butterfield Live Stock Co. et al.*, (1929) 48 Idaho 153, 279 P. 716. See, to the same effect, *Hicks v. Fruen Cereal Co.*, (1930) 182 Minn. 93, 233 N. W. 828.

¹³² *Barnes v. United Steel Works*, (1939) 11 N. Y. Supp. (2d) 161. A trust deed should be construed in a reasonable manner. *Marine Midland Trust Co. v. Alleghany Corporation*, (1939) 28 F. Supp. 680; *In re Wood's Estate*, (1940) 2 Wash. (2d) 319, 97 P. (2d) 1088.

¹³³ *Watson v. Chicago, R. I. & P. R. Co.*, (1915) 169 N. Y. App. Div. 663, 155 N. Y. Supp. 808; *Lubin v. Pressed Steel Car Co.*, (1933) 146 N. Y. Misc. 462, 263 N. Y. Supp. 433; *Williamsport Nat. Bank v. First Nat. Bank*, (1939) 334 Pa. 130, 5 A. (2d) 228; *Van Wezel v. McCord Radiator & Mfg. Co.*, (1939) 20 N. Y. Supp. (2d) 91; *Dunham v. Omaha & Council Bluffs Street Ry. Co.*, (1939) 106 F. (2d) 1, rev'g 25 F. Supp. 287. See also *Rothschild v. Jefferson Hotel Co.*, (1944) 56 F. Supp. 315; *Gillmor v. Indianapolis Gas Co.*, (1943) 136 F. (2d) 925.

¹³⁴ *Lubin v. Pressed Steel Car Co.*, supra (Note 133). To same effect, *Cunningham v. Pressed Steel Car Co.*, (1934) 238 N. Y. App. Div. 624, 265 N. Y. Supp. 256, 259, aff'd 263 N. Y. 671, 189 N. E. 750; *Guardian Depositors Corp. v. David Stott Flour Mills*, (1939) 291 Mich. 180, 289 N. W. 122.

See, however, *Mitchell v. Madison Ave. Offices, Inc.*, (1933) 147 N. Y. Misc. 149, 263 N. Y. Supp. 442, in which a statement in the bond, clearly indicating to the holders that their remedy upon default and dishonor was controlled by the terms of the trust deed, was held sufficient to bind the bondholders by limitations in the trust deed governing recovery upon default. Similarly, a statement on the debenture that all rights of action were vested in the trustee, and that enforcement was governed by the provisions of the trust agreement, was held to be sufficient to bind the debentureholder by the terms of the trust deed. *Friedman v. American National Co.*, (1939) 172 N. Y. Misc. 1044, 16 N. Y. Supp. (2d) 887.

provisions of the bonds and coupons prevail.¹³⁵ The types of bonds generally secured by mortgage indentures or deeds of trust are mortgage bonds and collateral trust bonds.

Mortgage bonds. Mortgage bonds are secured by a mortgage on the property of the corporation. The property may consist of real estate, personal property, or franchise of the corporation. The most usual form is a general mortgage covering all the property of the corporation, including after-acquired property.

Mortgage bonds have been issued with varied titles, depending upon the priority of their liens upon the corporate assets, the purpose for which the issue was created, or the particular manner in which principal or interest on the bonds is payable. For example, depending upon the priority of their liens, mortgage bonds have been called First Mortgage Bonds, First Lien Bonds, Prior Lien Bonds, General Mortgage Bonds, Consolidated Mortgage Bonds; depending upon the purpose for which the issue was created, mortgage bonds have been designated Refunding Bonds, Improvement Bonds, Adjustment Bonds, Construction Bonds, Extension Bonds; depending upon the manner of payment of principal or interest, mortgage bonds have been termed Sinking Fund Bonds, Callable Bonds, Serial Bonds, Income Bonds, Guaranteed Bonds.

Collateral trust bonds. The collateral trust bond differs from all other secured bonds in that it is secured by a pledge of intangible personal property, such as stocks or bonds, instead of a mortgage on real property or tangible personal property. The stocks, bonds, or other securities given as collateral for the bond issue are deposited with a trustee under a collateral trust indenture. This indenture is similar to the ordinary mortgage indenture or trust deed securing an issue of mortgage bonds, except that, instead of the granting clauses conveying the mortgaged property contained in the mortgage indenture, it includes pledging clauses.¹³⁶

Equipment trust certificates. The most common method of raising funds for the purchase of railroad and other movable equipment¹³⁷ is the issuance of equipment trust certificates

¹³⁵ *Goodjon v. United Bond & Bldg. Corp.*, (1929) 226 N. Y. App. Div. 137, 234 N. Y. Supp. 522, followed in 227 N. Y. App. Div. 688, 236 N. Y. Supp. 805.

¹³⁶ See *Marine Midland Trust Co. v. Alleghany Corporation*, (1939) 28 F. Supp. 680, involving a provision of the collateral trust indenture, obligating the corporation to maintain the collateral security at 150% of the principal amount of the outstanding bonds.

¹³⁷ Oil companies, tank car companies, and tank line companies, as well as other

under the so-called Philadelphia plan.¹³⁸ A railroad company desiring new equipment places its order with the manufacturer. When the equipment is about ready for delivery, an equipment trust agreement is entered into, the parties to which are the railroad company, the vendor of the equipment or someone representing the vendor, and a trust company which is to act as trustee. Under the terms of this agreement, title to the equipment is to be vested in the trustee, who is to execute a lease of the equipment to the railroad company and hold the equipment and the lease for the benefit of holders of equipment trust certificates. These equipment trust certificates are issued by the trustee, and represent shares of interest in the equipment and in the lease. The certificates are negotiable like any other securities, with interest coupons or dividend warrants attached, and may be guaranteed by the railroad company. They are sold to the public through the usual investment banking channels, and the proceeds are applied to the payment of the purchase price of the equipment. A lease is executed by the trustee to the railroad, under the terms of which the railroad company is to pay rentals to the trustee. An advance rental payable by the railroad company is generally applied to the balance of the purchase price of the equipment, and the subsequent periodic rentals are calculated to cover interest payments and payment of the principal of the equipment trust certificates as they mature. Under the terms of the lease, title to the equipment vests in the railroad company upon termination of the lease and after all payments due under the lease and under the equipment trust agreement have been completed. The trustee is required to execute an instrument for record to evidence transfer of title. Each piece

organizations that require large amounts of capital to be invested in movable and salable equipment, may make use of equipment trust obligations to finance the purchase of equipment. The equipment trust method of financing has also been used for the purchase of airplanes.

¹³⁸ Some railroad companies formerly financed the purchase of railroad equipment under the so-called "New York" or "Conditional Sale" plan. Under this plan, the vendor transfers the equipment to a trustee who, in turn, executes a conditional bill of sale to the railroad company. Payment by the purchasing railroad company is made in the form of notes, and title to the equipment remains in the trustee until all the notes are paid. Under the laws of some states, such equipment notes are subject to taxation, while equipment trust certificates issued under the Philadelphia plan are not, and for this reason, among others, the New York plan has been largely abandoned. For a more detailed explanation of the differences between the Philadelphia and the New York plans, see Kenneth Duncan, *Equipment Obligations* (New York, D. Appleton-Century Company, 1924).

of equipment must, by the terms of the lease, be marked with the names of the railroad company and of the trustee, with a reference to the equipment trust.

Bonds issued with stock purchase warrants. Stock purchase warrants have been issued by some corporations in connection with the sale and issuance of bonds. The principles outlined on page 486, governing stock purchase warrants issued in connection with stock, apply with equal force to warrants attaching to bonds.

Coupon and registered bonds. Bonds may be either coupon bonds or registered bonds. A coupon bond bears interest coupons payable to bearer, which are, in effect, written contracts for the payment of a definite sum of money on a given date. On the date fixed for payment of interest, the holder of the bond may detach the interest coupon and present it at any bank for collection. The coupons may be negotiated¹³⁹ and sued upon without proof of ownership or production of the bond.¹⁴⁰ Both principal and interest of a coupon bond may be payable to bearer, in which case the instrument has all the qualities of ordinary negotiable commercial paper.¹⁴¹

When a negotiable bond is lost or stolen, the owner loses title to it as soon as it passes into the hands of an innocent purchaser. As a protection against this loss, the bond may be registered. A fully registered bond is issued without coupons attached. The name of the payee is entered on the books of the corporation as the registered owner. On the day when, by the terms of the bond, the interest falls due, the interest is paid directly by check to the registered owner of the bond. A bond registered in the name of a particular owner is transferred in the same manner as a share of stock; that is, by delivery and by execution of an assignment indorsed on the bond, or by the execution of a separate "bond power," similar to the stock power.¹⁴²

A coupon bond may be registered as to principal and not as to interest. The bonds in such case are known as registered coupon bonds. The coupons remain attached to the bond and are col-

¹³⁹ *Mississippi Power & Light Co. v. A. E. Kusterer & Co.*, (1930) 156 Miss. 22, 125 So. 429; *Sears v. Greater New York Development Co.*, (1931) 51 F. (2d) 46.

¹⁴⁰ *Aurora City v. West*, (1868) 74 U. S. 42.

¹⁴¹ *Stuart Court Realty Corp. v. Gillespie*, (1928) 150 Va. 515, 143 S. E. 741. The bond may be transferred merely by delivery; no indorsement is necessary. *Pittsburgh, C. C. & St. L. Ry. Co. v. Lynde*, (1896) 55 Ohio St. 23, 44 N. E. 596.

¹⁴² *First Nat. Bank of Binghamton v. Mayor and City Council of Baltimore*, (1939) 27 F. Supp. 444.

lectible precisely as if the principal had never been registered. The bond may be reconverted into a bearer coupon bond by assignment on the back of the bond, payable to the bearer, and an entry on the registration books to the effect that the bond is again a bearer coupon bond.

Interchange of coupon and registered bonds. Under modern trust indentures, bonds are interchangeable, and may be changed from coupon bonds to registered bonds, and later back to coupon bonds. A coupon bond is converted into a registered bond in the following manner: the bond is presented to the corporation or to its registrar, the coupons are clipped, the name of the owner is entered on the books of the corporation, and a proper indorsement is made on the bond itself, showing its registration.

Ordinarily a bond that has once been converted from a coupon bond into a registered bond cannot again be converted into a coupon bond without the issuance of a new bond.¹⁴³

Power to issue bonds. The power of a corporation to issue bonds, like the power to mortgage, is an incident of its power to contract a debt. Even if the articles of incorporation do not specifically grant the power, the corporation may issue bonds in any instance where it may lawfully incur an obligation, in the absence of statutory restriction.¹⁴⁴ In many states, however, specific authority to issue bonds is granted by statute.

Unless otherwise provided by statute or by the articles of incorporation, the board of directors is vested with the authority to issue bonds as an accessory of its power to borrow, and consent of the stockholders is not necessary.¹⁴⁵ However, the statutes in many states require the consent of the stockholders to increase the bonded indebtedness of the corporation.¹⁴⁶ Others require the consent of stockholders, not only to increase the bonded in-

¹⁴³ *Benwell v. Mayor, etc. of City of Newark*, (1897) 55 N. J. Eq. 260, 36 A. 668. The holder of a coupon bond which entitles him to have it converted at his option into a registered bond may enforce such contract by an action for specific performance. *Ibid.*

¹⁴⁴ *Orme v. Salt River Valley Water Users' Ass'n*, (1923) 25 Ariz. 324, 217 P. 935; *Pratt v. Higginson*, (1918) 230 Mass. 256, 119 N. E. 661.

¹⁴⁵ *Citrus Growers' Dev. Ass'n v. Salt River Valley Water Users' Ass'n*, (1928) 34 Ariz. 105, 268 P. 773. After the directors have authorized creation of a bonded indebtedness, the president may bind the corporation by employing counsel to do legal work preliminary thereto. *Argue v. Monte Regio Corp.*, (1931) 115 Cal. App. 575, 2 P. (2d) 54.

¹⁴⁶ For a detailed discussion of these provisions and of the decisions rendered under them, see Myers, "Increase of Corporate Indebtedness under Constitutional Provisions Requiring Consent of Stockholders," 44 *Dickinson Law Review* 307 (1940).

debtedness but to create it as well. The stockholders may, however, waive the benefit of the statutory requirements, or may give their consent after the issuance of the bonds.^{146a} In an action in which the validity of an issue of bonds and the execution of a trust deed was questioned, because of the fact that the public notice required by statute to be given to stockholders had been omitted, it was held that the stockholders were bound in view of the fact that they had all actually been present at the meeting.¹⁴⁷ The corporation may similarly be estopped from questioning the legality of authorization of a bond issue. Where a corporation gave bonds as collateral to secure the original indorsers of its note, and received the benefits of the note, it was held that the corporation could not question the legality of the directors' authorization of the bonds.¹⁴⁸

Registration of bonds under Federal Securities Act. The term "security" as defined in the Securities Act of 1933, as amended, includes bond, debenture, and other evidences of indebtedness. The explanation on page 399 relating to necessity for registration with the Securities and Exchange Commission of new offerings of securities, and to the liability of directors and officers for failure to meet the requirements of the Act, applies, therefore, to bonds as well as to stock. Securities exempted from the provisions of the Act include short-term paper, such as notes, drafts, bills of exchange, and bankers' acceptances arising out of or used for current transactions with a maturity of not more than nine months. The Securities and Exchange Commission is given power to exempt other classes of securities where the aggregate amount at which the issue is offered to the public does not exceed \$300,000.

The Securities Exchange Act of 1934, as amended, also defines the term "security" to include notes, bonds, and debentures, excluding short-term obligations, and the registration requirements and restrictions outlined on page 399 with respect to stock are also applicable to bonds registered on an exchange.

Securities issued by utility companies may also be subject to the Public Utility Holding Company Act.¹⁴⁹

^{146a} *Waterman Corp. v. Johnston*, (1949) 195 N. Y. Misc. 991, 91 N. Y. Supp. (2d) 522.

¹⁴⁷ *Riesterer v. Horton Land & Lumber Co.*, (1901) 160 Mo. 141, 61 S. W. 238. See also *Mann v. Mann*, (1929) 57 N. D. 550, 223 N. W. 186, in which it was held that a subsequent lien creditor could evoke the statute where all the stockholders had given their consent.

¹⁴⁸ *Dennis v. Co-Operative Pub. Co. et al.*, (1928) 46 Idaho 534, 269 P. 82.

¹⁴⁹ For purposes of this Act, see *Securities and Exchange Commission v. Asso-*

Blue-sky laws. The right to issue and sell bonds and other securities and evidences of indebtedness is generally subject to the control of some state commission established under the so-called blue-sky laws. The language and provisions of the statutes are not uniform. However, the following details must, in most cases, be submitted to the officials designated to supervise the issuance of securities for consideration in determining whether their sale will be allowed:

1. The name of the corporation issuing the securities.
2. A description of the securities.
3. The amount of the securities to be offered.
4. The price at which the securities will be offered for sale.
5. A statement showing the financial condition of the corporation.

If the corporation wishes to sell its securities in a foreign state, it is generally required to file a certificate of consent to service of process in that state, or to appoint an agent upon whom service may be made. This is required for the protection of persons in the foreign state who may have a cause of action against the corporation in connection with its bond issue, and who otherwise might be unable to secure service of process upon the corporation.

Trust Indenture Act of 1939. The Trust Indenture Act, approved August 3, 1939, effective February 3, 1940, regulates trust indentures covering bonds, debentures, notes, and similar securities which are publicly offered by the means and instrumentalities of transportation or communication in interstate commerce. The Act applies to two classes of trust indentures: (1) indentures which must be filed with the Securities and Exchange Commission as part of a registration statement under the Securities Act of 1933 (see page 399), and (2) indentures covering securities issued in exchange for other securities of the same issuer and securities issued under a plan approved by a court.

The purposes of the Trust Indenture Act are threefold: (1) to provide full and fair disclosure of the essential provisions of the indenture at original issue and throughout the life of the securities issued under the indenture, (2) to provide machinery for such continuing disclosure and to enable security holders to unite for the protection of their own interests, and (3) to assure security holders that they will have the services of a disinterested

ciated Gas & E. Co., (1938) 24 F. Supp. 899, aff'd 99 F. (2d) 795. See also Prentice-Hall Securities Regulation Service.

trustee, who will conform to the high standards of conduct observed by the more conscientious trust institutions. To effect these purposes, the Trust Indenture Act requires that indentures subject to the Act shall be "qualified" by conforming to specific statutory requirements expressed in the Act. The standards prescribed by the Act affect those provisions of the indenture which relate to the protection and enforcement of investors' rights.

The Securities and Exchange Commission is entrusted with the duty of seeing that the terms of each indenture conform to the Act; it has no power with respect to enforcement of the provisions of the indenture. Civil and criminal liabilities imposed for violation of the Trust Indenture Act are substantially the same as those contained in the Securities Act of 1933.¹⁵⁰

It should be noted that small security issues are not subject to the Trust Indenture Act. Bonds, debentures, notes, or other evidences of indebtedness not issued under an indenture are exempt, but the maximum aggregate principal amount of such securities of any one issuer to which this exemption may be applied in any period of 12 consecutive months is limited to \$250,000.

Securities issued under an indenture which limits the aggregate principal amount of securities outstanding thereunder to \$1,000,000 or less are exempt, but the maximum aggregate principal amount of securities of any one issuer to which this exemption may be applied in any period of 36 consecutive months is limited to \$1,000,000.

Consideration for bonds—antecedent debt. In many of the states, the following provision is found on the statute books: "No corporation shall issue bonds, except for labor done, services performed, or money or property actually received, and all fictitious increases of indebtedness shall be void." The word "issue," in this connection, has been interpreted to include the pledge of bonds.¹⁵¹

The purpose of these statutes is to protect stockholders and bona fide creditors against the issuance of worthless securities.¹⁵²

¹⁵⁰ For complete information regarding the Trust Indenture Act of 1939 and the Securities Act of 1933, see *Prentice-Hall Securities Regulation Service*.

¹⁵¹ *In re Valecia Condensed Milk*, (1917) 240 F. 338, rev'g 233 F. 173. See also *Hinkley Co. v. Pelton et al.*, (1929) 200 Wis. 48, 227 N. W. 308; *In re Metalcraft Corporation*, (1940) 31 F. Supp. 194.

¹⁵² *Hinkley Co. v. Pelton et al.*, (1929) 200 Wis. 48, 227 N. W. 308; *Nelson v. Darley*, (1940) 239 Ala. 87, 194 So. 177. See *Clark v. Freeling*, (1938) 196 Ark.

Under such a statute, bonds cannot be issued either by way of mortgage or pledge, to secure an antecedent debt.¹⁵³ However, the borrowing and the issuing of the bonds need not be simultaneous.¹⁵⁴ Where a borrowing corporation promises the lender before the loan is made that it will subsequently issue and deliver bonds as collateral security for the loan, and later fulfills that promise, the bonds are deemed to have been issued for a present consideration.¹⁵⁵ An extension of time for the repayment of a loan will not be deemed sufficient consideration for the issuance of bonds under the requirements of the statutes mentioned above.¹⁵⁶ The Negotiable Instruments Law, however, recognizes a preëxisting debt as constituting value. Thus, it has been held under the Negotiable Instruments Law that bonds may be pledged as security for an antecedent debt.¹⁵⁷

Issuance of bonds at less than par. Unless prohibited by its charter or by statute, a corporation may issue bonds at a discount and may dispose of them on such terms as it may be able to secure under prevalent business conditions.¹⁵⁸ They may be

970, 120 S. W. (2d) 375, in which securities issued without consideration were held invalid, but good in the hands of innocent holders for value.

Value of goodwill of business sold, appraised as capitalization of seller's earnings, was held to be sufficient consideration for issuance of bonds. *Estate Planning Corporation v. Commissioner of Internal Rev.*, (1939) 101 F. (2d) 15.

¹⁵³ *Davis v. Seneca Falls Mfg Co.*, (1925) 8 F. (2d) 546, aff'd and modified, on another ground, in (1927) 17 F. (2d) 546; *Hess Warming & Ventilating Co. v. Burlington Grain & Elevator Co.*, (1919) 280 Mo. 163, 217 S. W. 493; *Lyon v. Bleeg*, (1917) 240 F. 405.

¹⁵⁴ *Westinghouse Electric & Mfg Co. v. Brooklyn R. T. Co.*, (1923) 288 F. 221. So, too, where a loan was made to a corporation within four months after execution of the security, it was held that this was sufficient to satisfy the statutory requirement that bonds be issued only for money paid. *In re Metalcraft Corporation*, (1940) 31 F. Supp. 194.

¹⁵⁵ *Rahway Nat. Bank v. Thompson*, (1925) 7 F. (2d) 419.

¹⁵⁶ *In re Progressive Wall Paper Corp.*, (1916) 229 F. 489; *In re Paul De Laney Co.*, (1928) 23 F. (2d) 737. In an appeal of the De Laney case, 26 F. (2d) 961, it was held that the release of a mortgage given as collateral to secure a debt was present consideration for the issuance of the bonds to secure the debt so as to satisfy the statute, the bonds being substituted as security in place of the mortgage. The court said further that it was immaterial whether the property mortgaged was equal in value to the market value of the bonds, property of any value being sufficient if it is really intended as consideration for the bonds and not merely as a cover to obtain security for a preëxisting debt. The case was affirmed in 33 F. (2d) 945, where the mortgage originally given to secure the debt was declared valid.

¹⁵⁷ *Hinkley Co. v. Pelton et al.*, (1929) 200 Wis. 48, 227 N. W. 308.

See also *In re Mifflinburg Body Co.*, (1942) 127 F. (2d) 59, discussed in 55 *Harvard Law Review* 1381 (1942).

¹⁵⁸ *Mercer v. Steil*, (1922) 97 Conn. 583, 117 A. 689; *In re Radio-Keith-Orpheum Corporation*, (1939) 106 F. (2d) 22.

sold or pledged at less than par, if necessary,¹⁵⁹ provided, of course, that no creditor is thereby defrauded.¹⁶⁰ The directors are only required to exercise their honest judgment.¹⁶¹

In some states, the statutes specifically authorize the directors to sell or pledge bonds on such terms as they may deem expedient. In others, the consideration for which bonds may be issued, or the rate of discount at which they may be pledged, is limited to a certain percentage of their par value.

The question arises as to whether a statute prohibiting a corporation from issuing bonds, except for money paid, labor done, or property actually received, and declaring fictitious increases of indebtedness void, does not prevent the sale of bonds at a discount.¹⁶² In interpreting this statute, it has been held generally that the issuance of bonds at less than par is not thereby prohibited, but that, while the statute may not require the corporation to receive one dollar in money or value for every dollar of indebtedness created, the amount received must bear some reasonable and just approximation to the amount of the indebtedness.¹⁶³

Even in those states in which corporations are permitted to set up the defense of usury, it has been regarded as settled that no usury exists where a corporation in good faith pledges its bonds at less than the face value as collateral to secure its debt. The primary duty, it has been argued, is to pay the debt and to release the collateral. The fact that collateral in excess of the indebtedness may be sacrificed after a default occurs does not taint the loan with usury, inasmuch as, at the inception of the loan, there was no intent to violate the statutes against usury.¹⁶⁴ In those states in which usury may not be set up by a corporation as a defense, bonds may of course be issued for less than par, unless the statute provides otherwise. In some states it is specifically provided by statute that the usury laws shall not apply to the issuance of bonds.

Extinction of bonded indebtedness. The bonded indebted-

¹⁵⁹ *In re Paul De Laney Co.*, (1928) *supra* (Note 156). See also *Westinghouse Electric & Mfg. Co. v. Brooklyn R. T. Co.*, (1923) 288 F. 221.

¹⁶⁰ *Pueblo Foundry & Machine Co. v. Lannon*, (1920) 68 Col. 131, 187 P. 1031.

¹⁶¹ *Central Trust Co. of Illinois v. Southern Oil Corp.*, (1925) 8 F. (2d) 338.

¹⁶² *McKee v. Title Insurance & Trust Co.*, (1911) 159 Cal. 206, 113 P. 140.

¹⁶³ *Northside Ry. Co. v. Worthington*, (1895) 88 Tex. 562. See also *Pollitz v. Wabash R. Co.*, (1915) 167 N. Y. App. Div. 669, 152 N. Y. Supp. 803; *In re Wyoming Valley Ice Co.*, (1907) 153 F. 787.

¹⁶⁴ *Rudisill Soil Pipe Co. v. Eastham Soil Pipe & Foundry Co.*, (1923) 210 Ala. 145, 97 So. 219.

ness of a corporation may be wiped out in one of three ways, namely: (1) by redemption at or before maturity, (2) by conversion, or (3) by refunding. These methods, and the procedure by which and the circumstances under which they may be used, will be discussed separately in the paragraphs following.

Redemption of bonds, in general. Redemption is the exchange of bonds for cash. The exchange may take place (1) at maturity, (2) before maturity at the option of the corporation, or (3) before maturity pursuant to agreement between the corporation and the bondholders. Where the corporation determines whether the bonds should be retired, the right to make the election generally rests with the board of directors. Of course, if the articles of incorporation or the governing state statute or the provisions of the bond itself require action on the part of the stockholders, the directors have no authority to retire the stock without the stockholders' consent.

Redemption of bonds by payment at maturity—sinking fund. The corporation is, of course, under obligation to extinguish its debt at maturity. To insure the availability of sufficient funds to redeem its bonds at their maturity, the corporation usually establishes what is known as a sinking fund, either of its own volition or pursuant to a requirement under the terms upon which the bonds were issued. The corporation sets aside a certain amount of cash out of each year's earnings to build up a fund for the specific purpose of retiring the bonds. This trust fund belongs to the bondholders and cannot be attached by creditors of the corporation.¹⁶⁵ The fund may be administered by the corporation, the trustee, or a sinking fund agent for the benefit of bondholders.¹⁶⁶ It may be built up by depositing in the fund fixed or variable installments of money, or by purchase of bonds for the fund at certain intervals.¹⁶⁷ Bonds retired by

¹⁶⁵ *First Nat. Bank of Portland v. Stretcher*, (1942) 169 Ore. 532, 129 P. (2d) 830; *Brown v. J. P. Morgan & Co., Inc.*, (1943) 265 N. Y. App. Div. 631, 40 N. Y. S. (2d) 229, aff'd, (1946) 295 N. Y. 867, 67 N. E. (2d) 263.

¹⁶⁶ For effect of failure to maintain sinking fund as required, see *Barnes v. United Steel Works Corporation*, (1939) 11 N. Y. Supp. (2d) 161; *Block v. Mansfield Mining & Smelting Co.*, (1938) 23 F. Supp. 700; *Van Wezel v. McCord Radiator & Mfg. Co.*, (1939) 20 N. Y. Supp. (2d) 91.

¹⁶⁷ Where the trust deed specifies the manner in which the sinking fund is to be applied, the fund must be applied in the manner indicated. *Truby v. M. & T. Trust Co.*, (1931) 141 N. Y. Misc. 507, 253 N. Y. Supp. 108. This case is discussed in 3 *Fiduciary Law Chronicle* 5 (1932). The article also considers in detail the meaning of the term "sinking fund" and presents the various cases in which the sinking fund has been defined. See also Posner, "The Trustee and the Trust Indenture," 46 *Yale Law Jour.* 737, at page 762 (1937). For waiver of

the sinking fund may be required to be cancelled by the trustee,¹⁶⁸ or they may be kept alive and interest paid to the holder of the sinking fund.

Very often, the bond issue is divided into series with varying maturity dates. For example, the bonds are distinguished by a designating letter such as A, B, C, and so on. Series A is made payable in five years; Series B, in six years; Series C, in seven years. The series that matures each year is paid out of the sinking fund.

Redemption of bonds before maturity. Under the terms of many trust deeds, the corporation is given the option of redeeming all or part of the bonds before maturity upon specified notice to the bondholders and upon payment of a fixed premium.¹⁶⁹ The bonds in such instances are known as "callable" bonds. Where less than all of the bonds are redeemable, provision is frequently made for the selection by lot of the bonds to be redeemed. The right to determine when the option to redeem shall be exercised by the corporation rests with the board of directors, and is exercised in the following manner: the directors adopt a resolution authorizing the redemption; notice of redemption is given to bondholders by publication and by mail;¹⁷⁰ if a paying agent is appointed to carry out the redemption, the corporation deposits with the agent a sum sufficient to redeem the bonds as they are presented for payment. Even in the absence of any redemption provision in the trust deed, a corporation ordinarily has the right to redeem its bonds before maturity by agreement with individual bondholders.¹⁷¹ Purchases

sinking fund payments by bondholders, see *Williamsport Nat. Bank v. First Nat. Bank*, (1939) 334 Pa. 130, 5 A. (2d) 228. A corporation cannot meet sinking fund requirements with unissued debentures. *Birn v. Childs Co.*, (1942) 37 N. Y. S. (2d) 689.

¹⁶⁸ For duty of the trustee to follow the regulatory provisions of the sinking fund, in general, see *Appeal of Colonial Trust Co.*, (1913) 241 Pa. 554, 88 A. 798.

¹⁶⁹ The right of the corporation to purchase bonds for retirement, and the price to be paid for such bonds, are governed strictly by the terms of the trust deed. *In re Jersey Mortgage & Title Guaranty Co.*, (1940) 127 N. J. Eq. 381, 11 A. (2d) 121. See also *New York Trust Co. v. S. E. C.*, (1942) 131 F. (2d) 274; *City Nat. Bank & Trust Co. of Chicago v. S. E. C.*, (1943) 134 F. (2d) 65.

¹⁷⁰ Notice of redemption does not create a new obligation. It serves merely to accelerate date of payment. *Lann v. United Steel Works Corp.*, (1938) 166 N. Y. Misc. 465, 1 N. Y. Supp. (2d) 951.

¹⁷¹ See *Fleming v. Montana Coal & Iron Co.*, (1923) 289 F. 793. See, however, *Missouri K. & T. Ry. Co. v. Union Trust Co. of New York*, (1898) 156 N. Y. 592, 51 N. E. 309. See also *Mueller v. Howard Aircraft Corp.*, (1946) 329 Ill. App. 570, 70 N. E. (2d) 203.

from individual bondholders may be effected by transactions in the open market or by inviting tenders of bonds for sale to the corporation.

Where issued and outstanding bonds are purchased by the obligor corporation, they are not necessarily redeemed or retired.¹⁷² They may be held by the corporation for resale. Such bonds are generally called treasury securities.¹⁷³ If a corporation purchases its own bonds and reissues them,¹⁷⁴ there is, of course, no extinction of the bonded indebtedness. If not resold, they will be extinguished when the issue of which they form a part is redeemed and retired.

Conversion of bonds. Conversion is the exchange of bonds for some other form of security, usually common or preferred stock. Such substitution is generally optional with the bondholder.¹⁷⁵ Where a trust deed gives to the bondholder the privilege of converting his security, the bond is known as a convertible bond. The weight of authority holds that a corporation has no power to issue convertible bonds unless authorized by its charter or by statute.¹⁷⁶ A corporation with the authority to increase its stock has been held to have the power to issue convertible bonds.¹⁷⁷ Upon exchange of the bond for stock, the corporation effects an extinction of its bonded indebtedness.

The right of the bondholder to convert is a contractual one, and cannot be denied by the corporation. If, upon election and demand of the bondholder, the corporation refuses to convert the bonds in accordance with the contract, its refusal constitutes a breach of contract, entitling the bondholder to sue for damages.¹⁷⁸ The bondholder is not required to resort to the trustee

¹⁷² But see *Continental Bank & Trust Co. of N. Y. v. W. A. R. Realty Corp.*, (1943) 265 N. Y. App. Div. 729, 40 N. Y. S. (2d) 854, holding that the obligor corporation's acquisition of negotiable bonds at or before maturity extinguished them.

¹⁷³ But securities issued to an officer of the corporation and held by him pending delivery to those entitled to them are not treasury securities. *Miners Nat. Bank of Pottsville, Pa. v. Frackville Sewerage Co.*, (1945) 157 Pa. Super. 167, 42 A. (2d) 177.

¹⁷⁴ For the right of a corporation to purchase outstanding bonds and reissue them see *Clafin v. S. Carolina R. Co.*, (1880) 8 F. 118; *Broomall v. North American Steel Co.*, (1912) 70 W. Va. 591, 74 S. E. 863.

¹⁷⁵ The privilege of converting bonds may be given to the corporation, but this is a rare practice.

¹⁷⁶ See *Wall v. Utah Copper Co.*, (1905) 70 N. J. Eq. 17, 62 A. 533.

¹⁷⁷ *Van Allen v. The Illinois Central Railroad Co.*, (1861) 7 Bos. (N. Y.) 515.

¹⁷⁸ *P. W. Brooks & Co. v. North Carolina Public Service Co.*, (1930) 37 F. (2d) 220, aff'g 32 F. (2d) 800. The corporation may not set up as a defense to a

as intermediary; he may sue in his own name, since his right is a personal one.¹⁷⁹

The ability of the corporation to effect the conversion is assured by an agreement on its part, contained in the trust deed, to reserve sufficient stock to meet the conversion privilege.

Where bondholders are given the option of conversion, and the corporation is given the option of redemption before maturity, the option to convert has been held to be terminated by the exercise of the option to redeem.¹⁸⁰ Bonds are, however, often issued with the provision that, after notice of redemption is given, the holder shall have a short period in which to exercise his right to convert.

Refunding. Refunding is the exchange of bonds or other obligations about to fall due for obligations having a later maturity date. This is not strictly an extinction of bonded indebtedness. It is a procedure employed by the corporation to extend the maturity date of its bond issue. While the original bonds are extinguished, the debt remains.¹⁸¹ New bond obligations take the place of the old, and the outstanding debt of the corporation is not reduced.

A bondholder has the right, in the absence of contrary provision in his contract, to demand payment of his bond in cash at maturity.¹⁸² He cannot, therefore, be forced to accept other securities in exchange for his maturing obligation. As an inducement to acceptance of the refunding offer, the corporation may offer him a cash bonus or an increased rate of interest. Or, instead of offering the new refunding obligations to the holders

demand for the stock that it did not have such stock available at the time of the exercise of the privilege. *Bratten v. Catawissa R. Co.*, (1905) 211 Pa. 21, 60 A. 319.

The holders of convertible bonds are not stockholders; they are creditors. They have no right to question the act of the corporation in declaring dividends. *Gay v. Burgess Mills*, (1909) 30 R. I. 231, 74 A. 714.

¹⁷⁹ *Brooks & Co., Inc. v. N. C. Public Service Co.*, (1929) 32 F. (2d) 800. See also *Mueller v. Howard Aircraft Corp.*, (1946) 329 Ill. App. 570, 70 N. E. (2d) 203.

¹⁸⁰ *Brooks & Co., Inc. v. N. C. Public Service Co.*, supra; *P. W. Brooks & Co. v. North Carolina Public Service Co.*, (1930) 37 F. (2d) 220. It was also held in this case that a bondholder who, after refusal of the corporation to recognize his conversion right, accepted the redemption money instead of litigating the conversion right, was thereafter estopped from litigating the right.

¹⁸¹ *Marden v. Elks Club*, (1939) 138 Fla. 707, 190 So. 40.

¹⁸² *Fleming v. Fairmont & M. R. Co.*, (1913) 72 W. Va. 835, 79 S. E. 826; *Dunham v. Omaha & Council Bluffs Street Ry. Co.*, (1939) 106 F. (2d) 1, rev'g 25 F. Supp. 287.

For restrictive provisions in trust indentures against action by bondholders, see footnote 130.

of the maturing securities, the corporation may offer the new securities to the public and apply the proceeds to the payment of the maturing obligations. Where the new securities consist of bonds convertible into stock, they are generally offered first to the stockholders and then to holders of the maturing securities.

An offer to exchange bonds for other obligations of the corporation may be made not as a means of extending the maturity date of the obligations, but as a matter of financing in order to take advantage of favorable market conditions. In either case, whether the plan for refunding is submitted at or before maturity, the corporation may assure the carrying out of the plan by means of a deposit agreement. The agreement provides a method for approval and acceptance of the plan by the holders of the maturing obligations and for consummation of the plan if it is declared effective. The plan may be underwritten by bankers.

The issuance of the new obligations must, of course, be duly authorized by resolution of the board of directors,¹⁸³ and in proper cases must be registered with the Securities and Exchange Commission.¹⁸⁴ Indentures covering securities issued in exchange for other securities of the same issues must be qualified under the Trust Indenture Act of 1939.¹⁸⁵

Extension of maturity of bonds. As indicated in the preceding paragraph on refunding, a bondholder has the right to payment of his bond at the time specified in the indenture;¹⁸⁶ the maturity date cannot be extended without his consent. A corporation desiring to extend the time for payment must obtain the consent of each bondholder,¹⁸⁷ or devise some way of paying off bondholders who refuse to consent to the postponement.

¹⁸³ As to necessity for consent of stockholders to refunding where consent was not required for original issuance of bonds, see *Citrus Growers' Dev. Ass'n v. Salt River Valley Water Users' Ass'n*, (1928) 34 Ariz. 105, 268 P. 773, discussed in 42 *Harvard Law Review* 280-281 (1928). As to consent of stockholders to execution of mortgage generally, see page 778.

¹⁸⁴ For registration requirements, see page 399.

¹⁸⁵ For a summary of this Act, see page 799.

¹⁸⁶ See footnote 182.

¹⁸⁷ Consent of the bondholders may be implied from subsequent approval and ratification. *First Trust Co. of Lincoln v. Carlsen*, (1935) 129 Neb. 118, 261 N. W. 333.

See also *Van Wezel v. McCord Radiator & Mfg. Co.*, (1939) 20 N. Y. Supp. (2d) 91. In this case, holders of 80% of debentures agreed to extension. It was held that this did not deprive the trustee of power to enforce obligation of the corporation to make payments into the sinking fund for the benefit of non-assenting holders.

The following method has been used effectively to carry out a plan for extension of maturity of bonds and other obligations. The board of directors adopts a resolution authorizing the officers of the corporation to request bondholders to agree to an extension of maturity of their bonds. Notice is sent to the bondholders of the plan for extension, with a request for deposit of the bonds under a deposit agreement,¹⁸⁸ or written acceptance of the extension offer. Arrangements are made with underwriters for the purchase of bonds of holders who refuse to accept the extension offer. The extension of the maturity date of the bonds constitutes a new offering which, in proper cases, must be registered with the Securities and Exchange Commission.¹⁸⁹

Many trust indentures provide for amendment of the indenture upon the consent of less than all the bondholders. It has been held that such a provision is valid, provided the modification is fair and equitable.¹⁹⁰ It is questionable, however, whether under such a provision less than all the bondholders may force upon a dissenting bondholder an extension of maturity of his bond.¹⁹¹ In some indentures, such an extension of maturity is specifically excepted from the matters which may be changed by supplemental indenture.

Bonds lost, destroyed, or stolen. The trust deed under which bonds are issued usually provides a method for the execution of duplicate bonds to replace those lost, destroyed, or stolen. In as much as bonds are negotiable instruments, an innocent pur-

¹⁸⁸ Committee appointed under deposit agreement was held to be agent of certificate holders depositing under agreement. Certificate holder desiring to withdraw from the agreement could do so in the manner provided by the agreement, but court could not, on request of one certificate holder, remove the Committee. *State v. Sartorius*, (1939) 344 Mo. 912, 130 S. W. (2d) 547.

¹⁸⁹ See page 399.

¹⁹⁰ *In re Los Angeles Lumber Products Co.*, (1938) 24 F. Supp. 501, aff'd 100 F. (2d) 963. See also Haines, "Modification Provisions of Corporate Mortgages and Trust Indentures," 38 *Michigan Law Rev.* 63 (1939), discussing *In re Los Angeles Lumber Products Co.*

¹⁹¹ See Securities & Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective & Reorganization Committees; *Kaleta v. Archer Coal & Material Co.*, (1936) (Ill. App.) 5 N. E. (2d) 879. See also "Postponement of Maturity Dates Under Trust Indentures," 46 *Yale Law Jour.* 1041 (1937). Extension of maturity of bonds may also bring the preëxisting indenture under which they were issued within the purview of the Trust Indenture Act of 1939. See *Securities and Exchange Commission v. Associated Gas & Electric Co. et al.*, (1938) 99 F. (2d) 795, aff'g 24 F. Supp. 899, in which it was held that the extension of maturity of a security constituted an "issue" or "sale" which brought the transaction within the jurisdiction of the Securities and Exchange Commission.

chaser who pays a valuable consideration before maturity of the bond may acquire a title superior to that of the original true owner.¹⁹² However, the owner may to some extent be protected and obtain a duplicate bond upon compliance with certain conditions.¹⁹³

The procedure for issuance of duplicate bonds is generally as follows:

1. The corporation receives notice of the loss, destruction, or theft, and a request to stop transfer of the bond.

2. The corporation immediately notifies all persons interested in the bond issue, namely, the registrar, the transfer agent, the interest paying agent, and the trustees, and an appropriate notation is made in the various accounts pertaining to the securities.

3. The owner of the bond furnishes proof of ownership and loss and an indemnity bond to protect the corporation against the claim of an innocent purchaser for value. The amount of the indemnity bond is generally twice the amount of the par value of the lost bond, plus interest which will accrue on the bond before maturity. Where the bond has valuable conversion privileges, it may be advisable to require a surety bond for a greater amount.

4. The board of directors passes a resolution authorizing the officers of the corporation to issue the duplicate bond. Where the bond issue is large and requests for replacement are frequent, a blanket resolution is sometimes passed by the board of directors authorizing the officers, the transfer agent, and the registrar to replace bonds upon proper indemnity without referring the particular matter to the board for its approval.

5. After the lapse of a period ranging from three to twelve months,¹⁹⁴ during which time the original bond may be found, a

¹⁹² *Hibbs v. Brown*, (1907) 190 N. Y. 167, 82 N. E. 1108, aff'g 112 N. Y. App. Div. 214, 98 N. Y. Supp. 353; *Hellar v. National City Co. of Cal.*, (1933) 171 Wash. 585, 18 P. (2d) 480.

¹⁹³ *Harvey v. Guaranty Trust Co.*, (1929) 134 N. Y. Misc. 417, 236 N. Y. Supp. 37. If no provision is made for the issuance of duplicate bonds, some courts hold that the owner of the lost bond may require the corporation to issue a certificate of indebtedness, covering the amount of the lost bond with interest, but containing a provision that the certificate shall be void upon recovery of the lost bond. *Switzerland General Ins. Co. of Zurich v. New York Central & Hudson River R. R. Co.*, (1912) 152 N. Y. App. Div. 70, 136 N. Y. Supp. 726. See also *Reynolds v. Title Guarantee & Trust Co.*, (1925) 120 N. Y. Misc. 561, 200 N. Y. Supp. 105; *First Nat. Bank of Binghamton v. Mayor and City Council of Baltimore*, (1939) 27 F. Supp. 444.

¹⁹⁴ The waiting period is generally shorter in the case of a coupon bond than of a registered bond. It will be noted that the surety bond is furnished immediately

duplicate bond is issued. The duplicate bond is authenticated in the usual way, is of the same life tenor, and bears the same number as the original bond.

6. The issuance of the duplicate bond is noted on the proper records.

Sometimes the provisions of a trust deed or a state statute require a court order directing the corporation to issue a duplicate bond upon receipt of the owner's indemnity bond.

Often the stock exchange on which the bonds are listed will have a regulation covering the marking of duplicate bonds. The corporation should, in any event, place a distinguishing mark, such as the word "duplicate," printed in red letters, upon the filing panel of the duplicate bond and across the face of each of the coupons. The possibility that the bond or its coupon will be circulated as originals is thus avoided.

Notes. A note is the evidence of a personal obligation. It may be issued upon an unsecured loan, or it may be given to the lender accompanied by a mortgage or a pledge of property. The instrument is generally employed on short-term loans, and is one of the common methods of short-term borrowing.¹⁹⁵

The power to borrow carries with it the power to execute a note as evidence of the obligation, and a corporation may always employ this method of obtaining funds if it has authority to borrow.¹⁹⁶

Authority to borrow on notes is generally delegated by the board of directors to a particular officer of the corporation either by resolution¹⁹⁷ or through the by-laws.¹⁹⁸ This delegation of

by the owner of the lost bond, although a duplicate of the lost bond is not issued until several months have elapsed. The surety bond therefore serves the purpose of indemnifying the corporation or its registrar whether the lost bond appears before a duplicate is issued, or whether it appears after it has been issued. For other practices in connection with surety bonds for lost securities, see Chapter 28.

¹⁹⁵ The expression "short-term borrowing" may also include the financing of merchandise purchased for resale, by means of drafts or bills of exchange drawn by the seller of the goods against credit established at some bank in favor of the purchaser.

¹⁹⁶ *Western Nat. Bank v. Wittman*, (1916) 31 Cal. App. 615, 161 P. 137; *Curtis and Others v. Leavitt*, (1857) 15 N. Y. 66. As to power of corporation to execute notes for accommodation, see Peller, "Corporations and Accommodation Paper," 12 *St. Johns Law Rev.* 266 (1938).

¹⁹⁷ See *Padgham v. Inyo Marble Co.*, (1931) 116 Cal. App. 328, 2 P. (2d) 531, in which it was held that only the officers designated in the resolution have authority to execute notes.

¹⁹⁸ See *Italo-Petroleum Corporation of America v. Hannigan*, (1940) 40 Del. 534, 14 A. (2d) 401.

authority need not be expressly made, however, and where the board of directors permits the treasurer to act as the financial agent of the corporation, the authority to execute a note may be implied.¹⁹⁹ Sometimes the corporate charter or by-laws will designate the officer in whom sole authority to execute the notes of the corporation is to be placed. But such a by-law provision cannot be pleaded by a corporation in denying its liability on a note executed by another appropriate officer if the provision was not known to the plaintiff.²⁰⁰

The officers of a corporation have no power to execute a note simply because they hold office.²⁰¹ However, where an officer has the power to borrow, express or implied, he may generally execute a note as evidence of a loan.²⁰² Corporations have been held liable on notes executed by officers who were intrusted with the management of the corporation,²⁰³ or who were otherwise clothed with apparent authority.²⁰⁴

When the corporate seal is affixed to a note, it is presumed that it was offered by proper authority.²⁰⁵

¹⁹⁹ *Gilman v. Bailey Carriage Co., Inc.*, (1928) 127 Me. 91, 141 A. 321. See also *D. Humphreys & Son, Inc. v. Broughton*, (1928) 149 Va. 789, 141 S. E. 764; *Aero-Gas Refining Co. v. Fisk Tire Co.*, (1940) (Tex. Civ. App.) 137 S. W. (2d) 191, error refused.

²⁰⁰ *La Grange Lumber & Supply Co. v. Farmers' & Traders' Bank*, (1927) 37 Ga. App. 409, 140 S. E. 766. See, however, *Padgham v. Inyo Marble Co.*, (1931) 116 Cal. App. 328, 2 P. (2d) 531, in which a note was held to have been executed without authority where a resolution of directors authorized the president or vice-president and the secretary or assistant secretary to issue notes, and the note in suit had been executed by the president and the treasurer.

²⁰¹ *St. Vincent College v. Hallett*, (1912) 201 F. 471; *Wallace v. Monton*, (1930) 170 La. 47, 127 So. 360; *First National Bank v. Tri-State Equipment & Repair Co.*, (1930) 108 W. Va. 686, 152 S. E. 635; *Cleburne County Bank v. Butler Gin Co.*, (1931) 184 Ark. 503, 42 S. W. (2d) 769; *Vincennes Savings & Loan Ass'n v. Robinson*, (1939) 107 Ind. App. 558, 23 N. E. (2d) 431, 24 N. E. (2d) 558.

²⁰² *Charleston Nat. Bank v. Lemkuhl-Shepherd Co.*, (1924) 97 W. Va. 284, 25 S. E. 241; *Citizens Bank v. Public Drug Co.*, (1921) 190 Iowa 983, 181 N. W. 274; *McCormick v. Stockton & T. C. R. R. Co.*, (1900) 130 Cal. 100, 62 P. 267.

²⁰³ *Eastern Public Service Corporation et al. v. Funkhouser*, (1929) 153 Va. 128, 149 S. E. 503; *Harris v. H. C. Talton Wholesale Grocery Co.*, (1929) 11 La. App. 331, 123 So. 480; *Aronofsky v. Humes*, (1929) (R. I.) 147 A. 749; *Aero-Gas Refining Co. v. Fisk Tire Co.*, (1940) (Tex. Civ. App.) 137 S. W. (2d) 191, error refused. See also *Federal Deposit Ins. Corporation v. Beakley Corp.*, (1940) 124 N. J. L. 445, 12 A. (2d) 700, in which a corporation was held liable on indorsement of a note by its president and general manager. The signature of the president, in this case, was placed upon the note at his direction by his private secretary.

²⁰⁴ *Clebourne County Bank v. Butler Gin Co.*, (1931) 184 Ark. 503, 42 S. W. (2d) 769; *Platt v. Montclair Feed & Fuel Co.*, (1931) (N. J. Law) 157 A. 553; *Italo-Petroleum Corporation of America v. Hannigan*, (1940) 40 Del. 534, 14 A. (2d) 401.

²⁰⁵ *Italo-Petroleum Corporation of America v. Hannigan* (supra).

Power of corporation to lend money. As a general rule, it may be said that corporations have no power to make loans unless authorized by statute. However, there need not be an express statutory declaration of the grant of the power. It may be inferred as a necessary incident of the power given to enter into any contract essential to the transaction of the ordinary affairs of the corporation.²⁰⁶

There has been much controversy as to when the power to lend may be implied. It is true that a mercantile or a manufacturing corporation has no authority to engage in the business of lending money.²⁰⁷ That statement admits of no dispute.²⁰⁸ However, there is a distinction between the practice of lending money as if a corporation were a bank and making a temporary loan, reasonably connected with the business of the corporation.²⁰⁹ The circumstances under which a corporation may lend money may be listed as follows:

1. Where the corporation has surplus funds, which it may deem expedient to lend temporarily on safe security.²¹⁰

2. Where the loan is a necessary and proper means of carrying on the business of the corporation for an authorized object.²¹¹

Loans to directors, officers, or stockholders. The statutes in many states prohibit the lending of corporate funds to directors, officers, or stockholders, and render persons making or assenting to such loans liable to the corporation for the amount of the funds advanced.²¹² Where this is so, the loan agreement is un-

²⁰⁶ *Seymour & Co. v. Castell*, (1926) 160 La. 371, 107 So. 143 (in which it was decided that a specific authorization in the charter to engage in a general merchandise and commercial business necessarily included the power to loan money to customers and to accept notes as evidence of business transactions); *Holt v. Farmers Loose Leaf Tobacco Warehouse Co.*, (1923) 201 Ky. 184, 256 S. W. 6 (holding that a corporation engaged in operating a public warehouse for receiving and storing tobacco, and for buying, selling, and rehandling on commission, can loan money to a customer on a growing crop of tobacco).

²⁰⁷ *American Credit & T. Co. v. New Era Chandelier Co.*, (1917) 208 Ill. App. 181; *National Trust & Credit Co. v. Orcutt & Sons Co.*, (1919) 259 F. 830.

²⁰⁸ *Garrison Canning Co. v. Stanley*, (1907) 133 Iowa 57, 110 N. W. 171.

²⁰⁹ *Murray v. Smith*, (1915) 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102 (modified, on another point, in 224 N. Y. 40, 120 N. E. 60).

²¹⁰ *Bank of Berwick v. George Vinson Shingle & Mfg. Co.*, (1913) 132 La. 861, 61 So. 850.

²¹¹ *Independent Order of Svithiod v. Ring Lodge No. 8*, (1931) 261 Ill. App. 289; *Seymour & Co. v. Castell*, (1926) 160 La. 371, 107 So. 143; *Holt v. Farmers' Loose Leaf Tobacco Warehouse Co.*, (1923) 201 Ky. 184, 256 S. W. 6.

²¹² *Fisher v. Parr*, (1901) 92 Md. 245, 48 A. 621; *Murray v. Smith*, (1915) 166 N. Y. App. Div. 528, 152 N. Y. Supp. 102 (modified, on another point, in 224 N. Y. 40, 120 N. E. 60); *In re Stucky Trucking & Rigging Co.*, (1917) 243 F. 287; *Cole*

enforceable and the money lent the officer can be recovered by the corporation regardless of the agreement.²¹³ A corporation cannot legally do indirectly what it is prohibited from doing directly. Thus, it cannot borrow money for its officers, mortgage its property to secure their debts, or guarantee repayment of loans made to them. The officers who authorize such transactions may be held personally liable for any resulting waste of corporate assets at a derivative suit of minority stockholders.²¹⁴ However, there is no ground for complaint if the sum borrowed has been returned with interest; and the borrower is not required to account for the profits made on the sum loaned by the corporation.²¹⁵

In the absence of statutory prohibition, loans may be made to directors, officers, or stockholders, as well as to other persons.²¹⁶ In the case of loans to directors or officers, the rules with regard to any transaction between a corporation and its directors or officers govern. The director or officer must act in the utmost good faith, and the terms of the transaction must be fair to the corporation. It is always advisable that the interested director or officer refrain entirely from participating in the proceedings at which the loan is approved.

In some states, the borrowing officer or director is required to pay interest²¹⁷ and to furnish security²¹⁸ in accordance with a statutory provision. Loans to directors and officers constitute a criminal offense in some states.

Guaranty of obligations of others, in general. Instead of advancing funds directly as a loan, a corporation may desire to

v. Brandle, (1940) 127 N. J. Eq. 31, 11 A. (2d) 255, discussed in 38 *Michigan Law Rev.* 1318 (1940).

²¹³ Cold Metal Process Co. v. Steckel, (1938) (Ohio) not reported, discussed in 52 *Harvard Law Review* 689; In re Woods' Estate, (1941) 299 Mich. 635, 1 N. W. (2d) 19, to the effect that note evidencing loan is not void and recovery thereon may be had by corporation against officer's estate.

²¹⁴ First Merchants Nat. Bank & Trust Co. v. Murdock Realty Co., (1942) 111 Ind. App. 226, 39 N. E. (2d) 507. See also 41 N. E. (2d) 669 and 41 N. E. (2d) 851.

²¹⁵ Rubinstein v. Kasprzak, (1924) 96 N. J. Ch. 406, 124 A. 362; Lindemann v. Rusk, (1905) 125 Wis. 210, 104 N. W. 119.

²¹⁶ The Garrison Canning Co. v. Stanley, (1907) 133 Iowa 57, 110 N. W. 171; Benson Lumber Co. v. Thornton, (1932) 185 Minn. 230, 240 N. W. 651.

²¹⁷ See Davidson v. Rodnon, (1941) 261 N. Y. App. Div. 902, 25 N. Y. S. (2d) 167, in which it was held that officers who borrow money from a corporation must pay interest in absence of agreement to contrary.

²¹⁸ Snyder v. Lassen, (1943) 156 Kan. 230, 132 P. (2d) 624, reaff'd, (1943) 157 Kan. 20, 138 P. (2d) 274.

enable another to obtain funds by lending the corporation's credit through the guaranty of the borrower's obligations. As a general rule, a corporation may lend its credit to another only where it is expressly permitted to do so by charter or by statute, or where the guaranty is a necessary or proper means of accomplishing the purposes authorized by its charter.²¹⁹ Following this principle, it has been generally held that a corporation may guarantee the debts of another corporation which it owns or controls,²²⁰ and that it may enter into a contract of guaranty or suretyship to protect debts due it.²²¹ Similarly, the weight of authority favors the view that a corporation may become a guarantor in order to render a direct benefit to its business.²²²

²¹⁹ *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, (1899) 174 U. S. 552, 19 S. Ct. 817; *Henderson Tire & Rubber Co. v. Gregory*, (1926) 16 F. (2d) 589; *Citizens Bank of Boonville v. Clements*, (1927) 172 Ark. 1023, 291 S. W. 439; *Commercial Cas. Ins. Co. v. Daniel Russell Boiler Works, Inc.*, (1927) 258 Mass. 453, 155 N. E. 422; *Farmers' & Merchants' Bank of Elkton v. Wisdom*, (1928) 226 Ky. 179, 10 S. W. (2d) 846; *Dewey Column & Monumental Works v. Ryan*, (1928) 206 Iowa 1100, 221 N. W. 800; *Rodgers v. Krankenhagen*, (1930) 18 Minn. 306, 232 N. W. 327; *Squaw Gulch Min. & Mill. Co. v. Kollberg*, (1930) 36 Ariz. 442, 286 P. 822; *Stephens v. Brackin et al.*, (1931) 16 La. App. 272, 134 So. 326; *Hayes v. State ex rel. Oldroyd Mach. Co.*, (1931) 124 Ohio St. 485, 179 N. E. 402; *Pantaze v. Murphy*, (1932) 54 F. (2d) 895; *Lincoln Inv. Co. v. Metros*, (1932) 257 Mich. 215, 241 N. W. 166; *Mercy v. A. I. Hall & Sons*, (1934) 177 Wash. 338, 31 P. (2d) 1009; *Brand v. Eastland County Lumber Co.*, (1934) (Tex. Civ. App.) 77 S. W. (2d) 600; *First Merchants Nat. Bank & Trust Co. v. Murdock Realty Co.*, (1942) 111 Ind. App. 226, 39 N. E. (2d) 507. See also 24 *Virginia Law Rev.* 802 (1938).

Statutory provisions authorizing guaranty in certain instances have been held to indicate a purpose to forbid any other form of pledging the assets for the benefit of others. In *re Bankers' Trust Co.*, (1928) 27 F. (2d) 912.

A corporation cannot guarantee a mortgage where it has no interest in the mortgagor or in the mortgaged land. *Crowley v. First Merchants' Nat. Bank of Lafayette*, (1942) 112 Ind. App. 80, 41 N. E. (2d) 669. See also *Fardy v. Mayerstein*, (1942) (Ind. App.) 41 N. E. (2d) 851.

²²⁰ *Central R. & Banking Co. v. Farmers' Loan & Trust Co.*, (1902) 114 F. 263; *Lumbermen's Trust Co. v. Title Ins. & Inv. Co.*, (1918) 248 F. 212; *In re John B. Rose Co.*, (1921) 275 F. 416; *In re Bankers' Trust Co.*, (1928) 27 F. (2d) 912; *American Surety Co. of N. Y. v. 14 Canal St. Inc.*, (1931) 276 Mass. 119, 176 N. E. 785; *In re Battani*, (1934) 6 F. Supp. 376.

²²¹ *North Texas State Bank v. Crowley-Southerland C. Co.*, (1912) (Tex. Civ. App.) 145 S. W. 1027; *Farmers' State Bank v. First State Bank*, (1924) (Tex. Civ. App.) 260 S. W. 664; *Modoc County Bank v. Ringling*, (1925) 7 F. (2d) 535; *Simpson v. Bergmann*, (1932) 125 Cal. App. 1, 13 P. (2d) 531; *Matter of German-Jewish Children's Aid*, (1934) 151 N. Y. Misc. 834, 272 N. Y. Supp. 540; *A. M. Castle & Co. v. Public Service Underwriters*, (1939) 198 Wash. 576, 89 P. (2d) 506.

A corporation may endorse a note for the accommodation of the maker if it is done for the purpose of protecting its own business interests. *Brockport Nat. Bank v. Webaco Oil Co.*, (1939) 257 N. Y. App. Div. 68, 12 N. Y. Supp. (2d) 652, reargument denied, 14 N. Y. Supp. (2d) 495.

²²² *W. C. Bowman Lumber Co. v. Pierson*, (1911) (Tex. Civ. App.) 139 S. W.

The statutes of some states expressly forbid a corporation to bind itself as a guarantor. Others expressly extend that power.

Guaranty of obligations of subsidiaries. A subsidiary company is one which is controlled by another corporation called the parent or holding company. The latter company owns a majority of the stock of the subsidiary company and controls it through the election of its board of directors.²²³ Questions frequently arise as to the validity of transactions between the two companies, particularly with regard to the lending of funds by one corporation to the other, or the guaranty of the subsidiary's obligations by the parent company.

The general rules discussed under the previous heading, that permit one corporation to guarantee the obligations of another in which it is vitally interested, apply.²²⁴ The statutes in some states make specific provision for the guaranty by the parent company of the obligations of the subsidiary company; but place upon this right such limitations as the following: that the holding company must own a certain amount of stock of the subsidiary company, and that a vote of a certain number of stockholders of the parent company is necessary to validate the loan.

618; *Weiss v. Fred Bender Store Fixture Co.*, (1917) 207 Ill. App. 72; *Woods Lumber Co. v. Moore*, (1920) 183 Cal. 497, 191 P. 905; *Irwin v. Colburn*, (1922) 56 Cal. App. 41, 204 P. 551; *A. M. Castle & Co. v. Public Service Underwriters*, (1939) 198 Wash. 576, 89 P. (2d) 506. See also *Mass. Bond & Ins. Co. v. The Phillips Co.*, (1923) 230 Ill. App. 38.

A corporation, however, has no power to enter into contracts of guaranty in expectation of indirect benefits. *In re Bankers' Trust Co.*, (1928) 27 F. (2d) 912. See also *In re Romadka Bros.*, (1914) 216 F. 113.

²²³ See Chapter 29, page 889.

²²⁴ *American Surety Co. of N. Y. v. 14 Canal St.*, (1931) 276 Mass. 119, 176 N. E. 785.

CHAPTER 28

RESOLUTIONS RELATING TO BORROWING AND LENDING

RESOLUTIONS—AUTHORITY TO BORROW

No. 599

Resolution of directors authorizing officers to borrow money.

RESOLVED, That the officers of this Corporation be and they hereby are authorized and directed to borrow, in behalf of this Corporation, from such banks or trust companies as they may in their judgment determine, an amount not exceeding (\$.....) Dollars, for such period of time and upon such terms and rate of interest as may to them in their discretion seem advisable, and to execute notes in respect thereto in the name of the Corporation for the payment of the amount so borrowed.

No. 600

Resolution of executive committee authorizing officers to borrow money and report on loans.

RESOLVED, That the Treasurer, with the approval of the President, be authorized, for and in the name of this Corporation, to borrow from time to time from any bank or trust company such amounts of money as may be deemed necessary for the current needs of this Corporation in the transaction of its business, and to give as evidence thereof a note or notes of this Corporation, which shall be signed by the Treasurer and countersigned by the President.

FURTHER RESOLVED, That any loans made by banks or trust companies pursuant to the above resolution shall be reported by the Treasurer to the Executive Committee at its next meeting after the date of such loans.

No. 601

Resolution of directors authorizing negotiation of loan to meet payroll and current obligations.

RESOLVED, That the directors do hereby empower (*insert name and*

office or descriptive title, such as President of the Corporation, or General Manager, etc.) to negotiate a loan to meet the present payroll, and to pay the current obligations of the Corporation, upon such terms and in such manner as may be deemed best for the interests of the Corporation.

No. 602

Resolution of directors ratifying advance by bank arranged by officers.

RESOLVED, That the action of the officers of this Company in arranging with the Trust Company for an advance of \$....., as of, 19.., payable, 19.., bearing interest at the rate of per cent, under an agreement dated, 19.., and, in executing said agreement, be and the same hereby is ratified, approved, and adopted as the act of this Company.

(Another form)

RESOLVED, That the action of the Treasurer in negotiating loans for the benefit of the Corporation to the amount of (\$.....) Dollars and the issuance of the notes of the Corporation for the same amount are hereby ratified and approved.

No. 603

Resolution of directors authorizing officers to procure loans secured by pledge of merchandise.

RESOLVED, That the officers of this Company be and they hereby are authorized to procure a loan or loans for the purposes of this Company, not exceeding in the aggregate (\$.....) Dollars, for such time and upon such terms as they may deem proper, and to pledge as security for the payment thereof the ore and pig iron now on hand or hereafter received by the Company, and for this purpose to make and enter into such agreements of lease and other contracts as they may deem necessary and proper in carrying out the authority hereby granted.

No. 604

Resolution of directors authorizing officers to borrow from a named bank upon a note.

RESOLVED, That the officers of this Company be and they hereby are authorized, empowered, and directed to borrow the sum of (\$.....) Dollars from the Trust Company at

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..... (.....%) per cent, payable months after date, and to execute a note therefor, to be signed in behalf of the Company by the President and the Treasurer, who are duly authorized to execute such documents according to the By-laws of this Company.

No. 605

Resolution of directors authorizing corporation to borrow from officer and to execute note as evidence of obligation.

WHEREAS, the Board of Directors deems it advisable and necessary for the Corporation to borrow the sum of (\$.....) Dollars to meet current obligations, and

WHEREAS, in view of the present market conditions, the Corporation finds itself unable to raise the said sum except upon the payment of an exorbitant premium, and

WHEREAS,, President of this Corporation, has indicated his willingness and ability to lend the said sum of (\$.....) Dollars to the Corporation for a period of (.....) years, at a low rate of interest,

NOW, THEREFORE, BE IT RESOLVED, That this Corporation borrow the said sum of (\$.....) Dollars from, its President, and that the Treasurer of this Corporation be and he hereby is authorized and directed to execute and deliver to the said, President of this Corporation, a note to the amount of (\$.....) Dollars, payable in (.....) years with interest at the rate of (.....%) per cent per annum.

No. 606

Resolution of stockholders giving board of directors general authority to borrow on notes and to pledge accounts receivable and other available assets as security.

WHEREAS, this Corporation desires to borrow money for its corporate purposes, be it

RESOLVED, That the Board of Directors of this Corporation be and it hereby is authorized to borrow, from time to time, such sums of money as it may deem advisable, upon the notes of this Corporation, and for that purpose to pledge and assign any or all bills and accounts receivable or any other available assets of the Corporation to secure such notes.

No. 607

Resolution of stockholders giving directors general power to mortgage and pledge property, privileges, and franchises to secure bond obligation of corporation and subsidiary up to fixed amount.

RESOLVED, That the stockholders of Corporation do hereby consent that said Corporation mortgage and pledge the property, rights, privileges, and franchises now owned by it or which it may hereafter acquire, or such part thereof as its Board of Directors may determine and as shall be described and specified in the mortgage or mortgages or deed or deeds of trust or instrument or instruments of pledge by which said mortgage and pledge shall be created, or as shall be subjected thereto in accordance with provisions therein contained, for any or all of the following purposes as said Board of Directors may, in its discretion, determine:

1. To secure the payment of the principal and interest of bonds or other obligations of said Corporation, issued in payment for property purchased, or in connection with any operations of the Corporation;

2. To secure the payment of bonds or other obligations of subsidiary companies now outstanding or hereafter issued, and for the payment of which said Corporation is now or may hereafter become liable; and

3. To secure the guaranty by said Corporation of the principal and interest, or both, of bonds or other obligations of any subsidiary company or companies; provided, however, that the aggregate principal amount of bonds or other obligations, the payment of which, or the guaranty of the payment of which, shall be secured by said mortgage and pledge (including bonds and other obligations issued or reserved for issue to pay off or retire existing bonds or other obligations of the Corporation or of subsidiary companies) shall not exceed at any one time (\$.....) Dollars, or an amount equal to twice the aggregate amount of the capital stock of said Corporation of all classes at the time outstanding, whichever shall be the larger amount; and provided, further, that said aggregate principal amount of bonds or obligations, to be secured as aforesaid, shall not exceed in any event at any one time, (\$.....) Dollars, without the consent of the holders of two thirds of the capital stock of said Corporation of each class having voting powers represented and voted upon in person or by proxy at a meeting specially called for the purpose of procuring such consent, or, if such purpose be specified in the notice thereof, then at any annual meeting.

No. 608

Resolution of directors authorizing assignment of accounts receivable to secure a note.

WHEREAS, this Corporation has borrowed from the sum of (\$.....) Dollars, for which the Corporation has issued to him its demand note in that amount, dated the .. day of, 19.., and

WHEREAS, this Corporation desires to secure the said for the amount loaned by him to the Corporation as aforesaid, it is

RESOLVED, That the Treasurer of this Corporation be and he hereby is authorized and instructed to transfer and assign, from time to time, to said, as security for the payment to him of the said note executed as above mentioned, bills and accounts receivable belonging to this Corporation, to be selected by the said, the face value of which bills and accounts receivable shall be, at all times, (.....%) per cent greater than the aggregate amount of the above-mentioned note, and it is

FURTHER RESOLVED, That the Treasurer be and he hereby is authorized and instructed to render a report to the said, on the first day of each and every month, and at such other reasonable times as the said may desire, of all moneys which have been received by or in behalf of this Corporation, on account of any bills and accounts receivable so transferred and assigned.

FURTHER RESOLVED, That, on the first day of each month, the Treasurer of this Corporation shall pay to the said any and all amounts collected on account of the bills or accounts receivable aforesaid, to be applied to the reduction of the amount due from the Corporation to the said, unless the said elects to accept, in lieu of such payment, other bills and accounts receivable due this Corporation, it being understood that, upon full payment of the note executed by this Corporation as hereinbefore mentioned, the said shall return to the Treasurer of this Corporation any and all bills and accounts receivable then remaining in his possession or under his control.

No. 609

Resolution of directors giving officers general authority to issue notes in series, secured by assignment of accounts receivable to trustee.

RESOLVED, That this Company, by virtue of authority given by resolution of its stockholders on the .. day of, 19.., borrow, from time to time, such amounts of money as may be necessary for

the business requirements and purposes of the Company, upon the promissory notes of the Company, to be designated as Series "A," and numbered from one (1) to one thousand (1,000), inclusive, to be issued at such time or times, in such amounts, and payable at such dates, respectively, as may be determined by the President and the Treasurer of the Company, and to be collaterally secured by the assignment and delivery, in pledge, of bills and accounts receivable and other available assets to a trustee for the holders of such notes pro rata, the value of which shall be at least (.....%) per cent greater than the aggregate amount of said notes, and the President and the Treasurer are hereby authorized and directed to execute the notes as aforesaid, and any notes that may be given in renewal thereof, and to deliver the same; and

FURTHER RESOLVED, That the President and the Treasurer be and they hereby are authorized and directed to execute assignments to such trustee, of any and all such bills and accounts receivable and other available assets to the amount aforesaid, and the Treasurer is hereby authorized and directed to pay over to said trustee, to be applied to the retirement of the amounts due by this Company on such notes or renewals thereof, any moneys which shall be collected on such pledged bills and accounts receivable and assets, and the Treasurer is also hereby authorized and directed to render an account to said trustee, as often as may be required by the latter, of all moneys which have been received by the Company on account of any bills and accounts receivable and assets which shall have been so assigned and delivered in pledge.

FURTHER RESOLVED, That, upon the payment of said notes of the Company, the trustee shall return to the Treasurer of the Company all accounts and bills receivable and assets belonging to the Company and then remaining in said trustee's hands; and

FURTHER RESOLVED, That be and he hereby is appointed to act as trustee in accordance with the terms and requirements specifically set forth in the foregoing resolution.

No. 610

Resolution of directors authorizing borrowing on execution of promissory note and providing for renewal of note.

WHEREAS, this Company desires to borrow money for its corporate purposes;

NOW, THEREFORE, BE IT RESOLVED, That the proper officers of this Company be and they hereby are authorized and empowered to borrow from the Bank, for and in behalf of this Company,

a sum not to exceed (\$.....) Dollars, on its promissory note maturing (.....) days from the date hereof, to be signed by the proper officers of this Company, and to bear interest at the rate of (.....%) per cent per annum, with the privilege, however, of renewing said loan at the maturity thereof for a further period of (.....) days, upon payment of (\$....) Dollars on account of the principal amount thereof, and with the additional privilege of renewing the balance of said loan at the maturity of said further period of (.....) days, for another period of (.....) days, upon payment of (\$.....) Dollars on account of said balance, thereby reducing said loan to (\$.....) Dollars; and the proper officers of this Company are hereby authorized and directed to sign any new or renewal note or notes required by said Bank to carry out the provisions of this resolution, which new note or notes shall bear such rate of interest as shall be agreed upon between this Company and the said Bank at the time of such renewal or renewals; and

RESOLVED FURTHER, That, Vice President of this Company, be and he hereby is authorized and empowered, for and in behalf of this Company, to countersign the aforesaid promissory note of (\$.....) Dollars, or any new or renewal note or notes above mentioned.

No. 611

Resolution of directors ratifying action of officers in executing note given as evidence of loan to corporation.

WHEREAS, the President and the Treasurer of this Corporation have executed and delivered to the Company three (3) notes of this Corporation, each for (\$.....) Dollars, each note dated the .. day of, 19.., and payable to bearer with interest at the rate of (.....%) per cent per annum, on the .. day of in the years 19.., 19.., and 19.., respectively, at, as evidence of the loan to this Corporation by the Company of (\$.....) Dollars,

NOW, THEREFORE, BE IT RESOLVED, That the said action of the President and the Treasurer in executing and delivering to the Company the three notes of this Corporation as aforesaid be and the same hereby is in all respects ratified, confirmed, and approved.

No. 612

Resolution of stockholders pledging unissued stock as collateral security, and giving pledgee right to vote stock pledged.

RESOLVED, That the Board of Directors be and it hereby is authorized to deliver to the Company (.....) shares of the unissued common stock of this Corporation, of the par value of (\$.....) Dollars each, to be held by the said Company as collateral security for the advance by the said Company to this Corporation, of the sum of (\$.....) Dollars, the said stock to be delivered to the Company immediately upon receipt of the said sum as aforesaid, and it is

FURTHER RESOLVED, That the said Company shall have the power and privilege of voting the said stock during the time it is held by said company as security for the indebtedness aforesaid.

No. 613

Resolution of directors authorizing issuance of note secured by pledge of bonds.

WHEREAS,, the Treasurer of this Corporation, has been able to arrange a loan from the Bank to meet current need for funds,

RESOLVED, That this Corporation borrow from the Bank the sum of (\$.....) Dollars, to be repaid within years, with interest at the rate of six (6%) per cent per annum, and it is

FURTHER RESOLVED, That, the President of this Corporation, and, its Treasurer, be and they hereby are authorized, empowered, and directed jointly to execute and deliver a promissory note to the said bank in the amount aforementioned, in the name and under the seal of this Corporation, payable in years, with interest as aforesaid, to evidence the aforementioned loan, and to secure the payment of the said promissory note by delivering to, President of the said bank, in pledge, (.....) first mortgage bonds of the Railway Company, of the face value of One Thousand (\$1,000) Dollars each, belonging to and now in the possession of this Corporation, and to do any and all other acts necessary to carry this resolution into effect.

No. 614

Resolution of directors authorizing officers to borrow money from a named bank, and to execute a mortgage on real property as security therefor.

RESOLVED, That the officers of this Company be and they hereby are authorized, empowered, and directed to borrow the sum of (\$.....) Dollars from the Bank at (.....%) per cent interest, for a period of years, and to execute as security for said loan a first mortgage on the real property of the Company, situated (*insert description of the property to be mortgaged*), and to do such other things and to execute such other documents as may be necessary and proper to effect the foregoing.

No. 615

Resolution of directors authorizing borrowing on debentures, fixing amount, limiting duration of loan and rate of interest, and calling stockholders' meeting for approval.

RESOLVED, That this Company borrow, for its corporate purposes, the sum of (\$.....) Dollars, for a period not exceeding (.....) years, with interest at a rate not exceeding (.....%) per cent per annum, payable semiannually; that such indebtedness be evidenced by coupon notes or debentures of the Company, issued independently under and in pursuance of a trust agreement between the Company and a trustee, in such form, and containing such terms and conditions in conformity with the foregoing, as the Board of Directors may determine; and be it

RESOLVED FURTHER, That a special meeting of the stockholders of this Company be called to convene at its general office, (Street), (City),, at o'clock in the noon of (Day of Week),, 19.., to take action for or against the above resolution; and be it

RESOLVED FURTHER, That the Secretary be and he hereby is directed to give notice of such meeting as required by law.

No. 616

Resolution of preferred stockholders consenting to creation of indebtedness by borrowing from banks.

RESOLVED, That the holders of the preferred stock of this Corporation do hereby consent to the creation of indebtedness by the Corporation in an amount not exceeding \$....., by loan or loans from one or more banks or other institutions, such loan or loans to bear interest at such rate or rates, be payable on such date or dates, be upon such

other terms and conditions and be evidenced by such notes or other evidences of indebtedness as the Board of Directors of the Corporation shall approve; provided, however, that the amount of any such indebtedness, together with the Corporation's presently outstanding bank loan of \$....., if such loan shall not be paid off, shall in no event exceed \$.....

No. 617

Resolution of directors proposing increase of indebtedness and calling meeting of stockholders for approval.

RESOLVED, That it is the purpose of this Company to increase its indebtedness from (\$.....) Dollars to (\$.....) Dollars, and that a meeting of the stockholders be called to convene at the general office of the Company on the .. day of, 19.., at o'clock ..M., to take action on the approval or disapproval of the purposed increase of indebtedness of the Company, from (\$.....) Dollars to (\$.....) Dollars, the notice by publication required to be given by the Constitution and laws of this state having been waived by the unanimous consent of the stockholders.

No. 618

Resolution of stockholders ratifying indebtedness previously incurred, and increasing indebtedness of corporation.

WHEREAS, the stockholders have heretofore authorized an increase in the indebtedness of this Company to Three Million (\$3,000,000) Dollars, and there has been issued its bond in the aggregate principal amount of Two Million (\$2,000,000) Dollars, part of which has been redeemed in accordance with the terms of the issuance thereof, and there has been issued its note in the principal amount of One Million (\$1,000,000) Dollars; and

WHEREAS, it is the desire of this Company to increase its indebtedness from Three Million (\$3,000,000) Dollars to a total of Five Million (\$5,000,000) Dollars by the creation of additional indebtedness or by, from time to time, recreating indebtedness not to exceed Five Million (\$5,000,000) Dollars at any one time; now then be it

RESOLVED, that the indebtedness heretofore incurred and created pursuant to previous authorization of an increase of indebtedness to Three Million (\$3,000,000) Dollars be ratified, approved, and confirmed and consent given thereto; and

RESOLVED, that the indebtedness of this Company be increased from Three Million (\$3,000,000) Dollars to Five Million (\$5,000,000) Dollars; and

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RESOLVED, that upon adoption of the foregoing resolution the Company will be authorized to incur or create any such indebtedness up to a total of Five Million (\$5,000,000) Dollars on terms determined by the Board of Directors.

No. 619

Resolution of directors authorizing application for permit to create bonded indebtedness in excess of subscribed capital stock.

WHEREAS, the subscribed capital stock of this Corporation is (\$.....) Dollars, and

WHEREAS, this Corporation desires to create an indebtedness in excess of its subscribed capital stock, it is

RESOLVED, That, the President of this Corporation, and, its Secretary, be and they hereby are authorized and directed to sign and verify an application to the (*insert official name of the commission*) of the State of, for a permit to create a bonded indebtedness aggregating (\$.....) Dollars in excess of its subscribed capital stock.

No. 620

Resolution of stockholders authorizing directors to pledge corporate holdings of stock in another corporation to secure collateral trust bonds.

RESOLVED, That the directors of this Company be and they hereby are authorized and empowered, in their discretion, to deposit with some trust company, as Trustee, the whole or any part of this Company's holdings of the capital stock of Corporation, for the purpose of further assuring the payment by this Company of the principal and interest of the bonds of said Corporation, as well as to assure the prompt payment of the bonds of this Company under such agreement and limitations as may seem proper to the Board of Directors of this Company.

No. 621

Resolution of directors authorizing pledge of securities to secure collateral trust bonds and authorizing officers to execute contract of pledge.

RESOLVED, That, to secure the payment of the proposed issue of bonds of this Corporation, to the amount of (\$.....) Dollars, there be deposited with the Company of, under a contract of pledge, (.....) shares of the capital stock of this Corporation.

RESOLVED FURTHER, That the President of this Corporation be and he hereby is authorized to execute, under the corporate seal, and the Secretary is authorized duly to attest, a contract of pledge, in the form now presented to and approved by this Board of Directors.

No. 622

Resolution of directors authorizing filing of registration statement and prospectus and issuance of debentures.

RESOLVED, That the requisite forms of registration statement and prospectus be prepared and filed as speedily as practicable under the Securities Act of 1933, as amended, and that as soon as the same shall have become fully effective, the Company proceed with respect to the issuance and sale of the Ten-year 6% Convertible Debentures as then called for by its agreement with its underwriters.

No. 623

Resolution of directors approving form of registration statement and prospectus relating to issue of bonds.

RESOLVED, That the forms of Registration Statement and Prospectus relating to the Company's issue of \$..... First Mortgage Bonds, Series A, Sinking Fund 5's due 19..., submitted to the meeting, be and the same are approved for initial filing, and that only such changes shall be made therein as shall be approved by the Chairman of the Board of Directors of the Company and by counsel for the Company.

No. 624

Resolution of directors authorizing application to public service commission for permission to issue and sell an amount of bonds previously authorized by commission at a lower price.

WHEREAS, the Public Service Commission, State of, has heretofore issued an order dated, 19..., Case No., and an order dated, 19..., Case No., authorizing this Corporation to issue (\$.....) Dollars and (\$.....) Dollars of bonds, and to sell the same at a price of eighty-nine (89%) per cent and eighty-eight (88%) per cent of par, respectively, and

WHEREAS, owing to market conditions, it has been impossible to dispose of bonds at the figures hereinabove set forth, and

WHEREAS, the President of this Corporation has recommended that he be authorized to make application to the Public Service Commission for permission to sell bonds heretofore authorized to be issued by said Commission at a price not less than eighty-five (85%) per cent of par, be it

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RESOLVED, That, in accordance with the foregoing, the President be and he hereby is authorized to make application to the Public Service Commission, State of, for permission to sell bonds heretofore authorized to be issued by said Commission at eighty-five (85%) per cent of par.

No. 625

Resolution of directors authorizing delivery of bonds to broker for sale at less than par.

WHEREAS, this Board of Directors heretofore and on the .. day of, 19.., did issue (.....) bonds of this Company, of the face value of (\$.....) Dollars each, bearing interest at the rate of five (5%) per cent per annum, payable semiannually, upon the consent of the stockholders of this Company, given at a meeting duly held for that purpose, and

WHEREAS, the said stockholders did authorize and empower this Board of Directors to fix the price at which the said bonds might be sold,

NOW, THEREFORE, BE IT RESOLVED, That the firm of, brokers, be and it hereby is authorized and empowered to sell the said bonds of this Company at a price not less than seventy-five (75%) per cent of the face value thereof, the said firm of to receive a commission of (..%) per cent of the sales made by it, the same to be deducted from the proceeds of the sale of said bonds, and it is

FURTHER RESOLVED, That the Treasurer of this Company be and he hereby is authorized and directed to deliver said bonds, properly indorsed, to the said firm of, and to obtain the proper receipt therefor.

No. 626

Resolution of directors authorizing employment of finance company to sell bonds issued under mortgage, and making provision for compensation.

RESOLVED, That the Vice President of this Corporation be and he hereby is authorized to employ the Trust Company to sell, for the account of this Corporation, at not less than par and accrued interest, each and all of the bonds authorized to be issued under the mortgage to be executed by this Corporation, to the Trust Company and, as Trustees, and to pay to said Trust Company, as compensation for its services in selling said bonds, an amount equal to (.....%) per cent of the principal amount of the bonds so sold.

No. 627

Resolution of directors authorizing officers to take necessary steps to sell bonds to designated purchaser.

RESOLVED, That the officers of this Company be and they hereby are authorized to take all necessary steps to sell, to the Engineering Corporation, all the Refunding and Improvement Bonds that have been authorized to be issued by the Public Service Commission for capital expenditures for the new railroad line, at prices authorized in orders issued by the Public Service Commission.

No. 628

Resolution of directors authorizing officers to apply for permission to issue bonds, and providing for sale to designated purchaser on receipt of permit.

RESOLVED, That, the President of this Corporation, and, its Secretary, be and they hereby are authorized and directed to sign and verify an application to the (*insert official name of Commission*) of the State of, in the name and in behalf of this Corporation, requesting permission for the issuance, by this Corporation, of (\$.....) Dollars of its bonds, and the sale and delivery of said bonds for a consideration in cash of not less than (.....%) per cent of the aggregate principal amount of said bonds, together with accrued interest from the date of said bonds to the date of their delivery to the purchaser thereof, and

FURTHER RESOLVED, That, upon receipt of the permission from the Commission as aforesaid, to sell and deliver the bonds as aforesaid, the officers of this Corporation be and they hereby are authorized and directed forthwith to sell and deliver, or cause to be sold and delivered, in behalf of this Corporation, all or any part of said bonds, to or upon the order of the Company, upon payment of the purchase price therefor—to wit, (....%) per cent of the principal amount of said bonds—together with accrued interest thereon from the date thereof to the date of such payment, the amount of said payment to be deposited with the Trust Company, as Trustee, pursuant to the provisions of the mortgage or deed of trust under which the said bonds are issued.

No. 629

Resolution of board of directors authorizing issuance of bonds in payment of debt.

WHEREAS, the Company has rendered an itemized

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statement of account against this Corporation for the cost of grading and the right of way of a portion of this Corporation's line of railroad, in the sum of (\$.....) Dollars; and

WHEREAS, said Company is willing to accept the First Mortgage 5 Per Cent Thirty-year Bonds of this Corporation in the total aggregate sum of (\$.....) Dollars, in full satisfaction and discharge of all claims and demands whatsoever which it now has or claims to have growing out of any matter or thing whatsoever against this Corporation, be it

RESOLVED, That the Treasurer of this Corporation be and he hereby is authorized to deliver to the Company, the First Mortgage 5 Per Cent Thirty-year Bonds of this Corporation in the aggregate amount of (\$.....) Dollars, after the Company has executed and delivered to this Corporation a receipt in full of all claims or demands whatsoever which it now has or claims to have for or on account of any matter or thing whatsoever.

No. 630

Resolution of board of directors authorizing issue of negotiable promissory notes secured by bonds, to pay existing debt and to cover future advances.

WHEREAS, the stockholders of the Railroad Corporation, a corporation of the State of, on the .. day of, 19.., did authorize the issue of bonds in the aggregate of (\$.....) Dollars, to be issued and disposed of on the terms and conditions set forth in a certain mortgage or deed of trust, dated the .. day of, 19.., and

WHEREAS, said mortgage or deed of trust authorized the said bonds to be used by the Railroad Corporation to build, finish, improve, or operate its railroad, and to pay the indebtedness incurred in building, improving, or operating its railroad, and

WHEREAS, this Corporation desires to borrow an additional amount of money from the Company, for the purpose of extending, completing, equipping, and operating its line of railroad, and desires to secure the amount which it now owes, or the amount which may hereafter be advanced by the said Company, or loaned to it by the said Company, as hereinafter stated,

THEREFORE, BE IT RESOLVED, That this Corporation issue its negotiable promissory notes, payable in two, three, and four years, respectively, from the .. day of, 19.., with interest at the rate of six (6%) per cent per annum, in such denominations as the

Company may desire, in the aggregate sum of (\$.....) Dollars, payable either to the Company or to order, as security for the amount due or owing to the said Company, and as security for such further amounts as may hereafter be advanced by or from the said Company, and

FURTHER RESOLVED, That this Corporation deliver to the said Company, (.....) of its First Mortgage 5% Thirty-year Bonds, of the par value of One Thousand (\$1,000) Dollars each, as collateral security for the payment of said note or notes.

No. 631

Blanket resolution of directors authorizing officers to issue duplicate bonds to replace bonds lost, destroyed, or stolen.

WHEREAS, this Corporation did, on the .. day of, 19.., duly issue (.....) First Mortgage 5% Bonds of the face value of (\$.....) Dollars each, under a certain trust deed dated the .. day of, 19.., and

WHEREAS, under the terms of the said trust deed, it is provided that this Corporation shall issue, and the Trust Company, Trustee under the said trust deed, shall certify, duplicate bonds to replace any bonds lost, destroyed, or stolen, upon the furnishing by the owner and holder thereof of satisfactory evidence of ownership and loss, destruction, or theft, and upon his furnishing of an undertaking in twice the amount of the bond so lost, destroyed, or stolen, plus interest thereon until maturity, to indemnify this Corporation and the said Trust Company against any loss, damage, or liability suffered or incurred by reason of the issuance of any duplicate bonds as aforesaid,

NOW, THEREFORE, BE IT RESOLVED, That the proper officers of this Corporation be and they hereby are authorized and empowered to execute, and the Trust Company is hereby authorized to certify and deliver, duplicate bonds to replace any bonds lost, destroyed, or stolen, provided that the alleged owner and holder thereof furnishes satisfactory evidence of his ownership and of the loss, destruction, or theft, and provided that the said owner and holder thereof furnishes an undertaking in twice the face amount of the bond so lost, destroyed, or stolen, plus interest thereon until maturity, indemnifying this Corporation and saving it harmless from and against any and all losses, damages, or liabilities whatsoever which this Corporation or the said Trust Company may incur through the issuance of the said duplicate bond.

FURTHER RESOLVED, That no duplicate bond shall be issued as aforesaid until the expiration of six months from the date of receipt by this Corporation of notice of the said loss, destruction, or theft.

No. 632

Resolution of directors authorizing officers and trustee to issue duplicate bond to replace one lost, destroyed, or stolen.

WHEREAS,, of, claims to be the owner of a First Mortgage 5% Bond of this Company numbered, in the face amount of (\$.....) Dollars, issued under the provisions of a certain trust deed dated the .. day of, 19.., and claims that the said bond has been lost (destroyed or stolen) and cannot be found, and

WHEREAS, more than six months have elapsed since the said notified this Company of the loss (destruction or theft) aforesaid, and the said has furnished this Company with satisfactory evidence of ownership and loss (destruction or theft),

NOW, THEREFORE, BE IT RESOLVED, That the officers of this Company be and they hereby are authorized and directed to execute, and the Trust Company, Trustee under the aforesaid trust deed, be and it hereby is requested to certify and deliver to, a duplicate bond of the face value of (\$.....) Dollars, with the proper notations thereon, to replace the bond lost (destroyed or stolen) as aforesaid, upon receiving from the said an undertaking in the sum of (\$.....) Dollars, indemnifying this Company and the said Trust Company against any damages, losses, or liabilities whatsoever that they or either of them may suffer or incur through the issuance of the aforesaid duplicate bond.

No. 633

Resolution of directors authorizing officer to sell certain land, and requesting trustee to release said land from lien of mortgage.

RESOLVED, by the Board of Directors of the Company, that the following-described real estate owned by said Company is no longer necessary for use in connection with its railway—namely, a parcel of land consisting of, and more particularly described as follows (*insert description*).

RESOLVED FURTHER, That the President of said Company be and he hereby is authorized and empowered to dispose of the same on such

terms as his judgment shall dictate, and to execute a deed therefor on behalf of the Company;

RESOLVED FURTHER, That the Company, Trustee under the mortgage made by the Company, under date of, 19.., be and it hereby is authorized and requested to release from the lien of said mortgage said above-described property, at the request of the President of the Company.

No. 634

Resolution of directors requesting trustee to release certain properties from lien of mortgage, and authorizing deposit with trustee of cash received upon sale of property.

RESOLVED, That Trust Co., as Trustee under the mortgage made by this Company to Trust Co., as Trustee, dated, 19.., and the indentures supplemental thereto, be and it hereby is requested to execute and deliver to this Company a release from the lien of said mortgage and supplemental indentures, of the following-described properties, which are no longer required or useful for or in connection with the business of this Company conducted upon the property covered by said mortgage, or for the conduct and operation thereof, and which this Company has sold for an amount in cash at least equal to the value of the property so sold—to wit, \$..... (For description of lands, see deed of Co. to, dated, 19.., and recorded in the office of the register of deeds of County,, on the .. day of, 19.., in Book of deeds, p.)

RESOLVED FURTHER, That the officers of this Company be and they hereby are authorized and directed to take all steps necessary or convenient to obtain the release of the above-described properties by Trust Co. from the lien of the mortgage made by this Company to Trust Co., as Trustee, dated, 19.., and the indentures supplemental thereto, including the execution and delivery to the Trustee, under said mortgage, of any certificates that may be required by said mortgage, or any certificates that may be required by said Trustee in connection with said release, and the deposit with said Trustee, pursuant to such mortgage, of the purchase price for said property, execution, and delivery to of proper conveyances covering the above-described properties, and the delivery to said, of the release of said properties from the lien of this Company's first mortgage and the indentures supplemental thereto.

No. 635

Resolution of directors authorizing exchange of security under collateral trust agreement.

RESOLVED, That Trust Company, as Trustee under the collateral trust agreement made by this Company to Trust Company, as Trustee, dated, 19..., be and it hereby is requested to deliver to, Treasurer of the Company, or, Assistant Treasurer of the Company, (.....) shares of the aggregate par value of (\$.....) Dollars of Corporation common stock, upon delivery to the Trustee of (.....) shares of no par value common stock, which was issued in exchange for all of the issued and outstanding common stock of the par value of \$100 each of Corporation.

RESOLUTIONS—EXECUTION OF INDENTURES

No. 636

Resolution of stockholders authorizing execution of mortgage on fixtures and stock of merchandise and other personal property, presently owned and after-acquired.

RESOLVED, That, the President, and, the Secretary of this Corporation, be and they hereby are authorized and directed to borrow the sum of (\$.....) Dollars from for a period of (.....) years, and to make and execute, in evidence of said indebtedness, a promissory note in the aforesaid amount, bearing interest at the rate of (....%) per cent per annum, payable to said on the .. day of, 19..., together with a mortgage to secure the payment of the said note, covering all the furniture and fixtures and the entire stock of merchandise, an inventory of which is listed below, and all other goods, chattels, and personal property of any kind or character which this Corporation now has or which it may hereafter acquire, all of which property is now located at (Street), in the City of, State of, and be it

FURTHER RESOLVED, That, the President, and, the Secretary of this Corporation, be and they hereby are authorized and directed to cause the required notices to be given to the creditors of this Corporation, and to do and perform all other things and acts necessary and proper to carry out the provisions of this resolution.

(Here insert inventory list of fixtures and stock of merchandise.)

No. 637

Resolution of directors authorizing president to execute and deliver trust deed covering all personal property for antecedent debt and future advances.

WHEREAS, this Corporation is indebted to the firm of, in the amount of (\$.....) Dollars, for money advanced for the payment of timber lands and operating expenses, and for the construction of a saw mill, a stave mill, and a dimension mill, and

WHEREAS, the said firm has agreed to advance an additional sum of (\$.....) Dollars to this Corporation, to enable it to meet its note to, due on the .. day of, 19..., be it

RESOLVED, That, in order to secure the present and future indebtedness of this Corporation to the said firm of, as aforesaid,, President of this Corporation, be and he hereby is authorized and instructed to execute and deliver to the said firm of a trust deed covering all the personal property of this Corporation, consisting of (*give full description of personal property*), and a second mortgage upon its timber lands situated in the, and described as follows (*incorporate complete description of real property*).

No. 638

Excerpt of minutes of directors' meeting proposing issuance of mortgage bonds to liquidate unfunded debt, and authorizing application for consent of public service commission, preparation and filing of a registration statement, and compliance with Trust Indenture Act of 1939.

The Chairman further reported that negotiations were again in progress for the issuance and sale of bonds of this Company for the purpose of liquidating the unfunded debt of this Company, particularly its open-account indebtedness to Company of, Inc., which aggregates \$25,100,000 as of, 19...

It was pointed out that the negotiations contemplate that, with a guaranty by Company of, Inc., of payment of principal and interest of said bonds, the bonds can probably be sold to a responsible investment house or group of investment houses to net not less than 98% of the face amount, or \$24,500,000.

On motion duly made and seconded, it was

RESOLVED, That the proposed issuance and sale of \$25,000,000 aggre-

gate principal amount of this Company's bonds (to be known as its "Consolidating Mortgage Bonds," or such other designation as may be determined upon), dated as of, 19.., bearing interest at the rate of not more than $3\frac{1}{2}\%$ per annum, maturing, 19.., and to be issued under and secured by a new mortgage of the property and franchises of this Company (subject to existing mortgages) to be executed and delivered to Trust Company, as Trustee, or such other Trustee as may be determined upon, and the sale of the same to a responsible investment house or group of investment houses at not less than 98% of the face amount thereof to yield proceeds of approximately \$24,500,000, be and the same hereby are approved; and

RESOLVED FURTHER, That the proper officers of this Company be and they hereby are authorized and directed to take all such action as may be necessary and proper to effectuate the issuance and sale of the afore-said bonds, including making of application to the Public Service Commission for its consent and authority for the issuance and sale of said bonds, the preparation, execution, and filing of a Registration Statement with the Securities and Exchange Commission pursuant to the provisions of the Securities Act of 1933, as amended, and the preparation of a Mortgage or Trust Indenture pursuant to which such bonds are to be issued, which shall comply with the requirements of the Trust Indenture Act of 1939.

No. 639

Resolution of stockholders authorizing increase of indebtedness and empowering directors to execute bonds secured by general mortgage covering all property of corporation, including franchise and after-acquired property.

RESOLVED:

First, that the stockholders of this Company, duly assembled in pursuance of the resolution of the Board of Directors of the Company, do hereby consent to and authorize an increase of the indebtedness of the Company from (\$) Dollars to (\$) Dollars.

Second, that the Board of Directors of this Company be and it hereby is authorized and directed to have prepared and executed, in the name of this Company, bonds in the sum of (\$) Dollars each, dated, 19.., and payable as follows: (\$) Dollars thereof on the first day of, and (\$) Dollars thereof on the first day of in each and every year thereafter until and including the first day of, 19.., at the rate of (.%) per cent per annum, payable

semiannually, both principal and interest being payable in lawful money of the United States of America, which bonds shall be secured by a mortgage upon all the property and assets, real, personal, and mixed, and the franchise of the Company now owned or hereafter acquired, said bonds and mortgage aforesaid to be in terms and form satisfactory to the officers of this Company and to be submitted to the stockholders of this Company for their approval.

Third, that the Board of Directors of this Company be and it hereby is authorized to execute and deliver the mortgage hereinbefore referred to, to a trustee to be designated by it, and that it shall also designate the time and place at which the principal and interest of the said bonds shall be payable.

Fourth, that the Board of Directors of this Company be and it hereby is authorized and directed to use the entire issue of said bonds for the purpose of carrying out the terms of the proposition made by the Company to this Company, and this day accepted by the stockholders of this Company.

No. 640

Excerpt of minutes of directors' meeting authorizing mortgage of properties to secure bond issue.

The Secretary read to the meeting certain resolutions adopted at the special meeting of stockholders of the Company, held on the .. day of, 19.., authorizing a mortgage on the properties of the railroad, lands, buildings, terminals, equipment, rolling stock, franchises, and concessions of the Company, in order to guarantee bonds not to exceed, in the aggregate amount, (\$.....) Dollars, and authorizing the present issuance thereunder, and as part of the said mortgage debt, of (\$.....) Dollars, aggregate principal amount, First Mortgage Bonds, Series A.

The Secretary also exhibited to the meeting a draft of the mortgage called "First Mortgage," which draft had been prepared by the officers in accordance with the resolutions of the stockholders, and which contains the proposed text of the said \$..... principal amount of bonds which will be called "First Mortgage Bonds, Series A," and the trustee's certificate which will appear on the back thereof.

RESOLVED, That the draft of the mortgage now exhibited to this meeting and the text of the bonds and of the trustee's certificate which appear therein be approved, and that the said draft be considered an integral part of the minutes of this meeting and be inserted in the minute book;

RESOLVED FURTHER, That the President, or any one of the Vice

Presidents of this Company, be and he hereby is authorized and instructed to execute, under the seal of this Company, affixed by its Secretary, or by any one of its Assistant Secretaries, any one of whom is hereby authorized to affix the said seal and to sign and execute in favor of the Bank of, as Trustee, a mortgage in substantially the form now approved by this meeting;

RESOLVED FURTHER, That, upon the execution and signing of the said mortgage, the President, or any one of the Vice Presidents of this Company, be and he hereby is authorized and instructed to execute, under the seal of this Company, affixed by its Secretary or by any one of its Assistant Secretaries, any one of whom is hereby authorized to affix the same, one or more bonds under and secured by the said mortgage, which shall be designated as "First Mortgage Bonds, Series A," of this Company, in substantially the form which shall be set forth in the said mortgage, and for an aggregate principal amount of (\$.....) Dollars;

RESOLVED FURTHER, That the proper officers of this Company be and they hereby are authorized and instructed to deliver the bond or bonds thus executed to the said Bank of, as Trustee, under the said mortgage, and that the said Trustee be authorized and requested to authenticate the said bonds upon receipt thereof, and to deliver the said bond or bonds to or upon the written order of this Company, signed by its President, or by any one of its Vice Presidents, and by its Secretary, or any one of its Assistant Secretaries;

RESOLVED FURTHER, That full power and authority be and it hereby is granted to the President and to each of the Vice Presidents, and to the Secretary and each of the Assistant Secretaries of this Company, in their discretion, to agree to and approve, and to make and cause to be made, any modification or addition in respect to the said form of bond and in respect to the provisions which are to be inserted in the said mortgage, and to approve and execute any form of mortgage which contains the provisions which they, or any one of them, considers proper, and that the signatures of the officers who may authorize any bond and the execution of the said mortgage shall be considered for all purposes as full proof of the approval thereof and of all the terms, stipulations, and conditions contained in the said bond and mortgage. Any and all acts which the said officers may do or perform in conformity with the powers conferred upon them by these resolutions are hereby expressly authorized, approved, ratified, and confirmed;

RESOLVED FURTHER, That the President, or any one of the Vice Presidents of the Company, be and he hereby is authorized and requested to sell and deliver to the Company,

represented by its President, or by any other competent officer, the bond or bonds of the present issue called "First Mortgage Bonds, Series A," to the aggregate principal amount of (\$.....) Dollars, represented by one or more temporary or definitive certificates, for the sum of (\$.....) Dollars, United States currency; to receive and give receipt for the said amount; and to sign and execute any documents, public or private, which may be necessary or proper in connection therewith.

No. 641

Resolution of directors providing for issuance of callable bonds upon stockholders' approval of increase of bonded indebtedness, and execution of mortgage indenture.

WHEREAS, at a special meeting held on the .. day of, 19.., the stockholders of this Corporation duly consented (*if upon written assent of stockholders, say*: "Whereas, the stockholders of this Corporation signified their assent in writing on the .. day of, 19.."), to an increase in the bonded indebtedness of this Corporation, from (\$.....) Dollars to (\$.....) Dollars, and the proper documents and certificates relating to the creation of such increase of bonded indebtedness have been properly filed with the Secretary of State of the State of and the County Clerk of County, it is

RESOLVED, That (.....) First Mortgage Five (5%) Per Cent Sinking Fund Bonds of the denomination of (\$.....) Dollars each, dated the .. day of, 19.., all due and payable the .. day of, 19.., shall be executed and issued by this Corporation in the manner set forth in Article of the trust indenture hereinafter set forth, and it is

FURTHER RESOLVED, That this Corporation shall have the right to call in and retire all or any of said bonds on any interest payment date before the maturity of same, upon and by the payment of the principal thereof and all accrued interest thereon, together with a premium of five (5%) per cent of the principal thereof, such redemption to be effected in the manner required by said trust indenture, and it is

FURTHER RESOLVED, That each of said bonds shall bear interest at the rate of (.....%) per cent per annum from the date thereof, payable semiannually on the first days of April and October in each year, said interest to be evidenced by proper coupons attached to said bonds, and it is

FURTHER RESOLVED, That, to secure the payment of said bonds and the interest thereon,, the President of this Corpora-

tion, and, its Secretary, be and they hereby are authorized, empowered, and directed to make, execute, and deliver a trust indenture in the following form, conveying and mortgaging the property of the Corporation to Trust Company, which is hereby designated and appointed Trustee under the said trust indenture (*insert trust indenture*).

No. 642

Resolution of directors authorizing issue of convertible bonds, fixing price, and calling meeting of stockholders to consent to execution of mortgage as security.

RESOLVED, That the Company issue and dispose of its bonds or other obligations up to but not exceeding the sum of (\$) Dollars, the bonds or other obligations to be sold at the present time not to exceed the sum of (\$) Dollars, such bonds or other obligations to bear interest at a rate not exceeding (. %) per cent per annum, payable semi-annually, and all and any part of said bonds or other obligations to become due and payable not more than (.) years from the date thereof.

RESOLVED FURTHER, That the stockholders, in conformity with the statute applicable thereto, be requested to consent that the Company execute a mortgage or a deed of trust mortgaging its property and franchises, to secure the payment of such bonds or other obligations, and that such mortgage or deed of trust shall be made to such corporation or person, and shall be in such form, and shall contain such provisions, as the Board of Directors of the Company may approve.

RESOLVED FURTHER, That the stockholders be requested to consent that the Board of Directors, under such regulations as it may adopt, may confer on the holders of any of said bonds or obligations the right to convert the principal thereof after (.) years, and not more than (.) years from the date of such bonds, into First Preferred Seven (7%) Per Cent Cumulative Stock of the Company at the par value of said stock, said stock to be issued subject to the right of the Board of Directors of the Company to call in and retire said stock, or any part thereof, at one hundred ten (110%) per cent and accumulated dividends.

No. 643

Resolution of stockholders consenting to issue of convertible bonds.

RESOLVED, That consent be and it hereby is given to the creation of

an issue of convertible debenture bonds of the Company, to be of an aggregate principal amount not exceeding (\$.....) Dollars, to bear such rate of interest, to mature at such date, and to contain such other terms and conditions as the Directors may determine, and to be offered to the stockholders for subscription, at such time or times and upon such terms and conditions as the Directors may determine, in proportion to their holdings of stock on a record date or dates to be designated by the Directors; and that consent be and it hereby is given to the Directors, under such regulations as they may adopt, to confer upon the holders of said bonds the right to convert the principal thereof within such period and upon such terms and conditions as may be fixed by the resolutions of the Directors conferring said right of conversion, into capital stock of the Company.

No. 644

Resolution of stockholders consenting to issue of convertible bonds and execution of mortgage or deed of trust covering property and franchise.

RESOLVED, That the Company issue and dispose of its bonds or other obligations up to but not exceeding the sum of (\$.....) Dollars (the bonds or other obligations to be sold at the present time not to exceed the sum of (\$.....) Dollars), such bonds or other obligations to bear interest at a rate not exceeding (%) per cent per annum, payable semiannually, and all or any part of said bonds or other obligations to become due and payable not more than (.....) years from the date thereof;

RESOLVED FURTHER, That the stockholders, in conformity with the statute applicable thereto, consent, and they do hereby consent, that the Company execute a mortgage or deed of trust mortgaging its property and franchises, to secure the payment of such bonds or other obligations, and that such mortgage or deed of trust be in such form, and contain such provisions, as the Board of Directors of the Company may approve;

RESOLVED FURTHER, That the stockholders consent, and they do hereby consent, that the directors, under such regulations as they may adopt, may confer on the holders of any of said bonds or obligations the right to convert the principal thereof after (.....) years, and not more than (.....) years from the date of such bonds, into First Preferred Seven (7%) Per Cent Cumulative Stock of the Company, at the par value of said stock, said stock to be issued subject to the right of the Board of Directors of the Company

to call in and retire said stock, or any part thereof, at one hundred ten (110%) per cent and accumulated dividends.

RESOLVED FURTHER, That said mortgage or deed of trust provided to be executed for the purpose of securing said bonds shall be made to such corporation or person, shall be in such form, and shall contain such provisions as the Board of Directors of the Company may approve.

No. 645

Resolution of directors authorizing deposit of funds with trustee of mortgage, in anticipation of use of an equal amount of bonds or their proceeds for purposes specified in the mortgage.

WHEREAS, pursuant to the provisions of Section of Article of the Refunding and Improvement Five Per Cent Mortgage of the Company to the Trust Company, as Trustee, dated, 19.., this Company is entitled to reimbursement out of bonds to be issued under said section of said mortgage, for expenditures or obligations made or incurred since, 19.., in the purchase of equipment and in improvements and betterments to its property and to the leased property mentioned in said section, and for the other purposes specified in said section; and

WHEREAS, in and by the terms of a certain order of the Public Service Commission, State of, made and entered at the Capitol in the City of, State of, on the .. day of, 19.. (Case No.), this Company was duly authorized to issue bonds under said mortgage to the par value of (\$.....) Dollars (of which (\$.....) Dollars have heretofore been issued, authenticated, and delivered), for the purpose mentioned in said order, and to be sold to provide funds for refunding car trust certificates maturing during the year 19.., and for expenditures made and to be made by this Company during the year 19.. for fixed capital, set forth in detail in Schedule A, attached to the petition filed by this Company with the said Public Service Commission, dated, 19.., and referred to in the Public Service Commission's order dated, 19.., or in the event of any necessary change or changes in the present plans of this Company, for expenditures for additions and betterments to its road and equipment, other than those listed in such schedule, which are properly capitalizable; and

WHEREAS, in and by the terms of a certain order of the Public Service Commission of the State of, dated, 19.. (Case No.), this Company was duly authorized to issue bonds under its Refunding and Improvement 5 Per Cent Mortgage,

dated, 19.., as aforesaid, for the purpose of acquiring right of way for, and the construction and equipment of, an extension of the railroad of this Company to, of the par amount of (\$) Dollars, for the purposes mentioned in said order, which said (\$) Dollars par value of bonds, together with (\$) Dollars par value of bonds aforementioned, aggregate (\$) Dollars par value of bonds now available for authentication and delivery; and

WHEREAS, a petition is about to be presented to the Public Service Commission for permission to issue additional bonds to the amount of (\$) Dollars par value, which, when granted, together with (\$) Dollars of bonds aforementioned, aggregate (\$) Dollars of bonds available for authentication and delivery; and

WHEREAS, it is provided in Section of Article of said mortgage that, in anticipation of the use of certain bonds to be issued thereunder, this Company may become entitled to the authentication and delivery of bonds for any of the purposes specified in Section of Article of said mortgage, upon depositing with the Trustee an amount of money equal to the par value of said bonds to be so authenticated and delivered by the Trustee, and that the money so received by the Trustee shall be expended only for the purposes specified in Section of Article of said mortgage, and shall be paid to this Company, or upon its order, upon resolutions and certificates similar to those which would entitle it to the authentication and delivery of the bonds of which such cash is the proceeds, but such resolutions and certificates shall be made in terms applicable to such payments of cash, instead of to the authentication and delivery of bonds;

NOW, THEREFORE, BE IT RESOLVED, That, pursuant to the provisions of Section of Article of the Refunding and Improvement Five Per Cent Mortgage of this Company, the officers of this Company be and they hereby are authorized, empowered, and directed forthwith to deposit, on or before, 19.., the sum of (\$) Dollars in cash, with the Trust Company, as Trustee, in anticipation of the use of (\$) Dollars par value of bonds, or the proceeds thereof, for certain of the purposes specified in Section of Article of the said mortgage, there now being available for authentication and delivery, pursuant to orders issued by the Public Service Commission, (\$) Dollars Five Per Cent Mortgage Bonds of this Company, for estimated expenditures for additions and betterments during the calendar year 19.., as detailed in Schedule A, attached to the petition

filed by this Company with the said Public Service Commission, dated, 19.., or, in the event of any necessary change or changes in the present plans of this Company, for expenditures for additions and betterments to its road and equipment, other than those listed in such schedule, which are properly capitalizable; and for the purpose of acquiring the right of way for the construction and equipment of the proposed extension of the railroad of this Company to, and for other purposes specified in Section of Article of said mortgage; and be it further

RESOLVED, That the Trust Company, as Trustee under said Refunding and Improvement Five Per Cent Mortgage of this Company, be and it hereby is requested to authenticate and deliver to this Company, or upon its order, from time to time, bonds to the amount of (\$.....) Dollars, upon the deposit with it of an amount of money equal to the amount of bonds authenticated and delivered on orders duly signed by the proper officers of this Company, the said bonds or the proceeds thereof to be used to reimburse this Company for or to pay for the expenditures anticipated to be made by it only for purposes authorized by Section of Article of said mortgage as aforesaid.

No. 646

Resolution of directors authorizing treasurer to request trustee to deliver mortgage bonds to corporation pursuant to terms of trust deed.

RESOLVED, That the Treasurer of the Company be and he hereby is directed to request the Bank of, Trustee under the deed of trust executed the .. day of, 19.., to deliver to him the (.....) First Mortgage bonds (total, (\$.....) Dollars par value) of this Company, duly certified by said Bank of, as Trustee, pursuant to the terms of said deed for the purposes of this Company.

No. 647

Resolution of directors requesting trustee to countersign and deliver mortgage bonds.

RESOLVED, That, Trustee, be and he hereby is requested by the Board of Directors to countersign, as Trustee, and to deliver to Messrs. and, of (Street), (City), (State), in behalf of this Company, (.....) of the

Company's First Mortgage Five Per Cent Bonds of One Thousand Dollars (\$1,000) each, numbers (.....) to (.....) inclusive, and

RESOLVED FURTHER, That a certified copy of this resolution be sent to the said, Trustee.

No. 648

Resolution of directors canceling mortgage upon receipt of other security.

WHEREAS, a certain bond and mortgage were made, executed, and delivered to this Corporation by the Company, on the .. day of, 19.., to secure the collection of certain securities in the amount of (\$.....) Dollars, transferred to this Corporation by the said Company, upon the purchase and sale of certain personal property, and

WHEREAS, it was resolved that such mortgage should not be recorded, but should be held only to keep alive the claim for any deficiency that might arise upon the collection of the aforesaid securities, and

WHEREAS, the said Company is desirous of selling the property covered by the said bond and mortgage, free and clear of the lien of the said mortgage, and

WHEREAS, the said Company has agreed to deliver to this Corporation, and this Corporation has agreed to accept from the said Company, certain additional securities, as collateral to secure the collection of the above amount in lieu of the bond and mortgage aforesaid,

NOW, THEREFORE, IT IS RESOLVED, That the aforesaid bond and mortgage be and the same hereby are cancelled, released, and discharged, and, the Secretary, and, the Treasurer, of this Corporation, be and they hereby are directed to cancel the same and to execute the necessary instruments therefor.

No. 649

Excerpt of minutes of directors' meeting authorizing limited issue of debentures under trust agreement, approving agreement, appointing a registrar, authorizing authentication of debentures, appointing officers to execute debentures, appointing paying agent, and authorizing listing of debentures.

[Authorization of issue]

RESOLVED, That an issue, limited to the aggregate principal amount

of (\$.....) Dollars, of Twenty-year 5 Per Cent Debentures, be and the same hereby is authorized, the same to be issued under a trust agreement to be dated as of, 19.., to be made between this Company and the Trust Company of, as Trustee.

[Presentation of trust agreement]

The Chairman thereupon presented the form of trust agreement with the Trust Company of, as Trustee, to be dated as of, 19.., providing for said authorized issue of (\$.....) Dollars, principal amount of Twenty-year 5 Per Cent Debentures. The Chairman stated that said form of trust agreement had been approved by counsel for the Company and for the Company and the Company of

Thereupon, upon motion of, seconded by, the following resolutions were unanimously adopted:

[Approval of trust agreement]

RESOLVED, That the form, terms, and conditions of the trust agreement of this Company to be made with the Trust Company of, as Trustee, to be dated as of the .. day of, 19.., providing for an issue of (\$.....) Dollars, principal amount of Twenty-year 5 Per Cent Debentures of the Company, together with the form, terms, and conditions of said debentures and the coupons to be attached thereto, and the certificate of authentication of the Trustee therein set forth, be and the same hereby are approved as presented to this meeting, and that the President or a Vice President and the Secretary or an Assistant Secretary of the Company be and they hereby are authorized, empowered, and directed, for and in the name of the Company, and under its corporate seal, to execute, acknowledge, and deliver to the Trust Company of, as Trustee, a trust agreement in substantially the form presented to the meeting, with such changes therein as may be approved by the Chairman of the Board or the President.

[Authorization of officers to carry out trust agreement]

FURTHER RESOLVED, That the officers of the Company are hereby authorized, empowered, and directed to do or cause to be done all things deemed by them to be necessary or advisable and proper to comply with and carry out the terms of such trust agreement.

[Authentication by facsimile signature]

FURTHER RESOLVED, That the coupons to be attached to the Twenty-year 5 Per Cent Debentures shall be authenticated by the facsimile

signature of the present Treasurer of the Company, as provided in said trust agreement, and that the Company hereby adopts such signature as binding upon it.

[Appointment of Registrar]

FURTHER RESOLVED, That the Trust Company of be and it hereby is appointed the agent of this Company, with the title of Registrar, for the registration and transfer of ownership of said Twenty-year 5 Per Cent Debentures, when said debentures shall be presented to said Registrar for that purpose.

[Authorization of temporary bonds and exchange for permanent bonds]

FURTHER RESOLVED, That the Chairman of the Board of Directors of the Company, or the President or one of the Vice Presidents, and the Treasurer or one of the Assistant Treasurers, or the Secretary or one of the Assistant Secretaries, be and they hereby are authorized and directed, for and in the name of the Company, and under its corporate seal, attested by the Secretary or an Assistant Secretary, to execute and deliver to the Trust Company of, as Trustee, a temporary debenture or debentures, to the aggregate principal amount of (\$.....) Dollars, in the form authorized by the said trust agreement, and in such denomination or denominations as are authorized thereby, and that said Trust Company of, as Trustee, be authorized and requested to authenticate and to deliver the same, pursuant to Section of said trust agreement, to or upon the written order of the Company; and upon the preparation of the definitive Twenty-year 5 Per Cent Debentures, said officers of the Company be and they hereby are authorized and directed to execute and deliver the same to the Trust Company of as Trustee, to an aggregate amount not exceeding (\$.....) Dollars principal amount in exchange, from time to time, for a like principal amount of temporary debentures, upon the surrender and cancellation of said temporary debentures.

[Effect of seal]

FURTHER RESOLVED, That the imprint of the seal of the Company upon the said temporary or definitive debentures shall have the same force and effect as though the corporate seal of the Company had been impressed thereon by the action of its proper officers.

[Appointment of officers with power to execute debentures]

RESOLVED, That be appointed a Vice-president and be appointed an Assistant Secretary of this

Company, with power limited to the execution of the temporary or definitive Twenty-year 5 Per Cent Debentures of the Company, issued or to be issued under the proposed trust agreement to the
 Trust Company of, as Trustee, to be dated as of , 19.., to secure an aggregate principal amount of (\$.....) Dollars of said debentures.

[Appointment of paying agent]

FURTHER RESOLVED, That the Trust Company of, and the Bank of, and each of them, be appointed paying agents of this Company, for the purpose of paying the interest due and to become due on the said debentures and the principal amount thereof and any premium thereon, either at maturity of the said debentures or upon the redemption thereof prior to maturity.

[Listing of debentures]

RESOLVED FURTHER, That application be made to the New York Stock Exchange for the listing thereon of the Twenty-year 5 Per Cent Debentures of the Company, and that the President, the Vice-president, the Treasurer, or the Assistant Treasurer, be and each of them hereby is authorized and directed to appear before the Committee on Stock List of said Exchange with authority to make such application, as well as any changes thereof or agreements in regard thereto as may be necessary to conform to the requirements for listing.

No. 650

Resolution of directors authorizing issue of notes and execution of collateral trust agreement.

RESOLVED, That this Company issue its 5% One-year Coupon Notes to the aggregate principal face amount of \$.....; and

RESOLVED FURTHER, That to secure such notes, this Company execute and deliver to Trust Co., as Trustee, a collateral trust agreement, to be dated , 19, in substantially the form submitted at this meeting and hereby approved; and

RESOLVED FURTHER, That the officers of this Company be and they hereby are authorized to sell to Trust Co., the \$..... principal face amount of the said notes to be issued under and secured by the said collateral trust agreement, at a price equivalent to per cent thereof, less per cent of the said principal face amount thereof, the commission to be payable to said Trust Co.

No. 651

Excerpt of minutes of directors' meeting authorizing execution of equipment trust agreement and lease, and empowering officers to make application to Interstate Commerce Commission for authority to execute agreement and lease, to guarantee the certificates, and to issue and sell them.

The Chairman recommended that the acquisition of twenty 4-8-4 type locomotives and tenders, twenty-five 4-6-6-4 type simple articulated locomotives and tenders, fifty passenger cars, one thousand ballast cars, two hundred tank cars and fifty lightweight box cars, at an estimated cost of \$13,881,000, the purchase of which equipment had been authorized, be financed by an equipment trust, and submitted to the meeting: (1) a form of proposed Agreement between and, Vendors, The Trust Company, as Trustee, and this Company creating Equipment Trust, Series E, covering the aforesaid equipment, and providing for the issue thereunder of equipment trust certificates, to be known as Equipment Trust Certificates, Series E; and (2) a form of proposed Lease of the aforesaid equipment from The Trust Company, as Trustee, to this Company.

On motion duly seconded, it was unanimously

RESOLVED (1), That, subject to the approval of the Interstate Commerce Commission,

(a) For the purpose of creating Equipment Trust, Series E, and providing for the issue of Equipment Trust Certificates, Series E, in the principal amount of \$10,410,000, payable in fifteen annual installments, said Certificates to bear dividends at the rate of two and three-quarters per cent per annum, this Company enter into an Agreement between and, Vendors (or such other vendors as shall become parties thereto), of the first part, The Trust Company, Trustee, of the second part, and this Company, of the third part, to be dated, 19.., or such other date as may be required;

(b) This Company accept from The Trust Company, as Trustee under the aforesaid Agreement, a Lease of the equipment described or referred to in the form of the Lease so submitted;

(c) Upon the issue from time to time by the Trustee under said Agreement of such Certificates, whether in definitive or temporary form, this Company indorse on each Certificate so issued its guaranty

of the prompt payment of the principal thereof and the dividends thereon; and and are each hereby appointed a Vice President of this Company for the special purpose of executing said guaranties;

(d) Said Agreement and said Lease shall be substantially in the forms thereof submitted to this meeting, and said Certificates and said guaranties shall be substantially in the forms thereof set forth in the form of Agreement so submitted, but with such modifications of any thereof, including changes in amounts, values, dates, rates, and numbers, as, Chairman of the Executive Committee, or, Vice President, shall approve, which approval may be evidenced by the execution of said Lease and said Agreement by either of said officers;

(e) This Company furnish to the Vendors under the Agreement aforesaid, for deposit under the provisions of Section of Article thereof, such sum as shall be necessary, in addition to the amount subscribed for the Certificates to be issued under said Agreement, to constitute the fund of \$10,410,000 required to be deposited against the execution and delivery of the total authorized amount of such Certificates;

(f), Chairman of the Executive Committee, is hereby authorized to approve the designation of banks or bankers with whom funds may be deposited pursuant to the provisions of said Agreement;

(g) The proper officers and agents of this Company be and they hereby are authorized and directed, in the name and in behalf of this Company and under its corporate seal or otherwise, to execute or cause to be executed said Agreement, said Lease, and said guaranties and any and all other agreements, guaranties, assignments, certificates, receipts, and instruments, and to make all payments and to do all other acts and things, including the making of any necessary or proper application or applications to the Interstate Commerce Commission or any other commission or public body for any requisite or desirable authorization or approval, necessary or proper to effectuate the creation of said Equipment Trust, the execution and delivery of the Agreement and Lease herein authorized, and the issue and sale of said Certificates, and fully to carry out and perform the obligations of this Company under said Agreement and Lease and to obtain for this Company the benefits therefrom.

RESOLVED (2), That the matter of the sale of said Certificates be referred to, Chairman of the Board of Directors, and, Chairman of the Executive Committee, with

full power to arrange for such sale in such manner and upon such terms as to them may seem best.

RESOLVED (3), That, Chairman of the Executive Committee,, Vice President, or
, Controller of the Company, be and each of them hereby is designated as the executive officer to make, sign, verify, and file any application and any supplemental applications to the Interstate Commerce Commission, and any supporting statements or exhibits, for authority (a) to execute a Lease and Agreement, in the form hereinbefore authorized, creating the Equipment Trust, Series E; (b) to indorse upon the Certificates to be issued under said Agreement the guaranty of this Company in the form hereinbefore authorized; and (c) to issue and sell said Certificates or cause the same to be issued and sold.

No. 652

Resolution of directors authorizing delivery of equipment to trustee under trust agreement in consideration of equipment trust certificates.

RESOLVED, That the President and/or other proper officer be and he/they hereby is/are authorized to sell, and by proper and sufficient bill of sale executed by such officers, with the seal of the Corporation thereto affixed and attested by the Secretary, to transfer, and make delivery of, to Bank of, Trustee, under the equipment trust agreement to be executed by Company with the Bank of, Trustee, the following-described equipment—to wit (*insert description of equipment*)—and to accept therefor from said Trustee, as full and complete consideration for said sale, transfer, and delivery of said equipment, and in full payment of the purchase price thereof, Equipment Trust Certificates, Series B (in temporary and/or definitive form), and to be issued by said Trustee to the aggregate principal amount of (\$.....) Dollars, under the terms of said equipment trust agreement, which said Equipment Trust Certificates, Series B, shall be in such form, and shall be payable on such terms and conditions and at such times as are set forth in said equipment trust agreement; and full authority and power is hereby conferred upon the President and/or other proper officer of the Company to agree upon the terms and conditions of the said equipment trust agreement and the form of said Equipment Trust Certificates, Series B, and the terms and conditions and the terms of payment thereof, as shall be set forth in said equipment trust agreement, and to execute the same in the name and in behalf of the Company.

No. 653

Resolution of directors authorizing president to sell and deliver equipment trust certificates.

RESOLVED, That the President of this Company be and he hereby is authorized to sell and deliver to the Bank certificates representing (\$.....) Dollars, face amount of Railways Equipment Trust, Series B, when the same are received by this Company, upon receipt of the purchase price of (\$.....) Dollars, with such adjustments for interest and other proper charges as he in his discretion shall see fit.

RESOLUTIONS—GUARANTY OF OBLIGATIONS

No. 654

Resolution of directors authorizing officer to arrange for granting of line of credit to another corporation (subsidiary) and to guarantee the loans made thereunder.

RESOLVED, That the officers of this Corporation be, and they hereby are, authorized, in the name of this Corporation, to arrange for the granting to the Company of a continuing line of credit with the Bank, to an amount not exceeding (\$.....) Dollars, or to such amounts as may hereafter be authorized by the Executive Committee of this Corporation; and any Vice President of this Corporation is hereby authorized to guarantee, in the name of this Corporation, and in such form as may be required by the bank making such loans, the payment of the principal and interest of all sums (not to exceed (\$.....) Dollars), which may be loaned by said bank to said Company, provided, however, that all loans, in order to come within the terms of any such guaranty, shall be authorized by the proper officer of said Company, and shall be approved by a Vice President of this Corporation.

No. 655

Resolution of stockholders authorizing corporation to guarantee obligations, and empowering officers to indorse notes of subsidiary.

WHEREAS, this Corporation is, and for many years past has been, the owner of all the shares of stock of the Company, and

WHEREAS, said Company is desirous of obtaining a loan of funds from the Bank, necessary for the operation of its business, and

WHEREAS, the said bank has agreed to advance the funds so required by the said Company, provided that payment of the indebtedness of the Company is guaranteed by this Corporation, and

WHEREAS, it is deemed for the best interests of the Company and for this Corporation that the said Company obtain the funds as aforesaid, it is

RESOLVED, That this Corporation is hereby authorized to guarantee the payment of any moneys advanced by the said Bank to the said Company, and, the President, and, the Treasurer of this Corporation, are hereby authorized and empowered to indorse, in the name of this Corporation, the notes or other obligations of the said Company, executed by it as evidence of the loans made by the Bank to it as aforesaid.

FURTHER RESOLVED, That, Secretary of this Corporation, shall file with the Bank a certified copy of this resolution under the seal of the Corporation, and that this resolution shall be in full force and effect and binding upon this Corporation until it shall be repealed, and until written notice of such repeal shall be delivered to the said Bank.

No. 656

Resolution guaranteeing payment of bills incurred by subsidiaries.

RESOLVED, That Mercantile Stores Company, Inc., guarantees the payment of all bills that may be incurred for merchandise and supplies by the following wholly owned subsidiaries: (*list*)

No. 657

Resolution guaranteeing bonds of subsidiary corporation.*

WHEREAS, this Corporation is, and for many years past has been, the owner of all the shares of stock of "B" Steel Company, hereinafter termed the Steel Company (except directors' qualifying shares), and the Steel Company, in the conduct of its manufacturing business, has received a large part of its supply of coke and of gas from the by-product coking plant formerly of "A" Company, situated at South Bethlehem, Pa., contiguous to the properties of the Steel Company, the said plant having been constructed primarily for the purpose of supplying coke and gas to the Steel Company; and

* See General Inv. Co. v. Bethlehem Steel Corp., (1918) 248 F. 303, in which the above resolution appears.

WHEREAS, the Steel Company has deemed it advantageous and essential, in the proper conduct of its business, that it acquire the entire control of the management and operation of said by-product coking plant, and for that purpose has purchased the entire capital stock of said "A" Company, and, in order to make part payment therefor, borrowed, upon its short-time collateral promissory note, the sum of Seven Million (\$7,000,000) Dollars, which obligation the Steel Company and this Corporation are, each of them, desirous shall be promptly paid, and the indebtedness evidenced thereby funded, so that the same may be made payable over a series of years; and

WHEREAS, the Steel Company has caused or is about to cause said coking plant to be sold and transferred to said "C" Company, of which it owns all of the outstanding capital stock, in consideration whereof the Steel Company will acquire Seven Million (\$7,000,000) Dollars of the First Mortgage 5% Fourteen-Year Sinking Fund Gold Bonds of "C" Company, secured by mortgage upon the properties and assets of said "C" Company, and the Steel Company has arranged with the holder of said collateral promissory note to accept payment of said note by the delivery to such holder, on or before, 19.., of said Seven Million (\$7,000,000) Dollars First Mortgage 5% Fourteen-Year Sinking Fund Gold Bonds of the "C" Company, on the condition, however, that the payment of the principal thereof and interest thereon shall be guaranteed by the Steel Company and by this Corporation, and

WHEREAS, the Board of Directors of this Corporation deems it advisable that payment of said indebtedness of Seven Million (\$7,000,000) Dollars, now owing by the Steel Company, be provided for, and that the arrangement proposed by the Steel Company is an advantageous one and to the best interests of the Steel Company and of this Corporation; and

WHEREAS, the form of said bonds and of the mortgage securing the same, and, as well, the form of guaranty to be executed by the Steel Company and by this Corporation, have been duly submitted to and considered by this Board,

RESOLVED, That, in order to provide for the payment of the Seven Million (\$7,000,000) Dollars owing by the Steel Company, and to aid said Company advantageously to sell and dispose of said Seven Million (\$7,000,000) Dollars First Mortgage 5% Fourteen-Year Sinking Fund Gold Bonds of the "C" Company, this Corporation guarantees the punctual payment of the principal and interest of said Seven Million (\$7,000,000) Dollars of bonds.

RESOLVED, That the guaranty to be indorsed upon each of the permanent bonds of said issue of Seven Million (\$7,000,000) Dollars of

First Mortgage 5% Fourteen-Year Sinking Fund Gold Bonds of the "C" Company shall be substantially in the following form:

GUARANTY

"B" Steel Corporation, a corporation created and existing under the laws of the State of, for value received, does hereby guarantee to the holder, or, if registered, to the registered owner of this bond, the punctual payment of the principal of and interest on said bond, as the same shall become or be made due and payable according to the terms of said bond and of the indenture therein mentioned, dated, 19..., made by "C" Company to the Trust Company of, as Trustee, to secure the same.

IN WITNESS WHEREOF, said "B" Steel Corporation has caused its corporate seal to be hereunto affixed, and to be attested by its Secretary or an Assistant Secretary, and these presents to be signed by its President or a Vice President, as of the .. day of, 19...

"B" Steel Corporation
By

Attest:

RESOLVED, That the President or one of the Vice Presidents of this Corporation, be and hereby [is] they are,* severally and respectively, authorized and directed from time to time, as said bonds shall be authenticated by the Trustee, to execute said guaranty in the name and on behalf of the "B" Steel Corporation (not exceeding, however, the aggregate principal sum of Seven Million (\$7,000,000) Dollars), and that the Secretary, or one of the Assistant Secretaries of this Corporation, be and hereby [is] they are,* severally and respectively, authorized and directed, at the same time, to affix to every such guaranty the corporate seal of the "B" Steel Corporation, duly attested by the signature of such Secretary or Assistant Secretary.

RESOLVED, That, pending the preparation and execution of the permanent bonds, the officers of this Corporation, hereinbefore named, be and hereby they are, severally and respectively, authorized and directed, whenever any temporary bond or bonds issued under said first mortgage of the "C" Company shall be authenticated by the Trustee, to execute on said bonds (not exceeding, however, the aggregate principal sum of Seven Million (\$7,000,000) Dollars) said guaranty, substantially in the form hereinbefore set forth, with appropriate variations, omissions, and additions, in the name of and in behalf of "B" Steel Corporation, and to affix to every such guaranty the corporate seal of "B" Steel Corporation, duly attested by the signature of such Secretary or Assistant Secretary.

* Appears thus in the original resolution.

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RESOLVED, That the proper officers of this Corporation be and they hereby are authorized and directed to do such other acts and things as may be requisite fully to carry out and perform, upon the part of this Company, the terms and provisions of this resolution.

No. 658

Resolution of directors authorizing agreement to assume obligations of another company if necessary or advisable.

RESOLVED, That the officers of this Corporation be, and they hereby are, authorized and directed to enter into an agreement with Trust Company, as trustee under the mortgage and deed of trust made by Co., dated, 19..., expressly assuming the obligations of said Co. if, under the terms of said mortgage and deed of trust, it shall be determined that such express assumption of the obligations of said Co. is necessary or advisable.

RESOLUTIONS—PAYMENT OF INTEREST

No. 659

Resolution of executive committee authorizing payment of interest due on bonds.

WHEREAS, the semiannual interest on Collateral Trust 4½% Bonds of this Company becomes due and payable on the .. day of, 19..., be it

RESOLVED, That the proper officers of this Company be and they hereby are authorized and instructed to pay such semiannual interest falling due on said date, upon presentation and surrender of the interest coupon bonds, and in like manner to pay said interest so due upon the registered bonds, to the registered owners thereof at the close of business on the .. day of, 19...

No. 660

Resolution of executive committee making interest on bonds payable through office of company instead of through agent.

RESOLVED, That, until further action by this Executive Committee or by the Board of Directors, the interest on this Company's Collateral Trust 4½% Bonds, issued under a trust agreement between this Company and Trust Company, dated the .. day of, 19..., be paid direct to the holders thereof, instead of through the Trust Company as heretofore, and that the office of the Company be and it hereby is designated as the

office in the City of for the payment of the interest on the above bonds.

No. 661

Resolution of executive committee designating agent for payment of interest on bonds.

RESOLVED, That, until further action by this Executive Committee or by the Board of Directors, the Trust Company, Trustee under the trust agreement between this Company and the said Trust Company, dated the .. day of .., 19.., under which said bonds were issued, be and the same hereby is designated the agent of this Company for the payment of the interest on its Collateral Trust 4½% Bonds issued under the said agreement, and that the office of the Trust Company, at (Street), (City), (State), be the office at which the said interest shall be payable.

No. 662

Resolution of directors accepting unpaid coupons from bondholders for cancellation.

WHEREAS, by resolution passed at a meeting of the stockholders of the Company, on the .. day of .., 19.., an issue of bonds amounting, in the aggregate, at par value thereof, to (\$.....) Dollars, was authorized; and

WHEREAS, there is outstanding of said authorized issue of bonds (.....) bonds, amounting, in the aggregate, at par value thereof, to (\$.....) Dollars; and

WHEREAS, the holders of said outstanding bonds of said authorized issue are likewise the holders of the shares of the capital stock of said Company; and

WHEREAS, for divers good and valuable considerations, said holders of said outstanding bonds have surrendered, for the purpose of cancellation, all the overdue and unpaid coupons of said bonds so outstanding, up to and including the coupons maturing on the .. day of .., 19..; provided, however, that said coupons so surrendered shall be cancelled by the said Company, or the Trustee under the deeds securing the payment of said authorized issue of bonds and coupons, and the said Company shall be discharged from the payment of said coupons so surrendered; therefore, be it

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RESOLVED, That the directors, for the consideration aforesaid, accept from the holders of said outstanding bonds of said Company all the overdue and unpaid coupons attached to said bonds, up to and including the coupons maturing the .. day of, 19.., and that the same shall be cancelled through the agency of the Trustee named in the deed securing the payment of said authorized issue of bonds and coupons, in such manner as will discharge the said Company from the payment of said coupons so surrendered, in accordance with the conditions imposed by the holders of said outstanding bonds.

No. 663

Resolution of directors authorizing nonpayment of interest coupons on notes and debentures, and directing publication and mailing of notice of nonpayment, and preparation of interest and sinking fund adjustment plan.

RESOLVED, That the, 19.. interest coupons on the Company's Ten-year 5½% Sinking Fund Notes, due, 19.., and the Convertible 6% Sinking Fund Debentures, due, 19.., be not paid at this time, and that the President be and he hereby is instructed to publish a notice in the News Bureau, the *Journal*, and such other publications as he may deem advisable, in the form presented to this meeting, and that a copy of said notice be attached to the records of this meeting, and that they be mailed to all known note and debenture holders, to the Trustees under the respective indentures, and to the Stock Exchange.

FURTHER RESOLVED, That the officers of the Company be and they hereby are authorized and instructed, in collaboration with the Underwriters of the Ten-year 5½% Sinking Fund Notes and the Convertible 6% Sinking Fund Debentures of the Company, to prepare a Note and Debenture Interest and Sinking Fund Adjustment Plan for the protection of the security holders of the Company and present such Plan to the directors at an early meeting.

RESOLUTIONS—REDEMPTION OF BONDS

No. 664

Resolution of directors authorizing redemption of all outstanding bonds and setting forth notice of redemption.

RESOLVED, That this Company redeem and pay off, on the .. day of, 19.., the (\$.....) Dollars principal amount of Collateral Trust 6% Bonds, Series A, of the Company, being all of

the bonds now outstanding under the trust agreement dated the .. day of, 19.., between this Company and the Trust Company of, as Trustee, such redemption to be at the principal amount of said bonds and a premium of ten (10%) per cent of such principal amount, together with accrued interest, pursuant to the provisions of Article of said trust agreement.

FURTHER RESOLVED, That, in accordance with the provisions of Article of said trust agreement, this Company advertise in,, and, three (3) newspapers of general circulation in the City of, once in each week for successive weeks, beginning on the .. day of, 19.., that the Company has elected to redeem and pay off all of said bonds, and that, on the .. day of, 19.., there will become due and payable upon the bonds, at the principal office of the Trust Company of, of Street, City of, the principal thereof with a premium of ten (10%) per cent of such principal, together with the accrued interest to such date, and that notice of such redemption to be so given shall be as follows:

(Here insert notice of redemption.)

FURTHER RESOLVED, That said notice be mailed on the .. day of, 19.., to the owners of all registered bonds at their addresses as the same shall respectively appear upon the bond register, and that the officers be and they hereby are authorized, empowered, and directed to do any and all other acts necessary and proper fully to carry into effect the intent of the foregoing resolutions.

No. 665

Resolution of directors authorizing redemption of entire bond issue prior to maturity.

WHEREAS, under a certain trust deed dated the .. day of, 19.., this Corporation did issue First Mortgage 5% Serial Bonds in the aggregate par value of (\$.....) Dollars, all of which bonds are now outstanding, and

WHEREAS, by the terms of the said trust deed, the aforesaid bonds were made redeemable in whole or in part at the option of this Corporation, at any time on thirty (30) days' notice, upon the payment of the principal amount of the aforesaid bonds and accrued interest thereon, together with a premium of (%) per cent of the principal thereof, and

WHEREAS, this Board of Directors believes it to be to the best inter-

ests of this Corporation to redeem the entire issue of the aforesaid bonds now outstanding,

RESOLVED, That this Corporation hereby declares its election to exercise the option aforesaid, and to redeem the entire issue of its First Mortgage 5% Serial Bonds outstanding as aforesaid, on the next interest payment date, to wit, the .. day of, 19.., and it is

RESOLVED FURTHER, That the President and the Secretary of this Corporation be and they hereby are directed to cause a notice to be advertised in two daily newspapers in general circulation, one published in the City of, and one published in the City of, at least once a week for (.....) successive weeks, the first publication to be not less than thirty (30), and not more than forty (40), days before the date of the redemption aforesaid, to wit, the .. day of, 19.., requiring the said bonds to be delivered for redemption at the office of this Corporation in the City of, State of, and it is

RESOLVED FURTHER, That the President and the Secretary of this Corporation be and they hereby are authorized and directed to send a similar notice through the mails, at least thirty (30) days prior to the redemption date, to those who appear, on the bond register on the .. day of, 19.., to be the registered holders of the bonds aforesaid, and to do all other acts necessary and proper to carry the foregoing resolution into effect.

No. 666

Resolution of directors authorizing redemption of part of bond issue prior to maturity.

WHEREAS, under a certain trust deed dated the .. day of, 19.., this Corporation did issue First Mortgage 5% Serial Bonds in the aggregate par value of (\$.....) Dollars, all of which bonds are now outstanding, and

WHEREAS, by the terms of the said trust deed, the aforesaid bonds were made redeemable in whole or in part at the option of this Corporation, at any time on thirty (30) days' notice, upon the payment of the principal amount of the aforesaid bonds and accrued interest thereon, together with a premium of (.....%) per cent of the principal thereof, and

WHEREAS, this Board of Directors believes it to be to the best interests of this Corporation to redeem (\$.....) Dollars principal amount of the said bonds, it is

RESOLVED, That this Corporation hereby declares its election to ex-

ercise the option aforesaid, and to redeem (\$.....) Dollars in principal amount of its aforesaid First Mortgage 5% Serial Bonds, on the next interest payment date, to wit, the .. day of, 19.., the bonds so to be redeemed to be determined by lot in any usual manner, in the presence of the President or a Vice President of this Corporation, or an officer of the Trust Company, Trustee under the aforesaid trust deed, and of a notary public, and it is

FURTHER RESOLVED, That the President and the Secretary of this Corporation be and they hereby are authorized and directed to cause a notice to be published in a daily newspaper in the City of, and a daily newspaper in the City of, once a week for (.....) successive weeks, the first publication to be not less than thirty (30) days prior to the next interest payment date, to wit, the .. day of, 19.., stating the serial numbers of the bonds so drawn, that interest on such bonds shall cease on the said .. day of, 19.., and that, on such date, there will become and be due and payable on each of said bonds, at the office of this Corporation in the City of, State of, the principal thereof, together with the premium as aforesaid and accrued interest to such date, and requiring such bonds to be delivered for redemption, and

RESOLVED FURTHER, That the President and the Secretary of this Corporation, under the direction of the Trust Company, Trustee under the trust deed aforesaid, be and they hereby are authorized and directed to send a similar notice through the mails, at least thirty (30) days prior to such redemption day to those who appear, on the bond register on the .. day of, 19.., to be the registered holders of the bonds so drawn by lot, and

RESOLVED FURTHER, That the President and the Secretary of this Corporation be and they hereby are authorized and directed to execute all instruments and to do all other acts necessary and proper to carry the foregoing resolution into effect.

No. 667

Resolution of directors approving form of agreement with trustee for redemption of bonds at maturity, and authorizing officers to execute and deliver agreement.

WHEREAS, the contract dated, 19.., between this Company and the Trust Company, provides that all necessary steps shall be taken by this Company to redeem the

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Collateral Trust Series A Convertible 6% Bonds of the Company, dated, 19.., and to deposit with the Trust Company a sufficient sum in cash to redeem, on, 19.., all of said bonds, and authorizes notice thereof to be given in accordance with the terms of said bonds and the trust agreement securing the same; and

WHEREAS, a form of agreement with Trust Company, covering the deposit by this Company of the necessary funds for the redemption, on, 19.., of all of said Collateral Trust Series A Convertible 6% Bonds, has been presented to the meeting, be it

RESOLVED, That the form of agreement presented to the meeting for the deposit of funds sufficient to redeem all the Collateral Trust Series A Convertible 6% Bonds of the Company, dated, 19.., be and the same hereby is approved, and the officers of the Company are hereby authorized and directed to execute and deliver an agreement substantially in such form, and with such changes therein as may be approved by the Chairman of the Board or by the President, and to deposit thereunder the proceeds received from the sale of the (\$) Dollars worth of Twenty-Year 5% Debentures, dated as of, 19.., together with such further amount as may be required under the terms of said agreement.

RESOLVED FURTHER, That the officers of this Company be and they hereby are authorized, empowered, and directed to execute such documents, to take such steps, and to do all other acts as may by them be deemed necessary, advisable, or proper to comply with and carry out the terms of the contract of this Company with the Company and the Company of, dated, 19.., in connection with the issuance and sale of (\$) Dollars, principal amount of Twenty-Year 5% Debentures of this Company.

No. 668

Resolution of directors authorizing treasurer to purchase bonds for sinking fund.

RESOLVED, That the Treasurer be and he hereby is authorized to purchase for the sinking fund of the Fifty-Year 5% Bonds of the Corporation, (\$) Dollars, par value, of the series Fifty-Year bonds, at 107 flat, on the .. day of, 19...

No. 669

**Resolution of stockholders ratifying purchase by trustee of bonds
for sinking fund purposes other than those prescribed
in mortgage.**

WHEREAS, by the terms of the first mortgage of the
Company to, Trustee, dated
19.., it was provided that the Company should pay
over to said Trustee, or his successors in trust, every six months, the
sum of (\$.....) Dollars, which sums, together with all
accretions thereto, should immediately be invested by said Trustee in
the purchase, at the lowest market price or offer, not exceeding par
and accrued interest, of as many of the bonds secured by said first
mortgage as the funds in his hands for such purpose could buy, such
bonds to be held for purposes of the sinking fund; and

WHEREAS, the market price of the bonds secured by said first mort-
gage greatly exceeds par and accrued interest, and it is therefore im-
possible for the Trustee to invest the funds in his hands in said bonds
in accordance with the terms of said first mortgage; and

WHEREAS,, the successor in trust under said
first mortgage, has heretofore used a portion of said funds then in his
hands in the purchase of (\$.....) Dollars of the Sinking
Fund Collateral Trust Bonds of said Company, and it is deemed ad-
visable that the remainder of the funds now in the hands of the acting
Trustee under said first mortgage, and which may hereafter accrue on
account of said sinking fund, should be invested by the Trustee in
such other bonds of this Company, its successor or successors, as the
Board of Directors or the Executive Committee of this Company may
deem advisable,

THEREFORE, RESOLVED, That the action of said,
Trustee, in purchasing said Sinking Fund Collateral Trust Bonds, on
account of said sinking fund, is hereby approved, ratified, and con-
firmed, and the acting Trustee under said first mortgage is hereby
authorized and requested to invest, from time to time, such funds as
may come into his hands on account of said sinking fund, in such
other bonds of this Company, its successor or successors, as may be
approved by the Board of Directors or the Executive Committee of
this Company, whenever said sinking fund cannot be invested in said
first mortgage bonds in accordance with the terms of said first
mortgage.

No. 670

Excerpt of minutes of director's meeting authorizing cancellation of debentures purchased by company, and instructing trustee to cancel and cremate debentures.

The Treasurer reported that a total of \$11,170,000 principal amount of the Company's Twenty-Year 5½% Debentures due, 19.., together with, 19.., and subsequent interest coupons attached thereto had been purchased by the Company and were held in the treasury of the Company as of the close of business, 19.. After full discussion of the advisability, in view of the proposed redemption of a part of the Debentures outstanding in the hands of the public, of the cancellation of all of said treasury Debentures, upon motion duly made, seconded, and passed, the following resolution was unanimously adopted:

RESOLVED, That the \$11,170,000 principal amount of Twenty-Year 5½% Debentures due, 19.., of this Company, together with, 19.., interest coupon and all subsequent interest coupons attached thereto held in the treasury of this Company as of the close of business, 19.., be and the same hereby are cancelled, and the Treasurer of this Company is authorized and directed to deliver the same together with a certified copy of this resolution to The Bank of the City of, Trustee under the Indenture dated as of, 19.., under which said Debentures were issued, and to instruct said Trustee to note on its records the fact of such cancellation and to cremate said Debentures and interest coupons so cancelled and to deliver a certificate of cremation to this Company.

RESOLUTIONS—CONVERSION OF BONDS

No. 671

Resolution of directors authorizing conversion of bonds into stock.

RESOLVED, That any and all holders of the First Mortgage 5% Bonds of the Corporation, duly authorized and about to be issued by the said Corporation, shall have the privilege of converting the said bonds into common stock of the Corporation without par value, on the .. day of, 19.., (.....) shares of common stock without par value to be given in exchange for each bond of the face value of One Thousand (\$1,000) Dollars, and it is

FURTHER RESOLVED, That the said bondholders shall have the right to convert their bonds as aforesaid only upon condition that a written notice, stating the amount of the par value of the bonds which will be

presented for conversion, shall be served by the holders thereof upon this Corporation, at its office at Street, on or before the .. day of, 19...

No. 672

Resolution of stockholders consenting to the conversion of convertible debentures into stock.

RESOLVED, That consent be and it hereby is given to the Board of Directors of the Company, under such regulations as they may adopt upon authorizing the issue by the Company of not exceeding (\$.....) Dollars principal amount of convertible debentures, to confer upon the holders of such debentures the right to convert the principal thereof into common stock of the Company within such period and upon such terms and conditions as may be fixed by the resolutions of the Directors conferring said right of conversion.

**RESOLUTIONS—REFUNDING—
EXTENSION OF MATURITY**

No. 673

Resolution of directors authorizing issue of new or extended notes in exchange for maturing notes, execution of trust indenture similar to existing indenture relating to maturing notes, and application to Interstate Commerce Commission for authority to issue new or extended notes.

RESOLVED, That this Company issue new or extended three-year notes aggregating not more than \$15,000,000, to be delivered in full payment of and in exchange for a like principal amount of its outstanding or issuable three-year 6% gold notes maturing, 19..., such new or extended notes to be dated, 19..., to bear interest at the rate of 6% per annum, to be payable, principal and interest, in any coin or currency which, at the time of payment, shall be legal tender for public and private debts, to mature three years after date and to be redeemable as a whole or in part at any time prior to maturity at the principal amount thereof plus interest then accrued; and

RESOLVED FURTHER, That the President or any Vice President and the Treasurer of this Company be, and they hereby are, authorized and directed to execute and deliver, as aforesaid, such new or extended notes and that said officers and also the Secretary or Assistant Secretary of this Company be, and each of them hereby is, authorized to execute and deliver an indenture between this Company and Trust Company of New York, as trustee, providing for the authentication of such new or extended notes by the trus-

tee and establishing the terms and conditions upon which they are to be issued (which indenture shall be in the general form of the Indenture, dated, 19.., and relating to said notes maturing, 19.., with such changes therein and additions thereto as may be necessary to conform to those resolutions, and with such further changes and additions as may be approved as necessary or advisable in the opinion of said officers, or of any of them, and of counsel for this Company), and to do each and every other act and thing necessary to accomplish the purposes of these resolutions; and that these resolutions are adopted subject to approval by the Interstate Commerce Commission of all matters under its jurisdiction; and

RESOLVED FURTHER, That application be made by this Company to the Interstate Commerce Commission for authority to issue said new or extended notes, as aforesaid, and that, President, or, or, Vice Presidents, or, Treasurer, be and each of them hereby is designated and authorized to make, sign, verify, and file an application by this Company to the Interstate Commerce Commission, under and pursuant to Section 20a of the Interstate Commerce Act and in such form as may be approved by counsel for this Company, for any and all necessary authority and approval in the premises.

No. 674

Resolution of directors authorizing officer to make inquiry of bondholders concerning refunding.

RESOLVED, That the President of this Company correspond with the present holders of the outstanding bonds, to ascertain whether or not they would be willing to accept bonds of a new issue, in amount equal to and in exchange for their present holdings (the total of the new issue to be (\$) Dollars, secured by a mortgage or deed of trust upon all the present property and future acquisitions of this Company, the proceeds to be used for the payment of the present indebtedness of this Company and for the cost of extension and equipment of its line).

No. 675

Resolution of directors extending maturity date of bonds, subject to consent of stockholders and bondholders, authorizing application to the Interstate Commerce Commission for extension of maturity of bonds, and authorizing President to enter into extension agreement.

WHEREAS, the first mortgage 5% bonds of the Company now out-

standing in the principal amount of \$..... mature and become due, according to their terms, on the .. day of, 19..; and

WHEREAS, the Company will be unable to pay said bonds at their maturity date without selling the properties of the Company at a great loss, and it is, therefore, to the best interest of the Company that the maturity of said bonds be extended; and

WHEREAS, the holders of an overwhelming majority in amount of said bonds have signified their willingness to extend the maturity date of said bonds for a period of ten years from, 19.., NOW, THEREFORE, BE IT

RESOLVED, subject to the consent of the stockholders of this Company, and subject to the approval of the Interstate Commerce Commission, and subject to the consent of the owners and holders of said bonds, that the payment of the principal of said bonds be and is extended to the .. day of, 19...

RESOLVED FURTHER, subject to the consent of the stockholders, that the President of the Company,, be and is hereby authorized and directed to enter into an extension agreement with the owners and holders of said bonds, in substantially the form attached hereto as Exhibit "A."

RESOLVED FURTHER, subject to the consent of the stockholders of this Company, that, the President, be and is hereby authorized and directed to sign, verify, and file with the Interstate Commerce Commission an application for authority on the part of the Company to extend the maturity date of its bonds to, 19.., and to file with the Interstate Commerce Commission such other instruments as may be necessary to comply with the requirements of the Commission with respect to such application.

RESOLVED FURTHER, that a special meeting of the stockholders of this Company be and is hereby called to be held in the present office of the Company in City,, on, 19.., at 10:00 o'clock A. M. for the purpose of taking all such action in the premises as may be necessary, including approving all action of the Board of Directors in the premises.

RESOLVED FURTHER, that the Board of Directors be and hereby is further authorized to take, or cause to be taken, all such further actions or proceedings as may be necessary to carry into effect the foregoing resolutions.

No. 676

Resolution of directors giving proper officers general power to secure extension of loans to corporation and to execute renewal notes.

RESOLVED, That the proper officers of this Company be and they hereby are empowered and directed to do any and all acts, and to execute such instruments, as may be necessary to secure a renewal or extension of any loan heretofore made to this Company, and to execute such promissory notes upon such terms and conditions as they may deem proper in order to effect renewals of any existing loans, or to obtain further loans.

No. 677

Resolution of directors authorizing extension of particular notes.

RESOLVED, That the two notes executed by this Corporation on the .. day of, 19.., for (\$.....) Dollars each, held by, be extended for a period of (.....) years from the .. day of, 19.., with interest at the rate of (....%) per cent per annum, payable semiannually, with a provision that this Corporation shall have the right to anticipate payment of the whole or any part of the said notes at any time, and

FURTHER RESOLVED, That, the President of this Corporation, be and he hereby is authorized and directed to execute and deliver to the said the renewal notes as specified.

No. 678

Resolution of stockholders to renew notes discounted by directors and authorizing officers to furnish collateral security.

WHEREAS,, a director of this Corporation, discounted the note of this Corporation dated the .. day of, 19.., in the sum of (\$.....) Dollars, payable on the .. day of, 19.., and

WHEREAS, said has agreed to renew said note provided the Corporation gives him as security for the payment thereof (\$.....) Dollars of first mortgage bonds of the Company, be it

RESOLVED, That the Company's note, in the sum of (\$.....) Dollars, discounted by, a director of this Corporation, be renewed for (.....) days, and that the Treasurer be and he hereby is directed to deliver to the said

....., first mortgage bonds of the
Company, in the amount of (\$.....) Dollars, as collateral
security for the payment of said note, and

RESOLVED FURTHER, That the Treasurer obtain from the said
..... a receipt and a stipulation to the effect that the
said bonds shall be returned to this Company upon payment of the
said note.

RESOLUTIONS—LOANS BY CORPORATION

No. 679

**Resolution of directors authorizing loan to director out of surplus
funds, after director has furnished security.**

WHEREAS,, one of the directors of this Corpora-
tion, has applied to the Corporation for a loan in the sum of
(\$.....) Dollars, and

WHEREAS, this Corporation has sufficient surplus funds to enable it
to advance the said sum of (\$.....) Dollars to the said
....., and

WHEREAS, the said has offered to furnish good
and sufficient security to guarantee the repayment of the said loan,

NOW, THEREFORE, BE IT RESOLVED, That, the
President, and, the Treasurer of this Corporation,
be and they hereby are authorized to issue a check to the said,
for the said sum of (\$.....) Dollars, upon the receipt by
them from the said, of a second mortgage, duly
made and executed by the said in favor of this
Corporation, covering his dwelling house located at
(Street), in the City of, State of, which prop-
erty is described as follows (*insert description of house to be mort-
gaged as security for loan to director*).

No. 680

**Resolution of directors ratifying loans by treasurer of treasury stock
to be used as collateral, and authorizing further loans of securities.**

WHEREAS, the Treasurer of this Corporation states that he has
loaned to the Company, to be used as collateral
by that Company, certain stocks from the treasury of this Corpora-
tion, be it

RESOLVED, That such loan by the Treasurer be and it hereby is rati-
fied and approved by this Board of Directors, and that the Treasurer

is hereby authorized to make such further loans to
 Company of any or all securities now in the treasury of this Corpora-
 tion as in his judgment seems proper.

No. 681

Resolution of directors authorizing loan to a subsidiary on a note, and extending existing loan.

RESOLVED, That in order to enable the Co., Inc.
 to meet its fixed charges on, 19.., the proper officers
 of this Corporation be and they hereby are authorized to loan to the
 Co., Inc. an amount not exceeding (\$....)
 Dollars on the note of the Co., Inc., payable one
 year from date, with interest at the rate of six (6%) per cent per
 annum, secured by such collateral as the President of this Corpora-
 tion may in his judgment deem proper and sufficient; and

FURTHER RESOLVED, That the existing loan of (\$.....)
 Dollars from this Corporation to the Co., Inc. be
 and the same hereby is extended to and including,
 19.., at the rate of interest which it now bears; and

FURTHER RESOLVED, That the proper officers of this Corporation be
 and they hereby are authorized and directed to do and perform all
 acts and execute all instruments necessary or convenient to accom-
 plish the purposes aforesaid, subject to the approval of counsel of
 this Corporation.

No. 682

Resolution of directors authorizing reconveyance of property con- veyed by trust deed given to secure loan.

WHEREAS, this Corporation did, on the .. day of, 19..,
 lend to the Company, a corporation organized and
 existing under and by virtue of the laws of the State of,
 the sum of (\$.....) Dollars, and

WHEREAS, the said Company did, on the date aforesaid, execute and
 deliver a promissory note in the said sum to the order of this Corpo-
 ration, payable on the .. day of, 19.., and did execute,
 acknowledge, and deliver to this Corporation a deed of trust to secure
 the payment of the said sum, with interest thereon at the rate of
 (....%) per cent per annum, as more fully appears in the said
 deed of trust now on record in the office of the County Recorder of the
 County of, State of, by which deed of trust
 the following described real property was conveyed to this Corpora-
 tion (*insert description*),

AND WHEREAS, the said note mentioned has been fully paid, together with interest thereon to date, and all charges and claims under the note and trust deed have been fully satisfied, be it

RESOLVED, That this Corporation reconvey to the Company all the property conveyed by said deed of trust aforesaid, and that the trust created by said deed be declared fully discharged and satisfied, and be it

FURTHER RESOLVED, That, the President, and, the Secretary of this Corporation, be and they hereby are authorized, empowered, and directed to execute, acknowledge, and deliver to the said Company, in the name of this Corporation and under its seal, a deed of grant, bargain, and sale in due form, conveying all the property described in said deed of trust.

No. 683

Resolution of directors ratifying action of officers in accepting bonds of subsidiary in payment of indebtedness of subsidiary to parent company.

RESOLVED, That the action of the officers of this Corporation in offering to cancel and discharge the indebtedness of (\$.....) Dollars and any other indebtedness, except any accounts payable representing materials, supplies, and services owing this Corporation by & Company in consideration of the surrender by said Company to this Corporation of (\$.....) Dollars principal amount of its 5% purchase money mortgage bonds issued under its deed of trust to & Company, dated, 19.., be and it hereby is ratified and confirmed; and

RESOLVED FURTHER, That the officers of this Corporation be and they hereby are authorized and instructed, upon the surrender to this Corporation by & Company of (\$.....) Dollars principal amount of the aforementioned 5% purchase money mortgage bonds, to execute and deliver to said & Company an instrument fully canceling and discharging the said indebtedness of & Company to this Corporation amounting to (\$.....) Dollars, and any other indebtedness except any accounts payable representing materials, supplies, and services.

CHAPTER 29

PURCHASE AND SALE OF ASSETS— HOLDING COMPANIES

Introduction. Intercorporate relations are most often effected by the following types of transactions: ¹ (1) purchase and sale of assets, (2) creation of holding companies, (3) lease of corporate property, and (4) consolidation or merger of corporations. While all of these subjects are closely related to one another, the subjects of leases (see page 934) and of consolidations and mergers (see page 958) are treated separately, for the sake of convenience, in the chapters following. The legal principles governing purchase and sale of assets and the creation of holding companies (see page 889) are considered in this chapter. Since, however, holding companies are created by the acquisition of stock of other corporations, the forms relating to such companies are included among the resolutions covering purchase and sale of assets.

Definition of sale of assets. A sale of assets is a transfer of complete ownership of all or a part of the corporate property, for a proper consideration, upon such authorization and consent as is required by statute or charter. It is sometimes difficult to determine whether a transaction constitutes a sale of assets, or a consolidation,² merger,³ or reorganization.⁴ The same trans-

¹ Much has been written on the economic and historical aspects of intercorporate relations. See William Z. Ripley, *Trusts, Pools and Corporations* (rev. ed., Boston, Ginn & Company, 1916); Arthur S. Dewing, *Corporate Promotions and Reorganizations* (Cambridge, Mass., Harvard University Press, 1914); W. H. S. Stevens, editor, *Industrial Combinations and Trusts* (New York, The Macmillan Company, 1913); Charles W. Gerstenberg, *Financial Organization and Management* (2d rev. ed., New York, Prentice-Hall, Inc., 1939); H. L. Purdy, M. L. Lindahl, and W. A. Carter, *Corporate Concentration and Public Policy* (New York, Prentice-Hall, Inc., 1950); Chelcie C. Bosland, *Corporate Finance and Regulation* (New York, The Ronald Press Company, 1949). A book on the legal phases that is now somewhat old but must be counted a legal classic is Noyes, *Intercorporate Relations*.

² For definition of consolidation, see page 958.

³ For definition of merger, see page 958.

⁴ For definition of reorganization, see page 982.

action has been interpreted by various courts as a sale of assets, merger, and a consolidation.⁵ The distinction is important chiefly because the statutes may require a different procedure to effect each type of transaction, and because the rights of creditors may vary depending upon whether the transaction is a sale of assets, consolidation, merger, or reorganization.⁶

Power of a corporation to sell its assets. A corporation has, as an incident to the ownership of property, whether real or personal, the same general power to sell, to convey, or otherwise to dispose of its property that any individual has,⁷ with the following restrictions: (1) it must not dispose of its property for a purpose that is not within its powers; (2) it must not violate any statutory or charter provision in disposing of its property;⁸ and (3) it must make no disposition that will be contrary to public policy; that is, it may not violate the common law or the state or Federal anti-trust laws forbidding monopolies and contracts or combinations in restraint of trade.

Power of corporation to acquire property. Every corporation has the implied power to acquire and hold any real⁹ and personal

⁵ *McAlister v. Am. Ry. Exp.*, (1920) 179 N. C. 556, 103 S. E. 129 (characterized the formation of American Railway Co. as a sale of assets), *Brabham v. So. Exp. Co. et al.*, (1922) 124 S. C. 157, 117 S. E. 368 (as a merger), *Gibson v. Am. Ry. Co.*, (1923) 195 Iowa 1126, 193 N. W. 274 (as a consolidation). See also *Cortland Specialty Co. v. Commissioner of Internal Revenue*, (1932) (C. C. A.) 60 F. (2d) 937, cited in *U. S. v. Niagara Hudson Power Corp.*, (1944) (S. D., N. Y.) 53 F. Supp. 796.

⁶ The Federal income tax liability of the corporations involved may also be affected by the nature of the transaction. See *Prairie Oil & Gas Co.*, (1933) 66 F. (2d) 309.

See also page 959, for the distinction between a sale of assets and a consolidation or merger.

⁷ *Lawson v. Household Finance Corp.*, (1930) (Del.) 152 A. 723, aff'g 147 A. 312. A private corporation, unless restrained by statute, may legitimately deal with its property in such manner as an individual deals with his property. *Hearst v. Putnam Mining Co.*, (1904) 28 Utah 184, 77 P. 753; *Levering v. Bimel*, (1897) 146 Ind. 545, 45 N. E. 775; see also *Austin v. Osborne*, (1931) 46 F. (2d) 956. See also *Tacoma Hotel v. Morrison & Co.*, (1938) 193 Wash. 134, 74 P. (2d) 1003; *Graham v. New Mexico Eastern Gas Co.*, (1940) (Tex. Civ. App.) 141 S. W. (2d) 389.

⁸ See *Swift v. Southeastern Greyhound Lines*, (1943) 294 Ky. 137, 171 S. W. (2d) 49; *Klopot v. Northrup*, (1944) 131 Conn. 14, 37 A. (2d) 700.

⁹ *Harmony Way Bridge Co. v. Leathers*, (1933) 353 Ill. 378, 187 N. E. 432; *Gratton v. Gratton's Estate*, (1929) 133 Ore. 65, 283 P. 747; *Dearborn Truck Co. v. Staver Motor Car Co.*, (1920) 219 Ill. App. 295; *Klein v. Independent Brewing Ass'n*, (1908) 231 Ill. 594, 83 N. E. 434, rev'g 135 Ill. App. 234; *Stockton Sav. Bank v. Staples*, (1893) 98 Cal. 189, 32 P. 936; *People v. La Rue*, (1885) 67 Cal. 526, 8 P. 84.

property¹⁰ that is needed to accomplish the object for which the corporation was created.¹¹ This right is generally confirmed by statute,¹² although in some instances it is made subject to limitations¹³ as to amount or as to the purpose¹⁴ or time¹⁵ for which the property may be held. The principles to be considered in acquiring property for stock of the corporation have been discussed on page 420.

Consent of stockholders required to effect a sale of all assets. Authority to effect a sale of all the assets of a corporation rests with the stockholders. Such a sale cannot validly be made by the corporation's officers¹⁶ or by its board of directors acting alone.¹⁷

Where, however, the directors of the corporation own all the

¹⁰ See *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, (1873) 111 Mass. 315. As to power to acquire securities, see page 890.

¹¹ *Bishop Mfg. Co. v. Sealy Oil Mill & Mfg. Co.*, (1920) (Tex. Civ. App.) 220 S. W. 203; *Shapleigh Hardware Co. v. Lewis*, (1918) 118 Miss. 586, 79 So. 765; *Western Investment & Land Co. v. First Nat. Bank of Denver*, (1912) 23 Colo. App. 143, 128 P. 476; *Sales v. Southern Trust Co.*, (1945) 182 S. Ct. Tenn. 270, 185 S. W. (2d) 623.

¹² *Coates & Hopkins Realty Co. v. Kansas City T. Ry. Co.*, (1931) 328 Mo. 1118, 43 S. W. (2d) 817; *Gratton v. Gratton's Estate*, (1929) 133 Ore. 65, 283 P. 747; *Milton v. Crawford*, (1911) 65 Wash. 145, 118 P. 32.

¹³ See *Africani Home Purchase & Loan Ass'n v. Carroll*, (1915) 267 Ill. 380, 108 N. E. 322. See also *Southern Realty Co. v. Tchula Co-operative Stores*, (1917) 114 Miss. 309, 75 So. 121.

¹⁴ Where the charter of a corporation gave it power to acquire real property for a specific purpose, it was held that it could not acquire property for another purpose. *The Pacific R. R. Co. v. Seely*, (1870) 45 Mo. 212.

For a case involving a statute restricting the amount of real estate which a corporation could hold to such as was necessary and proper for carrying on its legitimate business, see *Title Guarantee Trust Co. v. Sessinghaus*, (1930) 325 Mo. 420, 28 S. W. (2d) 1001. See *Hallam v. Bailey*, (1917) 66 Okla. 46, 166 P. 874, involving a statute which prohibited corporations from purchasing land not necessary to the conduct of their business, but permitted them to acquire such land temporarily in the collection of debts.

¹⁵ As to restrictions on length of time during which property may be held, see *Dearborn Truck Co. v. Staver Motor Car Co.*, (1920) 219 Ill. App. 295; *Commonwealth v. Clark County Nat. Bank*, (1919) 187 Ky. 151, 219 S. W. 175; *Commonwealth v. Mengel Box Co.*, (1912) 152 Ky. 287, 153 S. W. 771. See also *John Hancock Mut. Life Ins. Co. v. Ford Motor Co.*, (1948) 322 Mich. 409, 33 N. W. (2d) 763, comment, 47 *Michigan Law Rev.* 970 (May 1949).

¹⁶ *Tabenhouse v. International Oxygen Co.*, (1935) 74 F. (2d) 748; *Plant v. White River Lumber Co.*, (1935) 76 F. (2d) 155.

It has been held that before the officers of a corporation can employ a broker to sell all the assets of the corporation, the consent of the holders of two thirds of the stock must be obtained. *Trulock v. Kings County Iron Foundry*, (1926) 216 N. Y. App. Div. 439, 215 N. Y. Supp. 587. See, however, to the contrary, *Bob Bell Realty Co. v. Jones Valley Land Co.*, (1930) 221 Ala. 689, 130 So. 320.

¹⁷ *In re Courtney Bros.*, (1940) 110 Mont. 289, 100 P. (2d) 47.

stock and there are no creditors to be affected, the directors by their unanimous consent may make any disposition of the assets of the corporation that they wish.¹⁸ In the absence of a governing statute, where a corporation is solvent, a sale of all its assets requires the consent of all the stockholders.¹⁹ The right to dispose of all the corporate assets, even with unanimous consent, is limited to corporations organized for private purposes and having no duty to the public.²⁰ Quasi-public corporations, such as railroads, gas companies, and the like, cannot impair their public functions without statutory or charter power or special permission of the legislature.²¹

If the corporation is in failing circumstances or unable profitably to carry out the purposes for which it was organized, or where an emergency exists wherein delay would prove disastrous to creditors, the consent of a majority of the stockholders may be sufficient, provided the best interests of the stockholders are served by the sale and provided the sale is not a fraud on creditors or contrary to statutory, charter, or by-law requirements.²²

¹⁸ *Brown v. Byrne*, (1934) (Tex. Civ. App.) 75 S. W. (2d) 484. See also *De Lamar Mines of Montana v. Mackay*, (1939) 104 F. (2d) 271.

¹⁹ *Forrester v. Butte & M. Consol. Copper & Silver Min. Co.*, (1898) 21 Mont. 544, 55 P. 229; *Luehrmann v. Lincoln Tr. & Title Co.*, (1917) (Mo.) 192 S. W. 1026; *In re De Camp Glass Casket Co.*, (1921) 272 F. 558, cert. denied, 256 U. S. 703, 41 S. Ct. 624; *Hanrahan v. Andersen*, (1939) 108 Mont. 218, 90 P. (2d) 474; *Gottschalk v. Avalon Realty Co.*, (1946) 249 Wis. 78, 23 N. W. (2d) 606; *Michigan Wolverine Student Co-op. v. Wm. Goodyear & Co.*, (1946) 314 Mich. 590, 22 N. W. (2d) 884, discussed in 45 *Michigan Law Review* 341 (1947).

²⁰ *People ex rel. Barney v. Whalen*, (1907) 119 N. Y. App. Div. 749, 104 N. Y. Supp. 555, aff'd 189 N. Y. 560, 82 N. E. 1131. See also *O'Neill v. Finnesy*, (1930) 299 Pa. 97, 149 A. 103; *Johnson v. Spartanburg County Fair Ass'n*, (1947) 210 S. C. 56, 41 S. E. (2d) 599.

²¹ *Brunswick Gas Light Co. v. United Gas, Fuel, & Light Co.*, (1893) 85 Me. 532, 27 A. 525; *Central Transportation Co. v. Pullman's Palace Car Co.*, (1891) 139 U. S. 24, 11 S. Ct. 478; *Alabama Public Service Commission v. Louisville & N. R. Co.*, (1921) 206 Ala. 326, 89 So. 524; *Fenderson v. Franklin Light & Power Co.*, (1921) 120 Me. 231, 113 A. 177.

²² *Claus v. Farmers & Stockgrowers State Bank*, (1936) 51 Wyo. 45, 63 P. (2d) 781; *Howard v. Republic Bank & Trust Co.*, (1934) (Tex. Civ. App.) 76 S. W. (2d) 187; *Calnan v. Guaranty Security Corp.*, (1930) 271 Mass. 533, 171 N. E. 830; *Hicks v. Whiting*, (1924) 149 Tenn. 411, 258 S. W. 784; *Sewell v. East Cape May Beach Co.*, (1892) 50 N. J. Eq. 717, 25 A. 929; *Price v. Holcomb*, (1893) 89 Iowa 123, 56 N. W. 407; *Rhea v. Newton*, (1919) 262 F. 345; *Wall & Beaver Street Corporation v. Munson Line*, (1944) (D. C., Md.) 58 F. Supp. 109. See also *Bowditch v. Jackson Co.*, (1912) 76 N. H. 351, 82 A. 1014, in which it was argued that if the majority of the stockholders of a private business corporation may sell to prevent greater loss, they may also sell to make greater gains. See also *Noyes on Intercorporate Relations*, p. 208; 78 *Univ. of Pa. Law Rev.* 423; 14 *Minn. Law Rev.* 58.

The directors have no authority to sell all the property of the corporation without the consent of at least a majority of the stockholders.²³

The statutes in many states specifically authorize a sale of all the property and assets of a corporation, including its goodwill and corporate franchise, upon the consent of a fixed proportion of the stockholders. Such statutes have been held to be enacted for the protection of the stockholders only.²⁴ These statutes generally prescribe in detail the procedure to be followed in order to effect the sale, and the statutory requirements must be complied with strictly in order that the sale shall be valid.²⁵

It has been held that a statute authorizing a sale of all the assets of a corporation upon the consent of a fixed proportion of stockholders is inapplicable to a sale of all assets by a corporation which is insolvent or in failing circumstances, made for the purpose of closing up its affairs.²⁶ But consent of the fixed proportion of stockholders is required if the assets are turned over to another corporation, and the business continued.

Consent of stockholders not required for sales in ordinary course of business. Sales made in the ordinary course of a corporation's business do not require the consent of the stockholders, even if the sales are extraordinary in size, nor are they subject to statutes governing the voluntary sale of corporate assets.²⁷ The courts have frequently been called upon to determine whether a sale was one made in the ordinary course of business, or such a sale as required the consent of stockholders.

Ordinarily, a sale in the regular course of business is a sale of a product or an asset which the corporation was organized to buy

²³ *People v. Ballard*, (1892) 134 N. Y. 269, 32 N. E. 54. But see *Union Trust Co. of Maryland v. Carter*, (1905) 139 F. 717; *Beardstown Pearl Button Co. v. Oswald*, (1906) 130 Ill. App. 290.

²⁴ *Greene v. Reconstruction Finance Corporation*, (1938) 100 F. (2d) 31; *Boozer v. Blake*, (1944) 245 Ala. 389, 17 So. (2d) 152.

²⁵ *Bob Bell Realty Co. v. Jones Valley Land Co.*, (1930) 221 Ala. 689, 130 So. 320; *Wegman v. Levinson Shoe Mfg. Co.*, (1922) 195 N. Y. Supp. 535; *Hanrahan v. Andersen*, (1939) 108 Mont. 218, 90 P. (2d) 494; *Application of Valhalla Cemetery*, (1940) 32 F. Supp. 616.

See also *Breakstone v. Continental Bank & Trust Co. of N. Y.*, (1948) 119 N. Y. *Law Journal* 1339, 4/12/48, aff'd, (1948) (N. Y. App. Div.) 79 N. Y. Supp. (2d) 311, in which the Court refused to temporarily enjoin the holding of a stockholders' meeting to pass upon sale of assets.

²⁶ *Mills v. Tiffany's, Inc.*, (1938) 123 Conn. 631, 198 A. 185.

²⁷ See *Bean v. Commercial Securities Co.*, (1941) 25 C. A., Tenn. 254, 156 S. W. (2d) 338; *Swift v. Southeastern Greyhound Lines*, (1943) 294 Ky. 137, 171 S. W. (2d) 49.

and sell. A corporation engaged in the real estate business may make sales of real estate without submitting each proposition to the stockholders,²⁸ and a majority of the board of directors may consummate the sale, unless otherwise provided in the charter or by-laws.²⁹ An action by a minority of the directors cannot be maintained against the majority who in regular meeting assembled authorized the sale of a large tract of land owned by a corporation which was organized for the express purpose of buying and selling land, since such a sale was in the ordinary course of business and would not destroy the corporation.³⁰

The directors are not authorized to sell real property that is an integral part of the corporation, without authority from the stockholders, if it is not one of the purposes of the corporation to buy and sell real estate,³¹ for such a sale is not in the ordinary course of business. Nor would a sale of an independent or important branch of the business of a corporation, for the reason that the corporation lacked capital to carry on the department and that the sale was a business necessity, be a sale in the ordinary course of business.³² On the other hand, it has been held that a chain store organization could sell one of its stores by authorization of the board of directors, without the consent of the stockholders, where the certificate of incorporation authorized the company "to take, buy, purchase, exchange, hire, lease, sublease, mortgage, or otherwise encumber or dispose of real estate and property, either improved or unimproved and every right and interest therein of every sort and description." Such a sale was held to be made in the ordinary course of business and consequently did not require the approval of the stockholders.³³

Sale of assets to stockholders, directors, and officers. Assets of a corporation may be sold to a majority of the stockholders, provided the sale is fair and to the best interests of the corpora-

²⁸ *Keating v. Coleman*, (1925) 214 N. Y. App. Div. 668, 213 N. Y. Supp. 213; *Strauss v. Midtown Enterprises*, (1945) (S. Ct., N. Y.) 60 N. Y. S. (2d) 601.

²⁹ Sale of realty by secretary was held valid where secretary had acted for corporation in similar transactions; formal authorization of secretary was not necessary. *Gross v. Regor Finance Co.*, (1938) 96 F. (2d) 37.

³⁰ *Painter v. Brainard-Cedar Realty Co.*, (1928) 29 Ohio App. 123, 163 N. E. 57; *Hendren v. Neeper*, (1919) 279 Mo. 125, 213 S. W. 839.

³¹ *Berwin & Co. v. Hewitt Realty Co.*, (1922) 199 N. Y. App. Div. 453, 191 N. Y. Supp. 817.

³² *In re Timmis*, (1910) 200 N. Y. 177, 93 N. E. 522.

³³ *Wattley v. National Drug Stores Corporation*, (1924) 122 N. Y. Misc. 533, 204 N. Y. Supp. 254.

tion.³⁴ The minority stockholders may, however, always question the good faith of such a transaction.³⁵ Similarly, a sale of corporate assets to a director or officer will be upheld by the courts if it is made in good faith, for adequate consideration, and in the best interests of the corporation,³⁶ but such transactions will be subject to the closest scrutiny.³⁷

Consideration for sale of assets. The statutes authorizing the sale of property with the consent of less than all the stockholders do not impose any obligation upon the majority stockholders to receive for the assets sold a consideration equal to the fair value of the property. When a sale is effected with the consent of the stockholders required by statute, minority stockholders cannot attack the sale on the ground that the price was inadequate, where fraud was not committed and there was no collusion.³⁸ But a sale for a grossly inadequate price, where a secret interest or advantage is retained by those who authorize the sale, to the disadvantage of the minority stockholders, is not permitted over the protest of the minority stockholders.³⁹

The provision in the statutes governing sales of assets that dissenting stockholders shall be entitled to an appraisal of their shares and payment in cash of the fair value of their shares makes it incumbent upon the stockholders to obtain an adequate price; if they do not, the corporation may be called upon to pay a larger sum to the minority stockholders as the value of their interest than their proportionate share of the amount realized

³⁴ *Carrier v. Dixon*, (1919) 142 Tenn. 122, 218 S. W. 395; *Price v. Holcomb*, (1893) 89 Iowa 123, 56 N. W. 407. See also *Ostlind v. Ostlind Valve, Inc.*, (1946) 178 S. Ct. Ore. 161, 165 P. (2d) 779.

³⁵ *Chicago Hansom Cab Co. v. Yerkes*, (1892) 141 Ill. 320, 30 N. E. 667; *Jones v. Missouri-Edison Electric Co.*, (1906) 144 F. 765.

³⁶ *Ryan v. Williams*, (1900) 100 F. 172.

³⁷ *Twin-Lick v. Marbury*, (1875) 91 U. S. 328; *Geddes v. Anaconda Mining Co.*, (1921) 254 U. S. 590, 41 S. Ct. 209, rev'g, on other grounds, 245 F. 225.

³⁸ *Mitchell v. Highland Western Glass Co.*, (1933) 19 Del. Ch. 326, 167 A. 831; *Koehler v. St. Mary's Brewing Co.*, (1910) 228 Pa. 648, 77 A. 1016. See also *Hill v. St. Louis Coke & Iron Corporation*, (1934) 9 F. Supp. 69.

The court will not review the adequacy of the purchase price of corporate assets unless the disparity is so great as to shock the conscience of the court or warrant the conclusion that the majority was actuated by improper motives, thereby working an injury to the minority. Mistakes of judgment are not enough to justify interference in corporate transactions otherwise valid by the law of the state of incorporation. *Massaro v. Fisk Rubber Corp.*, (1941) (D. C., Mass.) 36 F. Supp. 382.

³⁹ *Cardiff v. Johnson*, (1923) 126 Wash. 454, 218 P. 269, 222 P. 902; *Lebold v. Inland S. S. Co.*, (1936) 82 F. (2d) 351.

on the sale.⁴⁰ It is the duty of the directors and stockholders to obtain the highest price possible for property of the corporation, but such a course may not always be for the best interests of the corporation. Before interfering with any transaction, the courts will give great weight to the honest judgment of those who have managed the corporation successfully and to the wishes of those who own or represent the owners of nearly all the capital stock.⁴¹

The consideration for the sale of the corporate property may be paid as follows: cash, or part cash and part securities of the purchasing corporation or entirely in securities of the purchasing corporation.

Sale of assets for stock of purchasing corporation. Two questions must be answered in determining the right of the corporation to sell its assets for stock in the purchasing corporation: (1) Has the corporation the right to purchase stock of another corporation? (2) Assuming that the corporation may lawfully acquire the stock of the purchasing corporation, may the minority stockholders be compelled to accept the stock in the purchasing corporation?

A corporation cannot become the owner of any portion of the capital stock of another corporation unless authority to acquire such stock is clearly conferred by statute or by the charter of the corporation.⁴² A corporation that has no power to acquire and hold stock in another corporation cannot sell its corporate property for stock of the purchasing company.⁴³ However, if all the stockholders consent, and creditors are not injured by the transaction, the sale cannot be attacked.⁴⁴

⁴⁰ Matter of Bickerton, (1921) 196 N. Y. App. Div. 231, 187 N. Y. Supp. 267.

⁴¹ Lewisohn Bros. v. Anaconda Copper Min. Co., (1899) 25 N. Y. Misc. 613, 56 N. Y. Supp. 807; Smith v. Stone, (1912) 21 Wyo. 62, 128 P. 612; Allaun v. Consolidated Oil Co., (1929) 16 Del. Ch. 318, 147 A. 257, discussed in 78 *Univ. of Pa. Law Rev.* 423. See also Kaye v. Kentucky Public Elevator Co., (1943) 295 Ky. 661, 175 S. W. (2d) 142.

⁴² Riker & Son Co. v. United Drug Co., (1912) 79 N. J. Eq. 580, 82 A. 930; Easun v. Buckeye Brewing Co., (1892) 51 F. 156; Byrne v. Schuyler Elect. Mfg. Co., (1894) 65 Conn. 336, 31 A. 833.

⁴³ Coler v. Tacoma Railway & Power Co., (1903) 65 N. J. Eq. 347, 54 A. 413, rev'g 64 N. J. Eq. 117, 53 A. 80; Easun v. Buckeye Brewing Co., (1892) 51 F. 156. A corporation that has the right to sell all its property, and the right to purchase stock or bonds of other corporations, has also the right, as a necessary sequence, to take the one in payment for the other. Germer v. Triple State Natural Gas & Oil Co., (1906) 60 W. Va. 143, 54 S. E. 509. To the same effect see Traer v. Lucas Prospecting Co., (1904) 124 Iowa 107, 99 N. W. 290.

⁴⁴ Read v. Citizens' St. R. Co., (1903) 110 Tenn. 316, 75 S. W. 1056. See also

The statutory prohibition against the purchase of stock, bonds, and securities of another corporation unless specially authorized may be considered as applying to a going concern and not to a sale that is made for the purpose of winding up the corporate affairs.⁴⁵ The implied power of a corporation to wind up its affairs authorizes a sale of the corporate assets for stock in another corporation.⁴⁶ The primary inquiry, therefore, when a corporation has sold its property and has taken stock of another corporation in payment, in the absence of authority to accept such stock, is whether the sale was made in good faith, and whether it is the purpose of the corporation to distribute the proceeds among the stockholders.⁴⁷ If the transaction is bona fide and the purpose is to wind up the business of the selling corporation, the corporation undoubtedly has the power to sell its property for stock; but if the purpose of the transaction is not to wind up the corporation, but to continue the corporate life through the instrumentality of another corporation, the corporation has no power to sell its assets for stock of the purchasing corporation unless the power is expressly conferred by the legislature.⁴⁸

Assuming that the corporation has authority to sell its property to another corporation for stock in the purchasing corporation, it cannot compel a minority stockholder objecting to the sale to take anything but cash for his interest in the purchase price.⁴⁹ The reason for this rule is that the minority stockholders may not lawfully be compelled to accept a change of investment made for them by others or to elect between losing their interests or entering a new company.⁵⁰ However, the rule is subject to the exception that when the stock of the purchasing corporation taken in exchange for the corporation's property has a wide and general market and can be converted into cash at any general market, it should be treated as the equivalent of money,

Tryson v. Southern Realty Corp., (1921) 274 F. 135, in which it was held that consenting stockholders cannot attack the transaction later as ultra vires.

⁴⁵ *Metcalf v. Amer. School Furniture Co.*, (1903) 122 F. 115.

⁴⁶ *McCutcheon v. Merz Capsule Co.*, (1896) 71 F. 787; *Metcalf v. Amer. School Furniture Co.*, supra (Note 45).

⁴⁷ *Metcalf v. Amer. School Furniture Co.*, supra (Note 45).

⁴⁸ *McCutcheon v. Merz Capsule Co.*, supra (Note 46).

⁴⁹ *Metcalf v. Amer. School Furniture Co.*, supra (Note 45); *Koehler v. St. Mary's Brewing Co.*, (1910) 228 Pa. 648, 77 A. 1016; *Ringler v. Atlas Portland Cement Co.*, (1930) 301 Pa. 176, 151 A. 815.

⁵⁰ *Geddes v. Anaconda Copper Min. Co.*, (1921) 254 U. S. 590, rev'g, on other grounds, 245 F. 225.

and a sale otherwise valid will be sustained.⁵¹ The objecting stockholder receiving a marketable security may at once convert it into an adequate cash consideration. Nor can a minority stockholder object to a sale of the corporate assets for stock of the purchasing corporation, if provision is made for cash payments to all the stockholders who do not desire to take stock in the purchasing corporation.⁵²

Restrictions upon sale of assets. The first essential in the sale of corporate assets is authority to sell. In addition, the following requirements must be considered: (1) the corporation must not violate the common law of monopolies or the state and Federal anti-trust laws; (2) the corporation must conform with the bulk sales laws wherever necessary; (3) the corporation must follow the procedure outlined by statute in effecting the sale of assets; (4) the corporation must consider the rights of dissenting stockholders; and (5) the selling as well as the purchasing corporation must consider the rights of existing creditors of the selling company. These subjects will be discussed in the paragraphs following in the order mentioned.

Sale of assets in violation of laws against monopolies and restraint of trade. Every corporation that proposes to enter into an agreement to sell its corporate assets, or to purchase the corporate assets of another corporation, or in any way to combine with another corporation, must take into consideration the fact that, if the contract results in a violation of the common law of monopolies, or the state laws concerning unlawful restraint of trade and monopolies, or the Federal anti-trust laws, the contract is likely to prove void. Those entering into such a contract may become liable to heavy fines and imprisonment penalties.

Under the common law, contracts in general restraint of trade are illegal and, if the purpose or effect of a sale of corporate property is such restraint of trade, the contract may be declared invalid. While the common law settles the question that contracts which create a monopoly or restrain trade are illegal, it does not have the same force in preventing contracts in restraint of trade as the anti-trust statutes which have been passed in many of the states. The state anti-trust laws have been passed principally to "put teeth" into the common law by providing

⁵¹ Ibid.

⁵² *Slattery v. Greater New Orleans Realty & Development Co.*, (1911) 128 La. 871, 55 So. 558; *Maxler v. Freeport Bank*, (1923) 275 Pa. 510, 119 A. 592. See also *Hill v. Page & Hill Co.*, (1936) 198 Minn. 30, 268 N. W. 704.

penalties for violations. The Federal anti-trust acts forbid contracts, agreements, and combinations in restraint of trade. These laws apply only to interstate commerce, as differentiated from the state anti-trust laws which apply to intrastate commerce, that is, business conducted within the state. For a violation of the provisions of the Federal acts, redress must be sought in the Federal courts, which alone have jurisdiction. The common law and state statutes determine the illegality of such contracts or combinations when attacked in the state courts.⁵³

Bulk sales laws affecting sale of assets. Bulk sales laws have been passed by all the states. These laws are designed to protect the creditors of a corporation which is about to sell its complete stock of merchandise, including, in some cases, fixtures pertaining to the conduct of the business. The laws usually require notice to be given by the purchaser to the creditors of the seller.

Failure to give notice of the sale as required by the bulk sales laws may affect the sale in various ways, depending upon the provisions of the governing statute.⁵⁴ Thus, the sale may be void, voidable, fraudulent and void, fraudulent and voidable, presumed fraudulent, presumed fraudulent and void, prima facie evidence of fraud and void, conclusively presumed fraudulent and void, or prima facie void. In many of the states where notice is required to be given by the purchaser to creditors, the seller must submit a list of the creditors to the purchaser. Obligations in addition to giving notice to creditors are placed upon the purchaser in some of the states. Thus, in a few states, the purchaser must pay, or see to it that the purchase price is paid, to all the creditors whose names are included in the list furnished by the seller.⁵⁵

Procedure to effect sale of assets. The procedure to be followed in putting into effect a sale of corporate assets that requires the approval of the stockholders is essentially the same, whether or not the transaction is subject to statutory regulations. Following are the usual steps:

1. The board of directors of the selling corporation adopts

⁵³ *Locker v. American Tobacco Co.*, (1907) 121 N. Y. App. Div. 443, 106 N. Y. Supp. 115, aff'd in (1909) 195 N. Y. 565, 88 N. E. 289.

⁵⁴ For a digest of the bulk sales acts, see *Credit Manual of Commercial Laws*, published by the National Association of Credit Men.

⁵⁵ See *Royal Indemnity v. Ginsberg*, (1935) 157 N. Y. Misc. 507, 284 N. Y. Supp. 551, for liability of director and officer of selling corporation who omitted the name of a creditor from the list furnished to the purchaser at a bulk sale.

a resolution⁵⁶ recommending the sale, and calling a meeting of the stockholders to consider the transaction.

2. A meeting of the stockholders of the selling corporation is called upon proper notice to consider the sale.⁵⁷

3. A proportion of the stockholders of the selling corporation, fixed by statute or charter, consent to the sale by resolution, or by written authorization, and approve the form of agreement for the sale.

4. A bill of sale is delivered to the purchasing corporation.

5. The consideration received for the sale of the assets is distributed among the stockholders or otherwise disposed of.

All statutory requirements should, of course, be carefully followed.⁵⁸

Statutory rights of stockholders objecting to sale of assets. The state statutes governing sales of all the assets of a corporation in some instances specifically provide that stockholders who object to the sale shall be entitled to demand payment in cash of the fair value of their stock, and to an appraisal of the value of the shares in case of disagreement between the stockholders and the corporation.⁵⁹ Usually the statute indicates the time within which demand for payment and application for appraisal must be made by the objecting stockholder, and the procedure to be followed by the claimant and the corporation.⁶⁰ In a fair sale under a statute, a dissenting stockholder has only the remedy of

⁵⁶ No complaint can be made of a sale authorized by resolution of the stockholders and not by the directors, for the stockholders are the parties vitally interested. *Carrier v. Dixon*, (1919) 142 Tenn. 122, 218 S. W. 395; *Merrion v. Scorup-Somerville Cattle Co.*, (1943) (C. C. A.) 134 F. (2d) 473.

⁵⁷ The statutory method of calling stockholders' meeting must be complied with or the sale will be illegal. *Shell v. Conrad*, (1941) (Mo. App.) 153 S. W. (2d) 384.

⁵⁸ See footnote 25. While formal action of the board of directors and stockholders of the corporation is required, a sale without such formal action may nevertheless be valid where no creditors' or other rights have been violated. *Fidelity & Casualty Co. of New York v. Lackland*, (1940) 175 Va. 178, 8 S. E. (2d) 306.

⁵⁹ See Levy, "Rights of Dissenting Shareholders to Appraisal and Payment," 15 *Cornell Law Quart.* 420; Lattin, "Remedies under Appraisal Statutes," 45 *Harvard Law Review* 233; Lattin, "A Reappraisal of Appraisal Statutes," 38 *Mich. Law Rev.* 1165 (1940). For the method of valuing shares, see *In re Clark's Will*, (1931) 257 N. Y. 487, 178 N. E. 766, discussed in 17 *Cornell Law Quart.* 487.

The statute authorizing appraisal contemplates objection by a bona fide stockholder, and not by one who purchases stock to harass and annoy other stockholders. *In re Leventall*, (1934) 241 N. Y. App. Div. 277, 271 N. Y. Supp. 493, discussed in 12 *N. Y. U. Law Quart.* 144.

⁶⁰ See *Finch v. Warrior Cement Corp.*, (1928) 16 Del. Ch. 44, 141 A. 54, for rights of nonassenting stockholders who delay in objecting to plan of sale of assets.

obtaining the appraised value of his shares, but, in a fraudulent sale, he has a choice of remedies. He may have an appraisal, or he may bring suit to avoid the sale.⁶¹

It has been held that a minority stockholder is entitled to the remedy of appraisal of his stock as soon as the majority of the stockholders have authorized the officers to effectuate the proposed sale, and that he need not wait until the sale has been consummated.⁶² But where the corporation had rescinded the vote taken on the sale of the property, it was held that those who dissented when the original vote was taken were not entitled to the benefits conferred by the statute providing for appraisal of the stock of dissenting stockholders.⁶³

Rights of dissenting stockholders in absence of statutory provision. We have seen, in the discussion of authority necessary for the sale of all or a substantial part of the corporate property of a going concern, that the consent of all the stockholders is necessary, unless the statute permits a sale with the consent of less than all the stockholders. We have also seen that, upon a lawful sale of the assets of a corporation by a majority or more of the stockholders, the minority stockholders cannot be compelled to accept other than cash for their holdings (see page 878). If it is within the power of the majority stockholders to bind the minority stockholders, and they sell the property of the corporation against the will of the minority holders, thereby working a practical dissolution of the company, the minority holders are not bound to take in payment for their stock a pro rata share of the proceeds of the sale, or, in substitution therefor, the stock of another corporation.⁶⁴ They have the right of election explained in the next paragraph.

At their election,⁶⁵ the minority holders are entitled to receive from the proceeds of the sale the market value of their stock at

⁶¹ Wall v. Anaconda Copper Min. Co., (1914) 216 F. 242.

⁶² Geiler v. Brooklyn-Manhattan Transit Corp., (1939) 18 N. Y. S. (2d) 788, reargument denied 19 N. Y. S. (2d) 656.

⁶³ Fenderson v. Franklin Light & Power Co., (1921) 120 Me. 231, 113 A. 177; In re O'Hara, (1928) 231 N. Y. Supp. 60.

⁶⁴ Tanner v. Lindell R. Co., (1903) 180 Mo. 1, 79 S. W. 155.

⁶⁵ A stockholder cannot be compelled to make an immediate election but has a reasonable time in which to do so. Polans v. Oreck's, Inc., (1945) 220 Minn. 249, 19 N. W. (2d) 435. An objecting stockholder who sits idly by, and when the sale of corporate assets has been accepted by a great majority of the stockholders, seeks to set it aside, will be barred by laches. Peterson v. New England Furniture & Carpet Co., (1941) 210 Minn. 449, 299 N. W. 208.

the date of the sale, or their proportional value of the proceeds;⁶⁶ or they may follow the property into the hands of the purchaser and share in the profits arising from its use in the same ratio that they would have shared if the sale had not been made.⁶⁷ However, the choice of following the property and demanding a pro rata share of the earnings after it has passed into other hands and been put to use must be made under the supervision and approval of the equity court.⁶⁸

If the transaction be made in bad faith,⁶⁹ the minority may, under some circumstances, have the sale set aside and the corporation rehabilitated, provided the party asking for a rescission of the sale has not by his own laches waited until the rights of outsiders have intervened.⁷⁰ Or, if equity requires it, and the application is made before the transaction is consummated, the minority may have an injunction to prevent the contemplated acts of the majority.⁷¹ Other legal remedies, such as an action for an accounting, may be available. A stockholder who is present at the meeting at which the sale is authorized by the majority, and who participates in the meeting and assents to the action of the majority, cannot later repudiate the terms of the sale and decline to accept payment in accordance with the conditions of the sale.⁷² Nor may a stockholder who has ratified the

⁶⁶ *Craddock-Terry Co. v. Powell*, (1942) 175 Va. 146, 22 S. E. (2d) 30.

⁶⁷ *Tanner v. Lindell R. Co.*, *supra* (Note 64).

⁶⁸ *Ibid.* *Graham v. New Mexico Eastern Gas Co.*, (1940) (Tex. Civ. App.) 141 S. W. (2d) 389.

⁶⁹ A transfer of corporate assets can be attacked successfully by a stockholder if he can show injury by the transaction, or bad faith, or that the transfer was not for the best interests of the corporation. *Funderburk v. Magnolia Sugar Co-op., Inc.*, (1942) (La. App.) 8 So. (2d) 374; *Citizens Bank & Trust Co. v. Magnolia Sugar Co-op., Inc.*, (1942) (La. App.) 8 So. (2d) 380.

⁷⁰ *Tanner v. Lindell R. Co.*, *supra* (Note 64).

⁷¹ *Tanner v. Lindell R. Co.*, *supra* (Note 64); *Abbott v. American Hard Rubber Co.*, (1861) 33 Barb. (N. Y.) 589; *Zabriskie v. Railroad* (1867), 18 N. J. Eq. 178.

The only grounds upon which minority stockholders can maintain an action to restrain a sale of assets are that the proceedings are ultra vires, illegal, or fraudulent. *Wick v. Youngstown Sheet & Tube Co.*, (1932) 46 Ohio App. 253, 188 N. E. 514.

Equity will not enjoin the sale of corporate assets when the procedure therefor conforms to law. *Meeks v. Seawell*, (1945) 198 Ga. 817, 33 S. E. (2d) 150. Even if a sale of corporate assets by majority directors and stockholders amounts to a breach of fiduciary obligations that they owe to minority stockholders, the latter cannot enjoin the transaction unless they allege and can prove that the price is less than the true or real value of property. *Kaye v. Kentucky Public Elevator Co.*, (1943) 295 Ky. 661, 175 S. W. (2d) 142.

⁷² *Carr v. Rochester Tumbler Co.*, (1904) 207 Pa. 392, 57 A. 945; *Koehler v. St. Mary's Brewing Co.*, (1910) 228 Pa. 648, 77 A. 1016.

acts of the majority stockholders, or acquiesced in the action, complain.⁷³

Liability of purchasing corporation for debts and obligations of selling corporation. Where a solvent corporation sells all of its assets to another corporation, and receives in consideration therefor adequate cash payment or other property which can be subjected to the payment of its debts, the selling corporation remains liable to its creditors, and the purchasing corporation cannot, ordinarily, be held responsible for the debts and liabilities of the seller.⁷⁴ The cash or other consideration received upon the sale takes the place of the assets which have been sold, and the creditors cannot follow the transferred assets in the hands of the purchasing corporation to satisfy their claims. Under certain circumstances, however, creditors of the seller may hold the purchasing company liable for their debts and obligations. For example, if the entire consideration for the sale of the assets of the corporation is stock of the purchasing corporation, and the stock is delivered to the stockholders of the seller, or it is contemplated that it will be distributed to them, leaving the seller without means to respond to its creditors, it has been held that the purchasing corporation may be held liable for the debts and obligations of the seller.⁷⁵

A corporation that purchases all the assets of another corporation will also be liable for the debts and obligations of the

⁷³ *Kimball v. Success Min. Co.*, (1910) 38 Utah 78, 110 P. 872.

⁷⁴ *Hawkins v. Central of Ga. Ry. Co.*, (1903) 119 Ga. 159, 46 S. E. 82; *Amer. Ry. Express Co. v. Commonwealth*, (1920) 190 Ky. 636, 228 S. W. 433; *First State Bank of Mangum v. Lock*, (1925) 113 Okla. 30, 237 P. 606; *Rodgers v. Lincoln Hospital*, (1927) 239 Mich. 329, 214 N. W. 88; *Bryand, Griffith & Brunson, Inc. v. General Newspaper, Inc.*, (1935) (Del.) 178 A. 645; *Safety Motor Coach Co. v. Maddin's Adm'x*, (1936) 266 Ky. 459, 99 S. W. (2d) 183; *Leach v. Ross Heater & Mfg. Co.*, (1938) 25 F. Supp. 822; *St. Claire Lime Co. v. Ada Lime Co.*, (1945) 196 Okla. 29, 162 P. (2d) 547. See also, Cuquet, "The Liability of a Successor Corporation for the Obligations of Its Predecessors," 14 *Tulane Law Rev.* 273 (1940).

⁷⁵ *Seattle Investors Syndicate v. West Depend. Stores*, (1934) 177 Wash. 125, 30 P. (2d) 956; *West Texas Refining & D. Co. v. Comm. of Int. Rev.*, (1933) 68 F. (2d) 77; *Kinsella v. Marquette: Easton Finance Corporation*, (1930) (Mo.) 28 S. W. (2d) 427; *Morlock v. Mt. Forest Fur Farms of America*, (1934) 269 Mich. 549, 257 N. W. 880.

See also *McKee v. Standard Minerals Corporation*, (1931) 18 Del. Ch. 97, 156 A. 193; *Amer. Ry. Exp. Co. v. Commonwealth*, (1920) 190 Ky. 636, 228 S. W. 433; *Goodwin & Jean v. Amer. Ry. Exp. Co.*, (1927) 220 Mo. App. 695, 294 S. W. 100; *Valley Bank v. Malcolm*, (1922) 23 Ariz. 395, 204 P. 207; *Commissioner of Insurance v. Lloyds Ins. Co.*, (1939) 287 Mich. 599, 283 N. W. 703. But see *McAlister v. American Ry. Express Co.*, (1920) 179 N. C. 556, 103 S. E. 129.

selling corporation under any of the following circumstances: ⁷⁶

1. If it has agreed, expressly or impliedly, to assume the debts of the seller.⁷⁷

2. If the purchasing corporation is a mere continuation of the selling corporation and not a different enterprise.⁷⁸

3. If the transaction is fraudulent.⁷⁹ Where the assets of a corporation are transferred for a grossly inadequate consideration or no consideration at all, the transfer amounts to a fraud upon creditors, regardless of the intention of the parties.⁸⁰

4. If the transaction constitutes not a sale of assets, but a consolidation or merger between the purchasing and selling corporation.⁸¹

5. If the state statute governing a sale of all the assets specifically provides that the purchaser shall be held liable for debts of the selling corporation. The state statutes may specifically require that adequate provision be made for the payment of the selling company's obligations. If the provision proves inadequate, the fact that it was believed to be sufficient does not satisfy the statute.⁸²

⁷⁶ See the following cases in which the general rule was stated: *Luedcke v. Des Moines Cabinet Co.*, (1908) 140 Iowa 223, 118 N. W. 456; *First State Bank of Mangum v. Lock*, (1925) 113 Okla. 30, 237 P. 606; *Ingram v. Prairie Block Coal Co.*, (1928) 319 Mo. 644, 5 S. W. (2d) 413; *Sinclair Refining Co. v. Rayville Motor Co.*, (1935) (La.) 160 So. 179; *Erickson v. Grande Ronde Lumber Co.*, (1939) 162 Ore. 556, 92 P. (2d) 170, rehearing denied 94 P. (2d) 139.

⁷⁷ *Colorado Springs R. Co. v. Albrecht*, (1912) 22 Colo. App. 123 P. 957; *Chorpenning v. Yellow Cab Co.*, (1933) 113 N. J. Eq. 389, 167 A. 12; *Mallory S. S. Co. v. Baker*, (1934) 117 Fla. 196, 157 So. 504; *Garey v. Kelvinator Corp.*, (1937) 279 Mich. 174, 271 N. W. 723; *Texas Co. v. Marlin*, (1940) 109 F. (2d) 305, rev'g 26 F. Supp. 611; *Pankey v. Hot Springs Nat. Bank*, (1941) 46 N. M. 10, 119 P. (2d) 636; *In re Lehrer-Howard, Inc.*, (1943) 44 N. Y. S. (2d) 494; *Religious Films, Inc. v. Potts*, (1946) (Tex. Civ. App., Galveston) 197 S. W. (2d) 592.

⁷⁸ *Ingram v. Prairie Block Coal Co.*, (1928) 319 Mo. 644, 5 S. W. (2d) 413; *Austin v. Tecumseh National Bank*, (1896) 49 Neb. 412, 68 N. W. 628; *Seattle Investors Syndicate v. West Depend. Stores*, (1934) 177 Wash. 125, 30 P. (2d) 956; *Fox v. Radel Leather Mfg. Co.*, (1937) 121 N. J. Eq. 291, 189 A. 366; *Walter v. Caffall*, (1939) 192 La. 447, 188 So. 137. See also *Calvin v. Washington Properties, Inc.*, (1941) (U. S. Ct. of App., D. C.) 121 F. (2d) 19.

⁷⁹ *Hurd v. N. Y. & C. Steam Laundry Co.*, (1901) 167 N. Y. 89, 60 N. E. 327; *Luedcke v. Des Moines Cabinet Co.*, (1918) 140 Iowa 223, 118 N. W. 456; *Harlan Public Service Co. v. Eastern Const. Co.*, (1934) 254 Ky. 135, 71 S. W. (2d) 24; *Claus v. Farmers & Stockgrowers State Bank*, (1936) 51 Wyo. 45, 63 P. (2d) 781; *General Gas & Elec. Corp. v. Commissioner of Int. Rev.*, (1938) 98 F. (2d) 561, cert. granted 59 S. Ct. 358; *Walter v. Caffall*, (1939) 192 La. 447, 188 So. 137.

⁸⁰ *Everett v. Carolina Mtg. Co.*, (1939) 214 N. C. 778, 1 S. E. (2d) 109.

⁸¹ *Atlanta B. & A. R. Co. v. Atlantic Coast Line R. Co.*, (1912) 138 Ga. 353, 75 S. E. 468; *Pankey v. Hot Springs Nat. Bank*, (1941) 40 N. M. 119 P. (2d) 636.

⁸² *Willey v. Diepress Co.*, (1935) 156 N. Y. Misc. 762, 281 N. Y. Supp. 905.

Liability of corporation succeeding to business of a partnership or an individual. Many conclusions have been reached by the courts of the various states on the question of the liability of a corporation organized to take over the business formerly conducted by a partnership or an individual. The courts by a large majority have definitely decided that the mere fact that a corporation takes over the business of a partnership or an individual does not necessarily make the corporation responsible for the predecessor's debts.⁸³ It is a rule of common law, however, that a corporation which succeeds to the business of a partnership or an individual and takes over the assets and business, assumes, by so doing, the debts and liabilities of the business acquired to the extent of the property received.⁸⁴

Power of corporation to make gifts of its property and contributions. Neither a majority of the stockholders nor the directors have any power to give away corporate property, against the protest of the minority stockholders.⁸⁵ But if the rights of creditors are not affected, and all stockholders consent, a corporation may give away its property or pay money out of its treasury, in the absence of positive law forbidding it.⁸⁶ A gift may also be upheld if the corporation expects to derive some benefit from the gift or some legitimate help from or through the donee.⁸⁷ For example, an industrial company can give away some of its products as an advertisement.⁸⁸ Whether or not a gift will result in sufficient benefit to justify itself is a question that must be decided in each case on its own facts.⁸⁹ Some states have enacted statutes expressly granting to corporations the power to make contributions for religious, charitable, scientific, literary, or educational purposes. In many states corporations

⁸³ 15 A. L. R. 1126, 30 A. L. R. 559.

⁸⁴ *In re W. J. Marshall Co.*, (1924) 3 F. (2d) 192.

⁸⁵ *McLaughlin v. Corcoran*, (1937) (Mont.) 69 P. (2d) 597; *McQuillan v. National Cash Register Co.*, (1939) 27 F. Supp. 639. See also *Hanrahan v. Andersen*, (1939) 108 Mont. 218, 90 P. (2d) 494.

⁸⁶ *Parrot v. Noel*, (1925) 8 F. (2d) 368; *MacQueen v. Dollar Sav. Bank Co.*, (1938) 133 Ohio St. 579, 15 N. E. (2d) 529.

⁸⁷ *Richelieu Hotel Co. v. Internat. Military Encampment Co.*, (1892) 140 Ill. 248, 29 N. E. 1044 (hotel derives benefit from proximate location of meeting place). *Contra Brinson Co. v. Exchange Bank of Springfield*, (1915) 16 Ga. App. 425, 85 S. E. 634 (railroad cannot donate to a school in town on railroad's right of way), and see *Davis v. Old Colony Railroad Company*, (1881) 131 Mass. 258.

⁸⁸ *Steinway v. Steinway & Sons*, (1891) 17 N. Y. Misc. 43, 40 N. Y. Supp. 718.

⁸⁹ *Vandall v. S. S. F. Dock Co.*, (1870) 40 Cal. 83.

are prohibited from making contributions for campaign expenses or other political purposes.

Holding Companies

Definition. A holding company is a corporation that holds the stock of one or more other corporations. If it does no operating for itself, but, through its stock ownership, dictates the policies and controls the affairs of the companies whose stock it owns it is called a *pure* holding company. A holding company that is also an operating company is called a *mixed* holding company.

Power to become a holding company. A distinction may be made between owning shares of stock in a corporation for investment, and owning shares of stock for the purposes of control. The term "holding company" generally implies the intent to hold the stock for purposes of control. A corporation may have the implied power to purchase the stock of other corporations for investment purposes.⁹⁰ For example, an insurance company undoubtedly has the implied power to purchase stock of other corporations in order to invest its surplus funds in dividend paying securities. But a corporation does not have the implied power to purchase and hold stock of another corporation for the purpose of exercising control. The reason for the rule is that the stockholders are entitled to assume, in the absence of notice to the contrary in the charter or statute, that the directors will use in the business the capital and assets authorized by the charter and will not share the capital with others.⁹¹ In order to purchase shares in another corporation for control, a corporation must have the power granted to it by statute or by charter, to purchase and hold stocks of other corporations.⁹²

⁹⁰ Ownership by a corporation of stock in another corporation is not per se necessarily unlawful. *Niedringhaus v. William F. Niedringhaus Inv. Co.*, (1931) 329 Mo. 84, 46 S. W. (2d) 828.

⁹¹ *Kappers v. Cast Stone Const. Co.*, (1924) 184 Wis. 627, 200 N. W. 376; *City Coal & Ice Co. v. Union Trust Co. of Maryland*, (1924) 140 Va. 600, 125 S. E. 697. See note to *Denny Hotel Co. v. Schram*, (1893) 6 Wash. 134. A corporation that is unable to collect money due it may accept payment in stock of another corporation in settlement of its account. *J. L. Young & Co. v. Minchew*, (1930) 42 Ga. App. 228, 155 S. E. 356.

⁹² *Dunbar v. Amer. Tel. & Tel. Co.*, (1906) 224 Ill. 9, 79 N. E. 423; *People v. Marcus*, (1932) 235 App. Div. 397, 257 N. Y. Supp. 424. See also *Roth v. Ahrens-feld*, (1939) 300 Ill. App. 312, 21 N. E. (2d) 21. In *State v. Long-Bell Lumber Co.*, (1928) 321 Mo. 461, 12 S. W. (2d) 64, it was held that a corporation may own stock in another corporation unless it is prohibited by statute, if the purpose is to facilitate the legitimate business of the parent company.

Most of the state corporation laws grant corporations organized thereunder the right to own and hold stock in other corporations. If the statute provides that corporations may be organized for any lawful business purpose, and the corporation is given the right by statute to hold shares of stock in other corporations, a corporation may be created for the purpose of holding shares and controlling the operations of other corporations.⁹³ If a corporation of one state has the power to hold stock of other corporations, it has the power to purchase shares of corporations organized in other states, unless the laws of the state in which the foreign corporation is organized forbid such acquisition.⁹⁴

A holding company cannot be used as a device to accomplish a purpose that is contrary to public policy, or prohibited by statute. It cannot, for example, be used as a mere instrumentality to avoid a sales tax.⁹⁵ However, the right to set up operating companies to minimize franchise taxes has been recognized.⁹⁶ A corporation may not, through the acquisition of stock of other corporations, effect a combination which violates the common law of monopolies, or the Federal or state anti-trust laws,⁹⁷ or which is in contravention of the statutes concerning merger, consolidation, and dissolution.⁹⁸

Necessity for obtaining consent of stockholders to acquisition of stock. A corporation with the power to own and hold stock of other corporations does not have to obtain the consent of the stockholders to effect a purchase of shares of other corporations unless such consent is required by the certificate of incorporation or by statute; ordinarily a resolution of the directors authorizing the purchase of stock is sufficient. However, stock of other corporations may be acquired otherwise than by an outright purchase, and the transaction involved in the acquisition may require the consent of stockholders. For example, suppose a corporation manufacturing automobiles and owning and operating a rubber plantation wished to separate the manufacturing operations from the rubber-growing end of the business. It

⁹³ *Dittman v. Distilling Co. of Amer.*, (1903) 64 N. J. Ch. 537, 54 A. 570.

⁹⁴ *Coler v. Tacoma Ry. & Power Co.*, (1903) 65 N. J. Ch. 347, 54 A. 413, rev'g 64 N. J. Ch. 117, 53 A. 680; *Buckeye, Marble & Freestone Co. v. Harvey*, (1892) 92 Tenn. 115, 20 S. W. 427; *Hall v. Woods*, (1927) 325 Ill. 114, 156 N. E. 258.

⁹⁵ *E. Albrecht & Son v. Landy*, (1939) 27 F. Supp. 65.

⁹⁶ *Consolidated Coal Co. v. State*, (1938) 236 Ala. 489, 183 So. 650.

⁹⁷ *Northern Securities Co. v. U. S.*, (1904) 193 U. S. 197, 24 S. Ct. 436.

⁹⁸ *In re Doe Run Lead Co.*, (1920) 283 Mo. 646, 223 S. W. 600; *Riker & Son Co. v. United Drug Co.*, (1912) 79 N. J. Ch. 580, 82 A. 930.

might form a corporation to take over the plantation assets of the corporation and take in return the stock of the subsidiary corporation. Such a transaction, if it involved the sale of a substantial part of the corporate assets, would require the consent of the stockholders. This subject has been discussed under the sale of assets.⁹⁹

Incidents of ownership attaching to stockholding. A corporation, as the owner of stock of other corporations, has the same rights as the individual stockholder, and is subject to the same liabilities and obligations. It has the right to acquire the stock in the name of the corporation or it may hold the property in the name of another person.¹⁰⁰ As an incident of ownership of the stock, it has the right to vote the stock.¹⁰¹ Usually, the board of directors of the holding company passes a resolution appointing one of its officers a proxy to vote the stock and instructs him how to vote. The resolution includes an authorization to execute a proxy to the person named. If the directors of the holding company are to be directors of the subsidiary company, and the statute or charter requires that the directors shall be stockholders, the corporation will give the directors "qualifying shares." As a stockholder, the corporation is entitled to all dividends declared upon the shares it holds. It is also liable for calls, if the stock is purchased upon subscription, and is subject to all assessments lawfully made against shareholders.¹⁰² It has the power to pledge the shares it owns in other corporations as security for loans. Public utility holding companies are now subject to regulation by the Federal government under the Public Utility Holding Company Act. For complete details regarding this Act, see *Prentice-Hall Securities Regulation Service*.

Rights of minority stockholders of controlled companies. A

⁹⁹ See page 874.

¹⁰⁰ While a holding company may hold the stock of other corporations in the name of another, when the holding corporation intentionally, persistently, and unreasonably deprives itself of the exercise of its highest function and privilege of a stockholder by refusing to hold the stock in its own name and to vote the stock held by it, it is such a breach of trust of its duty to its stockholders and so far removed from any characteristics of internal management and control which the majority stockholders may properly exercise that the minority stockholders may invoke the intervention of a court of equity. *Hyams v. Old Dominion Co.*, (1915) 113 Me. 294, 93 A. 747.

¹⁰¹ *Bouree v. Trust Français des Actions de la Franco-Wyoming Oil Co.*, (1924) 14 Del. Ch. 322, 127 A. 56.

¹⁰² *National Bank v. Case*, (1878) 99 U. S. 628.

corporation that controls any corporation through ownership of a majority or more of its stock assumes a relation of trust to the minority stockholders, and must conduct the affairs of the controlled corporation in such a way as to benefit all the stockholders and not merely itself.¹⁰³ In all contracts between a parent company and a subsidiary company, the relation is similar to that between the corporation and its directors; that is, the holding company occupies a fiduciary relation which places upon it the duty of acting in the utmost good faith.¹⁰⁴ It is the duty of the majority shareholder to make pro rata distributions of the fruit of its control on equal terms.¹⁰⁵ A court of equity will restrain a corporation owning the stock of another corporation and controlling its management, from conducting the affairs of the corporation in such a way as to impair the earnings of the controlled company and prejudice the rights of minority stockholders.¹⁰⁶ The parent corporation may also be required to account for profits wrongfully made by it at the expense of the subsidiary company, and may be held liable for damages sustained by the subsidiary.¹⁰⁷

Liability of holding company. The mere fact that stockholders in two or more corporations are the same does not make either corporation the agent of the other.¹⁰⁸ Nor does it merge them into one another so as to make the holding company liable for the debts and contracts of the corporation whose stock it holds, where each is separately organized under a distinct charter.¹⁰⁹ The ownership of the stock of any corporation does not render the stockholding company the owner of the property of

¹⁰³ *Farmers Loan & Trust Co. v. New York & N. R. Co.*, (1896) 150 N. Y. 410, 44 N. E. 1043; *Southern Pac. v. Bogert*, (1918) 250 U. S. 483 modifying 244 F. 61, which affirmed 226 F. 500.

¹⁰⁴ *Montgomery Traction Co. v. Harmon*, (1903) 140 Ala. 507, 37 So. 371.

¹⁰⁵ *Southern Pac. Co. v. Bogert*, *supra* (Note 103).

¹⁰⁶ *Memphis & C. R. Co. v. Woods*, (1889) 88 Ala. 630, 7 So. 108; *Blaustein v. Pan American Petroleum & Transport Co.*, (1940) 174 N. Y. Misc. 601, 21 N. Y. Supp. (2d) 651, *rev'd on the facts*, (1941) 263 N. Y. App. Div. 97, 31 N. Y. Supp. (2d) 934, *aff'd*, (1944) 293 N. Y. 281, 56 N. E. (2d) 705.

¹⁰⁷ *Blaustein v. Pan American Petroleum & Transport Co.*, *supra* (Note 106).

¹⁰⁸ *Haskell v. McClintic-Marshall Co.*, (1923) 289 F. 405; *Universal Oil Products Co. v. Derby Oil & Refining Corp.*, (1937) 19 F. Supp. 821; *Ledlow v. Good-year Tire & Rubber Co. of Alabama*, (1939) 238 Ala. 35, 189 So. 78.

¹⁰⁹ *Martin v. Development Co. of Amer.*, (1917) 240 F. 42; *Cannon v. Brush Elec. Co.*, (1903) 96 Md. 446, 54 A. 121; *Ambridge Borough v. Philadelphia Co.*, (1925) 283 Pa. 5, 129 A. 67; *Pittsburgh & Buffalo Co. v. Duncan*, (1916) 232 F. 584; *United States Gypsum Co. v. Masonite Corporation*, (1937) 21 F. Supp. 550.

the other,¹¹⁰ nor is stock ownership alone sufficient to make the corporate owner of the stock liable for claims against the corporation whose stock is owned.¹¹¹ A holding company has a separate corporate existence and is treated as a separate entity; and the corporation whose stock is owned does not lose its corporate identity when its stock is all owned by another corporation.¹¹² The legal fiction of distinct corporate existence, however, will be disregarded when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs are so conducted as to make it only an adjunct or instrumentality of another corporation.¹¹³ It requires a strong case to induce a court of equity to consider two corporations as one on account of owning all the stock of the other.¹¹⁴ And a person who, with knowledge of all the facts, accepted and approved the relationship between the two corporations, is estopped to claim that the parent corporation used the subsidiary as a mere instrumentality.¹¹⁵

¹¹⁰ *Chicago, Minn. & St. Paul Ry. Co. v. Minn. Civic Assn.*, (1918) 247 U. S. 500; *City of Holland v. Holland City Gas Co.*, (1919) 257 F. 679.

¹¹¹ *Brown v. Standard Casket Mfg. Co.*, (1937) 234 Ala. 512, 175 So. 358; *National Hotel Co. v. Motley*, (1938) (Tex. Civ. App.) 123 S. W. (2d) 461, error dismissed; *Ledlow v. Goodyear Tire & Rubber Co. of Alabama*, (1939) 238 Ala. 35, 189 So. 78; *Blaustein v. Pan American Petroleum & Transport Co.*, (1940) 174 N. Y. Misc. 601, 21 N. Y. Supp. (2d) 651, rev'd on other grounds, (1941) 263 App. Div. 97, 31 N. Y. Supp. (2d) 934, aff'd, (1944) 293 N. Y. 281, 56 N. E. (2d) 705.

¹¹² *Martin v. Development Co. of Amer.*, (1917) 240 F. 42; *Bell Telephone Co. v. Pennsylvania Public U. Com'n*, (1939) 135 Pa. Super. 218, 5 A. (2d) 410; *Taylor v. Standard Gas & Electric Co.*, (1938) 96 F. (2d) 693.

¹¹³ *Radio Craft Co. Inc. v. Westinghouse Elec.*, (1925) 7 F. (2d) 432; *Burton v. Roos*, (1937) 20 F. Supp. 75; *Society Milion Athena v. National Bank of Greece*, (1937) 166 N. Y. Misc. 190, 2 N. Y. Supp. (2d) 155; *Alabama Power Co. v. McNinch*, (1937) 94 F. (2d) 601; *Iroquois Gas Corporation v. Maltbie*, (1937) 251 N. Y. App. Div. 528, 297 N. Y. Supp. 907; *May Department Stores Co. v. Union Electric L. & P. Co.*, (1937) 341 Mo. 299, 107 S. W. (2d) 41; *Henry v. Dolley*, (1938) 99 F. (2d) 94; *Van Schaick v. Carr*, (1938) 170 N. Y. Misc. 539, 10 N. Y. Supp. (2d) 567; *First Trust Co. v. Maryott*, (1939) 135 Neb. 679, 283 N. W. 518; *Ledlow v. Goodyear Tire & Rubber Co. of Alabama*, (1939) 238 Ala. 35, 189 So. 78.

It has been held that in cases involving the rights of third persons, the fiction of corporate entity may be disregarded only to prevent fraud or injustice. *Feucht v. Real Silk Hosiery Mills*, (1938) 105 Ind. App. 405, 12 N. E. (2d) 1019.

¹¹⁴ *Ambridge Borough v. Philadelphia Co.*, (1925) 283 Pa. 5, 129 A. 67; *Martin v. Development Co. of Amer.*, (1917) 240 F. 42.

¹¹⁵ *In re Kalamazoo Bldg. Co.*, (1937) 21 F. Supp. 852.

CHAPTER 30

RESOLUTIONS RELATING TO PURCHASE AND SALE OF ASSETS

RESOLUTIONS—PURCHASE AND SALE OF PART OF ASSETS

No. 684

Resolution of directors authorizing president to purchase stock of another corporation from an individual.

RESOLVED, That the President of this Corporation be and he hereby is authorized to purchase from, the stock of the Corporation, owned by said, amounting to (\$.....) Dollars of preferred stock and (\$.....) Dollars of common stock, at such price as he may deem advisable, not exceeding the sum of (\$.....) Dollars.

No. 685

Resolution of directors authorizing stock purchased for the corporation to be held in the name of an individual.

RESOLVED, That stock purchased for and on behalf of the A Corporation be issued in the name of, and that upon the issuance of a certificate in the name of said, he shall thereupon indorse such certificate in blank and deliver it to the Secretary of the A Corporation.

No. 686

Resolution of directors authorizing execution of agreement with bankers to acquire stock of various corporations.

WHEREAS, this Board of Directors deems it desirable for the business of this Corporation to acquire the stocks of the following-named companies, owning, mining, manufacturing, or producing materials or other property necessary for the business of this Corporation—to wit (*insert names of companies*), and after careful investigation and appraisal, this Board has ascertained, adjudged, and determined, and hereby the directors do and each of them does

ascertain, adjudge, and determine, that the value of such stocks, severally and respectively, is equal at least to the par value of the stock of this Corporation and the sums in cash to be issued and paid therefor if purchased or acquired by this Corporation on the terms of the proposed agreement authorizing (*insert name of banking firm*) to procure the sale thereof to this Corporation, a draft of such proposed agreement having been submitted to the Board of Directors and read; be it

RESOLVED, That such proposed agreement under the date of....., 19.., be executed in duplicate by the President for and in behalf of the Corporation, and that the corporate seal be thereunto affixed and attested by the Secretary, and that the draft of such agreement now submitted be filed with the Secretary.

No. 687

Resolution of stockholders authorizing purchase of stock of various companies for stock and bonds of purchasing corporation.

WHEREAS,, and, as a committee acting in behalf of the several owners and holders of the stock of the corporations listed below, have offered to sell and transfer, or to cause to be transferred, to this Company, shares of capital stock of the following corporations (*insert name of corporation, amount of stock offered for sale, and proportion which amount offered for sale bears to total capital stock of each corporation*), in consideration of the issue of stock of this Company to the amount of (\$.....) Dollars par value and its five (5%) per cent bonds, secured by a collateral deed of trust or mortgage upon all of the above-mentioned stocks, amounting in the aggregate to..... (\$.....) Dollars, and

WHEREAS, it appears to the stockholders of this Company that the above-mentioned property is necessary for the business of this Company, and that the same is of the value of (\$.....) Dollars, be it

RESOLVED, That the Board of Directors of this Company be and it hereby is authorized and directed to purchase said property for said price, and to issue said stock and bonds in payment thereof, provided that, in the judgment of the Board of Directors, the said property is of the value above stated.

No. 688

Resolution of directors authorizing sale of real property owned by corporation.

WHEREAS, in the opinion of this Board of Directors, the real prop-

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erty owned by this Corporation and located at City,, more particularly described below, is not required for the purposes for which this Corporation was organized, be it

RESOLVED, That the President and the Secretary be and they hereby are authorized, empowered, and directed to sell for the best price obtainable, and upon such terms and conditions as they shall deem for the best interests of this Corporation, certain real property owned by this Corporation, described as follows (*insert complete description*);

RESOLVED FURTHER, That the said officers be and they hereby are authorized and empowered to enter into such agreements as may be necessary to carry out the sale of said property, and to consummate such sale by executing and delivering a deed to the property, for and in behalf of and under the seal of this Corporation.

No. 689

Resolution of directors of railroad company authorizing sale of land not required for operations.

WHEREAS, the operating officers and the Chief Engineer of this Corporation have certified that the land hereinafter described is not required by this Corporation for railroad purposes, and

WHEREAS, in the opinion of the Board of Directors, said land is no longer required by this Corporation for railroad purposes, and is not now necessary for the maintenance, operation, or other purposes of this Corporation, and

WHEREAS, said land is not held for and used in the service of transportation, but, on the contrary, was expressly excepted and reserved from the property conveyed by this Corporation's mortgage dated, 19.., to the Trust Company,

RESOLVED, That the President, or a Vice President, be and he hereby is authorized, in the name and in behalf of this Corporation and under its corporate seal, to execute and deliver a quitclaim deed, conveying to, of City,, for the consideration of (\$.....) Dollars, a certain parcel of land in said, as shown within the yellow lines on the map entitled, and bounded as follows (*insert description of property*).

RESOLVED FURTHER, That the proceeds from the sale of said land be deposited with the Trust Company of, under the terms of the mortgage hereinafter mentioned, until such time as new lands are to be purchased to which said proceeds are applicable.

RESOLVED FURTHER, That the Treasurer of the State of, as Trustee under the general mortgage of the Company to the Treasurer of the State of, dated, 19.., be requested, upon the written consent of the Trust Company of, to release said land from the lien and operation of said mortgage.

No. 690

Resolution of directors authorizing sale of real property of corporation to separate real estate holdings from other property, and authorizing lease to be made with purchaser.

WHEREAS, prior to the .. day of, 19.., this Company had arranged to sell and convey the real estate holdings of this Company in the City of, exclusive of all buildings, machinery, fixtures, and other improvements thereon, to, with a view to separating the real estate holdings of this Company in the City of from its other property and plant, it being the purpose and intention to secure other real estate in or near the City of, and ultimately to remove the plant of this Company to such new location, and

WHEREAS, prior to the .. day of, 19.., this Company had arranged that the said, for the use of himself and his associates, should have an option on the said real estate holdings in the City of, at the book value of such holdings as of, 19.., and

WHEREAS, the book value of said real estate as of, 19.., has been ascertained to be the sum of (\$.....) Dollars,

NOW, THEREFORE, BE IT RESOLVED, by the Board of Directors, that the Vice President and the Secretary of this Company be and they hereby are authorized and directed to execute to, for and in behalf of this Company, a proper deed of conveyance conveying to the said all of the real estate holdings of this Company in the City of, for the consideration of the said sum of (\$.....) Dollars, such conveyance to exclude all buildings, machinery, fixtures, and other improvements on the said property, with the right to remove the same within a reasonable time after the expiration of a lease to be made by the said to this Company; that the said consideration be paid according to the terms of the vendor's lien note for the sum of (\$.....) Dollars, payable (.....) years after date, with interest thereon at the rate of (%) per cent per annum, the interest to be payable semiannually, with the privilege of prepayment

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of the full amount, or of any multiple of (\$.....) Dollars on the .. day of or the .. day of, of any year, upon (.....) days' written notice of such intention to prepay; that the vendor's lien be retained to secure the payment of the said note; and that the said execute, when requested, a deed of trust upon the said property, with power of sale, in the usual form, in order further to secure the payment of the said vendor's lien note.

AND BE IT FURTHER RESOLVED, That this Company be authorized to accept from the said, a lease for the said real estate at an annual rental of (\$.....) Dollars, plus all taxes accruing against the said property, the payment dates of such rental to be at the end of each six months, corresponding to the dates of interest payments on the said vendor's lien note; that such lease extend for the said term of (.....) years, but may be terminated prior to the expiration of said (.....) years if this Company shall secure and remove to a new location in or near the City of; and that the lessee be granted the privilege of removing all buildings, machinery, fixtures, and other improvements from the said premises, within a reasonable time after the termination of the lease.

No. 691

Resolution of directors of corporation engaged in buying and selling real estate, authorizing sales to be made by officers.

RESOLVED, That the President and the Secretary of the Corporation be and they hereby are authorized, empowered, and directed to sell, mortgage, lease, or convey any and all property of said Corporation, on such terms as they may deem advisable, and the said President and Secretary are hereby authorized, empowered, and directed to execute all deeds, mortgages, releases, leases, or other instruments necessary to carry into effect the sales, mortgages, or leases as herein provided.

No. 692

Resolution of directors accepting offer to sell real property in consideration for entire capital stock of corporation.

WHEREAS,, Inc., has offered to sell, transfer, and convey the real property now owned by it at, Town of, County,, subject to a mortgage of, on the terms stated in a written proposal made to this Company by said, Inc., and forming part of the minutes of the first meeting of stockholders, and

WHEREAS, the incorporators and stockholders of this Company approved the said proposal and recommended that the Board of Directors accept the same, and

WHEREAS, in the judgment of this Board of Directors, the assets to be transferred to this Company are reasonably worth the amount of the consideration demanded therefor, and it is to the best interests of this Company to accept the said offer as set forth in said proposition,

NOW, THEREFORE, IT IS RESOLVED, That the said offer of
....., Inc., as set forth in said proposition, be and the same hereby is approved and accepted, and that in accordance with the terms thereof, this Company shall, as full payment for said property, issue and deliver to said, Inc., or its nominees, the entire issue of the capital stock of this Company; and

RESOLVED FURTHER, That upon the execution and delivery of such proper instruments as may be necessary to transfer and convey the property aforesaid to this Company, the officers of this Company are authorized and directed to issue and deliver the shares of the capital stock of this Company in accordance with the said offer;

RESOLVED FURTHER, That the acts of and
....., in engaging the Title Insurance Company to issue a title policy in the sum of \$..... on the property at, County,, at a cost of \$....., be and the same hereby is in all respects ratified, approved, and confirmed, as and for the acts and deed of this Company.

No. 693

Resolution of directors authorizing execution of deed of real estate.

RESOLVED, That the President and the Treasurer be and they hereby are authorized and empowered to execute and deliver a deed of the real estate belonging to this Corporation, located on Street, in, in accordance with the agreement entered into between this Corporation and, on the .. day of, 19.., and to do everything necessary to carry this agreement into effect.

No. 694

Resolution of stockholders ratifying sale of real property made by directors.

RESOLVED, That the action of the Board of Directors in authorizing the sale of real property owned by this Corporation, described as follows (*insert complete description*), for the sum of

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..... (\$.....) Dollars, which said sum has been duly received and is now held in the treasury of this Corporation, and the action of the President and the Secretary in executing and delivering a deed to, dated, 19..., conveying the above-described real property, be and it hereby is ratified, approved, confirmed, and accepted as the action of the Corporation.

No. 695

Resolution of stockholders authorizing sale of business carried on by branch office, to new corporation to be organized as subsidiary.

RESOLVED, That the business, property, accounts, goodwill, and all other assets of this Corporation in the City of, State of, as heretofore and now carried on by this Corporation's branch office in the City of, State of, be sold to a corporation now being organized under the laws of the aforesaid foreign state, in consideration of the issuance and delivery to this Corporation of (....) shares of common stock with no par value and (....) shares of the preferred stock with a par value of (\$.....) Dollars each, the said stock to represent at least a majority of all the entire authorized capital stock of the said foreign corporation.

No. 696

Resolution of directors (or executive committee) authorizing sale by surety company of accounts receivable and other claims.

WHEREAS, in order to save this Company from failure, to enable it to preserve its extremely valuable assets, to protect the interest of all the stockholders and policyholders, and to enable the Company to continue in business, it is necessary to raise immediately a certain amount of cash, and

WHEREAS, Messrs. "A" and "B" have offered to purchase all the assets hereinafter set forth, for the sum of (\$.....) Dollars, on the terms herein set forth,

NOW, THEREFORE, BE IT RESOLVED, That this Company sell, for (\$.....) Dollars, on the terms hereinafter mentioned, to Messrs. "A" and "B," the following: (1) its claims for all premiums over 90 days old, as per the memorandum submitted and to be set forth in these minutes, the face value of which premiums is (\$.....) Dollars, but all of which are subject to agents' commission, and some of which are admittedly bad, and the net value of which is estimated to be at least (\$.....) Dollars, but which amount is in no sense guaranteed; (2) claims for all advances on contracts, the

net value of which is estimated to be at least (\$.....) Dollars, but which amount is in no sense guaranteed; (3) the so-called "Salvage" account, the net value of which should be at least (\$.....) Dollars, but which amount is in no sense guaranteed; and (4) the claim of this Company known as the claim, now pending in the Court of, the net value of which is estimated to be at least (\$.....) Dollars, but which amount is not guaranteed; and that payment of said assets shall be made as follows: (\$.....) Dollars is to be paid in cash this day, and the balance is to be paid within (.....) months from the date hereof. The deferred payment of said (\$.....) Dollars is to be secured by the retention of title by this Company to the said claim, said claim to be assigned finally and absolutely to the said Messrs. "A" and "B" when and as soon as said (\$.....) Dollars is paid; if the same shall not be paid until or before the final settlement is made of said claim, any balance realized from said claim over and above (\$.....) Dollars, with interest from this date, shall be and become the property of said Messrs. "A" and "B," subject, however, to the following conditions to which the said Messrs. "A" and "B" are to agree and do hereby agree:

First. The Surety Company shall agree and it does hereby agree that it will serve as the agent of the said Messrs. "A" and "B," and will use its best efforts and diligence in collecting, subject to the general direction and control of the said Messrs. "A" and "B," all of the aforementioned assets hereby sold, and in paying the net proceeds from such collections to the said Messrs. "A" and "B."

Second. That if the amount realized from all of the said assets shall exceed the amount of the purchase price paid as aforesaid, plus (....%) per cent interest and (....%) per cent of the amount paid in addition as a bonus, the amounts realized from said assets in excess therefor shall be returned to the Company.

Third. That no releases or settlements for less than the full amount of the claim shall be made until the assent of Messrs. "A" and "B," or one of them, has been obtained.

Fourth. That at any time upon the demand of Messrs. "A" and "B," or either of them, a statement shall be rendered in regard to the conditions of the said claims, or any other information or assistance with reference to the collection thereof that may be needed shall be furnished.

Fifth. Notice shall be given to the said Messrs. "A" and "B" when

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and as any payments are received on account of said claims, and immediate remittances thereof shall be made either to the Messrs. "A" and "B" or their order.

Sixth. The cost and legal expenses, if any, in connection with the collection of any of these assets, shall be deducted from the proceeds of the claim collected, and shall not be borne by the Surety Company, but no counsel fees shall be incurred except with the assent of the said Messrs. "A" and "B" or either of them.

Seventh. That all provisions set forth in this arrangement in regard to any assignment by Messrs. "A" and "B" shall affect the Surety Company only in the event that the said Messrs. "A" and "B" notify such Company that they have assigned said claim, and that the said assignees request that they be treated in the place of said Messrs. "A" and "B." Otherwise Messrs. "A" and "B" shall be recognized as the only parties in interest.

Eighth. That the said Surety Company in this connection obligates itself only to use its best efforts and to exercise due diligence and good faith in the collection of these accounts and in the carrying out of the provisions of this resolution. But if, in the judgment of the said Messrs. "A" and "B," the proper methods of diligence should not be exercised in the collection of any particular asset, the said Messrs. "A" and "B," or their assigns, may revoke the agency for the collection of that particular item. In case of any dispute between the Surety Company and the Messrs. "A" and "B" as to the amount for which any claim shall be settled, the Surety Company shall always have the option of repurchasing any given item at the price at which the other parties wish to settle, or vice versa.

Ninth. Inasmuch as the Surety Company has an interest in a possible surplus over and above the amounts as hereinabove stipulated, the Messrs. "A" and "B" are also to agree that no settlement of any claim shall be made without first obtaining the assent of the Surety Company.

FURTHER RESOLVED, That the officers of the Company be authorized to execute any papers that may be found necessary to carry out the provisions of this resolution. This contract shall be binding on the successors and assigns and the personal representatives of the parties hereto, provided that the Messrs. "A" and "B" notify the Company in writing of any assignment of their interests as herein created, and provided that in such event, they file with the Company a recital of the privileges reserved to them hereunder, which are to be extended to such assignees.

FURTHER RESOLVED, That this resolution be submitted to the Insur-

ance Commissioner for, who is thoroughly familiar with this situation and with the necessity for this action, and that, before it becomes effective, his approval thereof be obtained.

No. 697

Resolution of directors modifying terms of resolution authorizing sale by surety company of accounts receivable and other claims.

WHEREAS, under and by virtue of a resolution of the Executive Committee passed, 19.., as ratified and approved by the Insurance Commissioner of, certain so-called non-admitted assets of the Company were sold to Messrs. "A" and "B" upon the terms and conditions set forth in said resolution, and

WHEREAS, under the terms of said sale as aforesaid, there is still due from said purchasers a deferred payment of (\$.....) Dollars, and said purchasers are willing to consent to a modification of said contract of sale as herein set forth, provided that they are released from the payment of said deferred payment, and

WHEREAS, it is believed to be greatly to the advantage of this Company to modify said contract, as herein provided,

NOW, THEREFORE, BE IT RESOLVED, That the said Messrs. "A" and "B," their personal representatives and assigns, be and they hereby are relieved from the payment of said deferred sum of (\$.....) Dollars, with interest. The conditions of said release, and the modifications of said contract to which Messrs. "A" and "B" and their assigns have assented, and which assent is to be evidenced by such appropriate instruments as counsel of the Company may require, are as follows:

First. The management and control of said assets shall rest with this Company exclusively, for the purpose of collecting the same and making payments as provided herein and in said original resolution.

Second. After the payment, out of the first proceeds from the collections on all said non-admitted assets, of any balance of the (\$.....) Dollars paid therefor, with interest, the Company shall, out of all proceeds from said assets realized over and above such balance on (\$.....) Dollars, with interest, pay one third to the said Messrs. "A" and "B," or their personal representatives and assigns, and two thirds to the Company. But such one third paid to the Messrs. "A" and "B" shall not exceed Twenty-Five Thousand (\$25,000) Dollars. All proceeds over and above that amount shall also be paid to the Company.

No. 698

Resolution of stockholders authorizing sale of stock representing half interest in another company.

RESOLVED, That this Corporation sell, transfer, and deliver to "A" Company and that the stockholders of this Corporation consent to the sale, transfer, and delivery to "A" Company of shares, of the par value of \$..... each, of the capital stock of "X" Company, and shares, of the par value of \$.... each, of the capital stock of "Y" Company (said shares representing this Corporation's one-half interest in "X" Company and "Y" Company) upon the terms and conditions set forth in the agreement dated , 19.., between this Corporation and "A" Company, a copy of which has been submitted to this meeting, and that the execution of such agreement be, and it hereby is, in all respects, authorized, ratified, and approved.

RESOLVED FURTHER, That the officers of this Corporation be, and they hereby are, authorized and directed to take all action deemed by them necessary or proper to consummate the sale of said shares and to effect the purposes of the foregoing resolutions.

No. 699

Resolution of directors authorizing sale of treasury stock at auction.

WHEREAS, in the judgment of this Board, it is necessary and desirable for this Company to raise money for additional working capital and to meet the costs of improving the corporation's property, and to that end to sell shares of common stock of the Company now held in the treasury,

THEREFORE, BE IT RESOLVED, That this Company offer to sell at public auction, as soon as possible, (....) shares of said common stock, giving to the general public the opportunity of making bids for all or any part of such stock; and

RESOLVED FURTHER, That all persons desiring to make bids for such stock be required to deliver the same in writing to Bank, Transfer Agent of this Company, specifying the number of shares desired and the price offered, and to deposit therewith (%) per cent of such price in lawful money of the United States, and that this company reserves the right to accept or to reject all or any of such bids; and

RESOLVED FURTHER, That the Secretary of this Company be, and he hereby is, authorized and directed to prepare a form of circular containing the terms and conditions of said offer, and a form of bid, and to submit the same for approval at the next meeting of this Board.

No. 700

Resolution of stockholders authorizing sale of property to new corporation to be organized, and directing officers to form the corporation.

RESOLVED, That this Corporation sell and convey the steamboats "X," "Y," and "Z" and the barge "S," subject to the deeds of trust which now stand as security for the bonds issued thereunder, affecting the said vessels, to a corporation or corporations to be organized under the direction of the directors and officers of this Corporation, and that this Corporation accept as full consideration for such sale and conveyance the capital stock of such corporation or corporations so formed; and

FURTHER RESOLVED, That the Board of Directors and officers of this Corporation be and they are hereby authorized and directed to cause to be formed a corporation or corporations, and, as in their judgment may seem proper, to purchase any or all of the above-named vessels from this corporation, and to pay therefor with the capital stock of the corporation or corporations so formed as full consideration for the vessels sold by this Corporation to the new corporation or corporations; and

FURTHER RESOLVED, That the Board of Directors of this Corporation be and it is hereby authorized and directed to execute and deliver any instrument or instruments and to do all things that may effectuate the sale and conveyance hereby authorized, and the payment of the consideration therefor, and the organization of a new corporation or new corporations for the purpose hereinbefore mentioned, in accordance with these resolutions, and they are hereby authorized to carry out these resolutions in such manner as to them may seem to the best interests of this Corporation, and to do all things necessary or incident to the carrying out of these resolutions.

No. 701

Resolution of directors approving officers' action in executing and delivering deed of property.

RESOLVED, That the action of, Vice President, and, Secretary, in executing and delivering a deed to, dated, 19..., conveying for a consideration of (\$.....) Dollars, all the following property (*insert complete description of the property*), be and it hereby is in all respects approved, ratified, confirmed, and accepted as the action of the Company and of this Board of Directors.

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RESOLUTIONS—PURCHASE AND SALE OF ALL ASSETS

No. 702

Resolution authorizing officers to acquire outstanding capital stock of another corporation.

The Chairman stated that the purpose of the meeting was to consider and discuss methods by which Company might acquire the outstanding capital stock of the Corporation.

Upon motion, duly seconded and carried, it was

RESOLVED, That the officers of the Company be and they hereby are authorized, by and with the advice of counsel, to take all steps necessary or in their opinion desirable to acquire the capital stock of Corporation, on a basis whereby two shares of the stock of Corporation will be received in exchange for one share of the common stock of Company.

No. 703

Resolution of stockholders authorizing purchase of assets and capital stock of another corporation for stock.

WHEREAS, Company has proposed, in writing, to sell, assign, transfer, convey, and set over all its rights to do business, its goodwill, stock in trade, office fixtures, assets, leases, licenses, privileges, benefits, advantages, and property, whether real, personal, or mixed; and Messrs. "A," "B," and "C," stockholders of the Company, have proposed, in writing, to sell, transfer, assign, and set over to this Corporation the stock of the Company, consisting of (.....) shares of common stock, all of which are owned and controlled by them,

NOW, THEREFORE, in consideration of the amount specified in said proposal, which amount is of the fair value of the stocks, assets, etc., of the Company, be it

RESOLVED, That this Corporation purchase from Messrs. "A," "B," and "C" the (.....) shares of common stock of the Company, and purchase from the Company all the goodwill, right to do business, stock in trade, assets, leases, licenses, privileges, benefits, advantages, and property, of any kind or character whatsoever, wheresoever located, for the sum of (\$.....) Dollars, to be paid for by issuing and delivering (.....) shares of the common stock of this Corporation as follows: "A," (.....) shares; "B," (.....) shares; and "C," (.....) shares; and be it

RESOLVED FURTHER, That these stocks are not to be delivered, and the transfer is not to be consummated, until Messrs. "A," "B," and "C" execute to this Corporation their joint and several bonds, in and by virtue of the terms of which they each promise and agree to hold this Corporation, or its successor or successors, harmless from any debts, liabilities, obligations, liens, or incumbrances, of any kind or character, that may be outstanding against the Company or anyone claiming under or through it, and by which they each promise and agree to bind their heirs, executors, and assigns; and be it

RESOLVED FURTHER, That the President be and he hereby is authorized and directed to execute such certificates of stock, and the Secretary is hereby authorized and directed to attest the same and to attach the official seal of the Corporation thereto.

No. 704

Resolution of directors authorizing purchase of copartnership for stock and other consideration.

WHEREAS, this Corporation was incorporated under the laws of the State of, for the purposes set forth in the Certificate of Incorporation, and

WHEREAS, it was the intention of the incorporators, and it was one of the purposes set forth in the Certificate of Incorporation, among other things, to purchase, take over, and carry on the business now being carried on by "A" and "B" as copartners under the firm name of "A" & "B" Co., at Street, in the City of, State of, and

WHEREAS, the purchase of said business and the assets thereof are authorized by the Certificate of Incorporation of this Corporation, and is necessary for the use and lawful purpose of said Corporation, and

WHEREAS, the said "A" and "B," copartners as aforesaid, have made a proposition, in writing, for the sale and transfer on their part, and the purchase on the part of this Corporation, of the said business as a going concern, including all the assets of said business, whether tangible or intangible, except certain accounts, the said transfer to be made on the .. day of, 19.., upon certain terms and conditions as more fully appear in the aforesaid proposal and offer which has just been read and spread upon these minutes, and

WHEREAS, it appears, after due consideration and investigation, that it is necessary and advantageous for the best interests of this Corporation that it acquire and purchase the said business and the assets thereof, and that it take over and carry on the said business, and

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WHEREAS, in the judgment of this Board of Directors, after careful examination and fair appraisal, this Board is unanimously convinced that the said property is necessary and advantageous for the business of this Corporation, and the fair value thereof is the consideration mentioned in the said proposition, computing the stock of this Corporation at par;

NOW, THEREFORE, BE IT RESOLVED, subject to ratification by the stockholders of this Corporation,

That this Board accept the aforesaid proposal and offer of "A" and "B," and purchase from them, the said business now conducted at Street, in said City of, State of, under the firm name of "A" & "B" Co., specified in said proposal, and pay for the same the sum of (\$) Dollars, to be paid over as follows: (\$) Dollars by the issuance of (.) shares of fully paid, nonassessable common capital stock of this Corporation at a par value of (\$) Dollars per share; (\$) Dollars by the issuance of (.) shares of fully paid, nonassessable preferred capital stock of this Corporation at a par value of (\$) Dollars per share; three notes of this Corporation, bearing interest at (.%) per cent, for the sum of (\$) Dollars each, one of said notes to run for the term of one year from date, the second note to run for the term of two years from date, and the third to run for the term of three years from date, all payable to "B"; and three notes of this Corporation, bearing interest at (.%) per cent, for the sum of (\$) Dollars each, one of said notes to run for the term of one year from date, the second note to run for the term of two years from date, and the third to run for the term of three years from date, payable to "A."

That this Corporation assume all obligations of said copartnership existing, 19 . . ., not exceeding the sum of (\$) Dollars.

That all of said notes bear interest from, 19 . . .

That the said stock and the said notes be issued and delivered on, 19 . . ., to the said "A" and "B," copartners under the firm name of "A" & "B" Co., as set forth in said offer, upon the receipt by said Corporation of said bill of sale, the transfer to take effect on the . . day of, 19 . . .

That the President and the Treasurer of this Corporation, or either of them, are hereby authorized, empowered, and directed, upon the execution and delivery of the proper legal instrument or instruments necessary to convey and transfer said property as set forth in said

proposition and offer, to issue and deliver, in accordance with this resolution, the stock and notes therein specified.

That the President and the Treasurer are hereby authorized and directed to deliver said certificates of stock and said notes at once to, Esq., in escrow, to be delivered by him to said "A" and "B" on, 19..., upon receipt by them of satisfactory proof that said bill of sale from said copartnership has likewise been delivered to said, in escrow, to be delivered by him to the said Corporation on, 19..., and provided that the said acknowledges in writing that he holds said certificates of stock, said notes, and said bill of sale to be delivered by him as herein provided on , 19...

No. 705

Resolution of stockholders ratifying agreement to purchase all the capital stock of another corporation.

WHEREAS, the Board of Directors, having considered it for the best interests of this Corporation to acquire the stock of the Company, entered into an agreement for the purchase of all of the capital stock of the Company, be it

RESOLVED, That the agreement heretofore made by this Corporation, providing for the purchase of stock of the Company at a price equal to the par value thereof, payable in capital stock of this Corporation, at a valuation or rate of (\$.....) Dollars per share, be and it hereby is ratified and approved, and that the officers and Board of Directors of this Corporation are hereby authorized to carry said agreement into effect by issuing and delivering new stock of this Corporation, authorized at this meeting, to holders of stock of the Company, in exchange for said stock, on the terms and conditions of the said agreement.

No. 706

Resolution of directors rescinding a previous resolution authorizing the purchase of all the assets of a corporation.

WHEREAS, counsel of this Corporation has advised the Board of Directors that it is inadvisable, from a legal standpoint, for this Corporation to purchase, own, and hold all the property and assets of the Co., be it

RESOLVED, That the resolution adopted by this Board at its meeting held on the .. day of, 19..., authorizing the purchase from the Co. of all its property and other assets, be and it hereby is rescinded.

No. 707

Resolution of stockholders giving directors full authority to find a purchaser for the corporation's assets.

RESOLVED, That full, ample, and exclusive authority be and the same hereby is conferred upon and vested in the Board of Directors of this Company, to sell, lease, or dispose of all the real estate, machinery, fixtures, and other assets of the Company, in whole or in part or parcels, for such price or prices and upon such terms as it may in its discretion and judgment deem to be most advantageous for the stockholders, and for these purposes to insert advertisements and to engage and authorize one or more real estate or other agents to effect such sales, hereby ratifying and approving all that said Board of Directors may do in the premises, and making it unnecessary to obtain further confirmation of the stockholders.

No. 708

Resolution of stockholders authorizing directors to sell property of corporation.

RESOLVED, That the Board of Directors be and it hereby is authorized to sell or exchange all or any part of this Corporation's property and assets, including its goodwill and its corporate franchises, upon such terms and conditions and for such consideration, which may be in whole or in part shares of stock in any other corporation or corporations, as the Board of Directors shall deem expedient and for the best interests of the Corporation, and more especially, but without limitation of the foregoing, to sell or exchange its assets, including its goodwill and its corporate franchises, to "X" Corporation.

No. 709

Excerpt of minutes of stockholders' meeting at which directors are instructed to sell all of corporation's assets at public sale on terms indicated; amendment of resolution fixing sale price, and protest of objecting stockholders.

Mr. "A" offered the following resolution, which Mr. "C" seconded:

RESOLVED, That the Board of Directors be and it hereby is instructed to proceed at once to sell at public sale the mills, premises, and entire property and plant of this Corporation, located at Street, in the City of, on the following terms:

(Here insert such limitations as the stockholders wish to place upon the terms.)

Mr. "X" offered the following amendment to the resolution:

Provided, That no bids for less than 75 cents on the dollar of stock be considered.

Mr. "A" refused to accept the amendment, and thereupon Mr. "X" moved and Mr. "Y" seconded the amendment.

Mr. "B" moved to amend the amendment by striking out the words "75 cents on the dollar of stock," and inserting the amount "\$25,000." Mr. "C" seconded the amendment to the amendment. The amended amendment was carried, Messrs. "X" and "Y" voting "no."

The resolution, as amended, was carried by the following vote:

<i>Ayes</i>	<i>Noes</i>
"A" shares	"X" shares
"B" shares	"Y" shares
"C" shares	

The following protest of stockholders was, at the request of Messrs. "X" and "Y," noted in the minutes:

The undersigned stockholders consider inadequate the minimum price of \$25,000, fixed in the resolution offered by Mr. "A," as amended by Mr. "B," and adopted by a vote representing (.....) shares of stock, at a meeting of the stockholders held on the .. day of, 19.., for the sale of the mills, premises, and entire property and plant of this Corporation at public sale on the .. day of, 19.., and hereby protest against the said resolution.

....."X".....
 "Y".....

No. 710

Resolution of stockholders authorizing directors to sell at public or private sale, all assets of a corporation operating at a loss.

WHEREAS, the mills and plant owned by this Corporation and located at Street, in the City of, have remained idle since, 19.., because this Corporation has lacked the working capital necessary to operate the said mills and plant, and

WHEREAS, the said mills and plant have been depreciating in value because of idleness and will continue to depreciate if allowed to remain idle, and

WHEREAS, the officers and directors of this Corporation report that they are unable to raise the working capital necessary to put the mills and plant into operation, and are also unable to make any arrangement for operation by others under a contract that would net this Corporation a fair return upon its investment, be it

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RESOLVED, That the Board of Directors of this Corporation be and it hereby is directed and instructed to proceed at once to sell the mills, premises, and entire property and plant of this Corporation, at either public or private sale, upon the best terms obtainable, and that it is hereby authorized to make, execute, and deliver any and all necessary and proper deeds, contracts, and other instruments in order to consummate such sale; and

RESOLVED FURTHER, That the Board of Directors be and it hereby is directed to report any action taken in this matter to the stockholders, at an adjourned meeting to be held on the .. day of .., 19.., and that no actual sale be made previous to that date.

No. 711

Resolution of stockholders authorizing officers to offer to sell corporate assets for stock of another corporation, offer to be good for limited period.

WHEREAS, negotiations have been carried on during a number of weeks prior hereto, between the officers of the "A" Company and the officers of the "X" Company, a corporation organized under the laws of the State of .., relative to the purchase and sale of all the assets, business, goodwill, etc., belonging to the "A" Company, and

WHEREAS, an audit was made by .., certified public accountants, of the books, records, papers, documents, stock, material, and finished product of the "A" Company as of .., 19.., which said audit shows that the total assets of the "A" Company on said date had a value of .. (\$.....) Dollars, and

WHEREAS, the stockholders of the "A" Company have carefully considered the value of said assets, and are satisfied that, on said .., 19.., they were reasonably worth the sum of .. (\$.....) Dollars, and

WHEREAS, the stockholders of the "A" Company have given careful thought and much consideration to the question of the advisability of selling and disposing of the assets of the "A" Company, and have come to the conclusion that it is for the best interests of the "A" Company that its assets and business should be merged, joined, and united with the business and assets of the said "X" Company, and that the consolidated business be conducted under one management;

NOW, THEREFORE, BE IT RESOLVED, That the "A" Company offer to sell all its assets of every kind, nature, and description, tangible and intangible, and wherever situated, together with its goodwill, patent rights, trade-marks, etc., to the said "X" Company of .., for the following-described securities (*insert securities by name and amount*); and

That the "A" Company shall pay all its debts, liabilities, and obligations as they existed on, 19.., and that said "X" Company shall assume and agree to pay all debts, obligations, and liabilities incurred in connection with the operation of the "A" Company, on and after, 19..; and

That the "A" Company shall assign, transfer, and set over unto the said "X" Company all its contracts of every kind and nature, as they existed on said, 19.., or at the time of transfer, which it can legally assign, and the said "X" Company shall assume and agree to carry out and perform the same, and all obligations thereof agreed to be performed by said "A" Company; and

That the said "X" Company shall be entitled to receive and retain all profits or gains resulting from the operation of the business carried on by the said "A" Company from the close of business on, 19.., up to the date of this transfer, and said "X" Company shall, on or prior to (.....) days from the date of the transfer of said assets, pay to the said "A" Company (.....%) per cent upon the sum of (\$.....) Dollars from, 19.., up to the date of the making of said payment; and

That the said assets shall be conveyed and transferred by good and sufficient conveyances; and

RESOLVED FURTHER, That the officers of the "A" Company be and they hereby are authorized, instructed, and directed to put this offer into proper form, to deliver the said offer to the said "X" Company, and, upon acceptance thereof, to do every act reasonable, necessary, or proper in the premises to bring about, fully perform, and carry out the terms and conditions of said agreement and transfer; and

RESOLVED FURTHER, That this offer shall be good only for the period of (.....) days from the .. day of, 19.., and if not accepted within that time, shall be void and of no effect.

No. 712

Excerpt of minutes of meeting of stockholders authorizing directors to offer for sale to new company assets of company and license to manufacture under patents owned by company.

The President stated that the object of the meeting was to consider the granting of the sole and exclusive license to manufacture and sell safety razors and razor blades under the patents owned by this Corporation, to Company, a new company, which had been formed with an authorized capitalization of \$500,000, of which \$400,000 is common stock and \$100,000 preferred stock, the proposed license fee to be \$1 for the razor frame and 1¢ for each razor blade

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given in addition to those blades contained in each razor set. The President further stated that this Corporation was to receive, in consideration of the execution of the license agreement and the transfer to the new company of this Corporation's plant and materials on hand, the total issue of common stock, and the new company was also to assume all outstanding obligations of this Corporation; and that, of the common stock so received by this Corporation in consideration of the transfer of its plant and other assets, and the signing of a license agreement, \$50,000 par value is to be returned to the new company as treasury stock, to be used by the new company as a bonus in the sale of its preferred stock.

After full discussion, on motion duly made and seconded, it was unanimously

RESOLVED, That the President and Secretary of this Corporation be and they hereby are authorized to formulate an offer to the Company to grant such Company a sole and exclusive license to manufacture and sell safety razors and razor blades, under the patents owned and controlled by this Corporation, and to transfer to such Company all its machinery, tools, dies, and stock on hand used by it in connection with the manufacture of safety razors and razor blades, for the consideration and in accordance with the terms stated by the President of this Corporation, the form of such offer to be approved by the Board of Directors; and

RESOLVED FURTHER, That, in the event that such offer be accepted, the President and the Secretary of this Corporation be and they hereby are authorized to execute and deliver to the Company a license agreement, in a form to be approved by the Board of Directors of this Corporation.

No. 713

Resolution of directors accepting offer to purchase all assets of corporation, subject to stockholders' approval, and calling stockholders' meeting to consider execution of agreement for sale.

WHEREAS, an offer has been made to this Corporation by the Company, to purchase the entire property and assets of this Corporation for the consideration and upon the terms and conditions set forth in the following proposed agreement (*insert copy of agreement*); and

WHEREAS, in the opinion of this Board of Directors, it is for the best interests of this Company that its entire property and assets be sold to the Corporation for the consideration and upon the terms and conditions named in the proposed agreement above; be it

RESOLVED, That the offer of said Corporation be and it hereby is accepted, subject to the approval of the stockholders of this Company; and

RESOLVED FURTHER, That the President and the Secretary be and they hereby are authorized and directed to make, execute, and deliver the aforementioned agreement upon the adoption of the same by the stockholders; and

RESOLVED FURTHER, That a meeting of the stockholders of this Company be called for the purpose of taking into consideration the execution of said proposed agreement, to be held at Street, City,, on the .. day of, 19.., at o'clock in thenoon, and the Secretary is directed to give notice of the meeting to all the stockholders of the Company, as required by law and the By-laws of this Company.

No. 714

Resolution of directors authorizing officers to execute agreement for sale of assets upon consent of stockholders given at meeting.

WHEREAS, on the .. day of, 19.., the stockholders of this Corporation, by a vote of of the stockholders, passed the following resolution:

WHEREAS, the Company, a corporation duly organized under the laws of the State of, has proposed to purchase and take over all of the property, both real and personal, assets, business, and goodwill of this Corporation, and, in consideration therefor, to issue and deliver to the stockholders of this Corporation its total capital stock, amounting to (\$.....) Dollars, and

WHEREAS, it is deemed advisable to accept said proposition;

THEREFORE, BE IT RESOLVED, That the directors of this Corporation be and they hereby are authorized and directed to make the following agreement (*insert copy of agreement*);

AND BE IT FURTHER RESOLVED, That said directors be and they hereby are authorized and directed to do and perform all necessary acts and to make, execute, and deliver all necessary papers to carry said agreement into full force and effect.

THEREFORE, BE IT RESOLVED, That the President and Secretary of this Corporation be and they hereby are authorized and directed to make, execute, and deliver the aforementioned agreement, to do and perform all necessary acts, and to make, execute, and deliver the necessary papers to carry the same into full force and effect.

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No. 715

Resolution of directors of subsidiary company approving plan of liquidation of subsidiary and transfer of assets to parent company, to be submitted to stockholders.

RESOLVED, That the "Plan of Liquidation, dated, 19.., of the "A" Company, the "B" Company, and the "C" Company" be and the same hereby is approved.

FURTHER RESOLVED, That the said Plan be submitted to the stockholders of the "A" Company at a special meeting to be held on, 19.., Street, City, at o'clock P.M.

FURTHER RESOLVED, That the "A" Company does hereby transfer, assign, and convey all of its property, real and personal, of every sort and description and wherever located, including specifically, but without being limited to, properties located in the States of,,,, and, to the "AH" Company, Inc., and that the officers of this Corporation are hereby authorized and instructed to take all such action, and the President, or a Vice President, and the Secretary, or an Assistant Secretary, are hereby authorized and instructed to execute and deliver all such deeds, assignments, bills of sale, and other instruments as may be necessary or advisable to effect the foregoing transfer, assignment, and conveyance of its property.

FURTHER RESOLVED, That this Corporation discontinue business as a corporation and surrender its charter and corporate franchises to the State of, and that this resolution be submitted to the stockholders of this Corporation at their special meeting to be held on, 19...

No. 716

Resolution of stockholders accepting offer to purchase corporate property.

WHEREAS, an offer was received from, at the public sale held on the .. day of, 19.., to purchase the mills, premises, and entire property and plant of this Corporation, located at Street, in the City of, for the sum of (\$.....) Dollars, be it

RESOLVED, That the offer of said be and it hereby is accepted, and the President and the Secretary be and they hereby are authorized and directed to execute a proper deed to consummate the sale, and to deliver the said property to the said,

upon receipt of payment therefor according to the terms of the sale—to wit, (\$.....) Dollars in cash, and a note for the balance of (\$.....) Dollars, payable six months from the date of the execution and delivery of a deed to the said property, with interest at (....%) per cent, secured by collateral satisfactory to the Board of Directors.

No. 717

Excerpt of minutes of meeting of stockholders consenting to sale of entire corporate property and approving agreement of sale.

The Secretary presented and read a proposed form of agreement for the sale of the entire property and assets of this Company to Corporation. Upon motion duly made and seconded, the following resolution was adopted by the affirmative vote of all the stockholders:

WHEREAS, Corporation has offered to purchase the entire property and assets of this Company, and to pay in consideration therefor the sum of (\$.....) Dollars, upon the terms and conditions set forth in the proposed form of agreement submitted to this meeting, and

WHEREAS, the Board of Directors of this Company, at a meeting held on the .. day of, 19.., by the affirmative vote of of the directors, authorized the execution of said agreement, subject to the approval of the stockholders; be it

RESOLVED, That the stockholders of this Company consent, and they do hereby consent, to the sale of the entire property and assets of this Company to Corporation, in consideration of the payment of the sum of (\$.....) Dollars, upon the terms and conditions set forth in said proposed form of agreement, which form is hereby adopted and approved; and

RESOLVED FURTHER, That the President and the Secretary be and they hereby are instructed and directed to make, execute, and deliver said agreement, to do and perform all necessary acts, and to make, execute, and deliver all necessary papers to carry the sale herein authorized into full force and effect.

No. 718

Resolution of stockholders authorizing officers to accept offer to purchase assets of an unsuccessful corporation for stock.

WHEREAS, the officers of the "A" Mining Company have received a proposition as follows:

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"Pursuant to a resolution duly adopted, the "B" Company, a
..... corporation, does hereby offer (.....) shares of
the capital stock of the "B" Company as the purchase price for the
"A" Mining Claim, U. S. Lot No., together with all other real
and personal property owned by said "A" Mining Company.

The "B" Company
By, President
....., Secretary"

AND WHEREAS, the "A" Mining Company is not a financial success,
and is not a going concern, and has been unable to find any ore or
valuable minerals on its ground, and, in order to conduct its business,
it has been and will in the future be necessary to levy and collect
assessments from its stockholders,

AND WHEREAS, the stockholders are desirous of discontinuing opera-
tion of the Company's property,

NOW, THEREFORE, BE IT RESOLVED, That the President and the Sec-
retary be and they hereby are authorized to accept (.....)
shares of the capital stock of the "B" Company, a corpora-
tion, as the full purchase price of the "A" Mining Claim, U. S. Lot No.
....., together with all other real and personal property owned by
this Company, and that the President and the Secretary of this Com-
pany be and they hereby are authorized and directed to make, execute,
and deliver, for and in behalf of this Company, deeds of conveyance of
all the real and personal property belonging to this Company, and to
deliver the same to the "B" Company, upon receiving for the use and
benefit of this Company (.....) shares of the capital stock
of the said "B" Company; and

FURTHER RESOLVED, That the Board of Directors of the "A" Mining
Company be and it hereby is requested, after it has received for the
use and benefit of this Company the said (.....) shares of
the capital stock of said "B" Company, from the sale of real and per-
sonal property of this Company, to declare a dividend of all of said
capital stock so received, and to pay the same to the stockholders of
this Company pro rata, according to their holdings as shown by the
books of this Company, upon delivery by said stockholders to the
Secretary of this Company, for cancellation, of all their certificates of
stock in the "A" Mining Company, properly indorsed.

No. 719

**Resolution of stockholders accepting offer to purchase assets for
consideration other than stock.**

WHEREAS, "A" and "B" have offered to purchase the entire mill plant

of this Corporation, located at Street, City, and the sash and door plant located at Street, City, including therein all land, improvements thereon, fixtures, furniture, lumber, and all real and personal property of every kind, including all unassigned accounts receivable and choses in action, but not including the books of entry and accounts, which books, however, are to be open at all times for their use and inspection, with authority to take copies, and

WHEREAS, in consideration of this purchase, said "A" and "B" have offered to pay as follows:

1. To transfer by indorsement log paper issued by Company, falling due within the next ninety days, in the amount of (\$.....) Dollars;

2. To execute their note to the Corporation in the sum of (\$.....) Dollars, payable on or before (....) months from this date, with interest at the rate of (....%) per cent per annum;

3. To execute a note in the sum of (\$.....) Dollars, payable on or before (....) years from this date, with interest at the rate of (....%) per cent per annum, payable semi-annually, secured by a mortgage on the same property that is now covered by mortgage heretofore made by to Trustee, making a total consideration to be paid to the Corporation of (\$.....) Dollars; and said "A" and "B" have further agreed to assume and pay the present outstanding payroll of the Corporation, amounting to approximately (\$.....) Dollars, and any other immediate expenses attached to the above plants, to assume and perform all obligations under the contract to furnish power between the Corporation and the Company, and to assume and pay any and all conditional sales contracts upon all machinery, including electrical machinery; and

WHEREAS, the Board of Directors considers that a fair valuable consideration has been offered for said property, and that it is for the best interests of the Corporation, its directors, and stockholders to accept said offer,

NOW, THEREFORE, BE IT RESOLVED, That said offer be and the same hereby is accepted, and that the President and the Secretary of the Corporation be and they hereby are authorized and directed to cause to be prepared and executed the necessary instruments conveying title to all the above-mentioned property, to "A" and "B" or to their order, and to deliver the same upon receiving said consideration; and be it

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RESOLVED FURTHER, That as and when said consideration is converted into cash, the President and the Secretary be and they hereby are authorized and directed to pay the creditors of the Corporation pro rata, after the payment of all secured and preferred claims. Pending the preparation of transfer papers, the President is hereby authorized to permit "A" and "B" to have joint equal possession of each of said mill plants, all operations thereof to be at their expense; provided, however, that, if the title to said real estate is in fact not marketable, "A" and "B" shall surrender, to the Corporation, the joint equal possession before referred to, on or before , 19...

No. 720

Resolution of stockholders approving agreement for sale of all assets, including goodwill and right to use corporate name, for cash and stock; authorizing dissolution of selling company and distribution of consideration received among stockholders.

RESOLVED, That the shareholders of this Company hereby approve the execution and delivery by this Company of the agreement dated , 19..., between this Company and Corporation, a corporation, for the assignment, transfer, and conveyance by this Company of all of its property and assets, including its goodwill, to said Corporation, or its nominee or nominees, upon the terms and conditions set forth in said agreement, a copy of which has been submitted to this meeting; and that the shareholders of this Company hereby authorize the assignment, transfer, and conveyance of all of its said property and assets, including the goodwill of this Company and the right to the use of its corporate name, to said Corporation, or its nominee or nominees, upon the terms and conditions and for the considerations set forth in said agreement; and

RESOLVED FURTHER, That the minutes of the special meeting of the Board of Directors of this Company held on , 19..., which have been read to this meeting, be and they hereby are in all respects approved; that the resolutions therein set forth be and they hereby are severally authorized, adopted, approved, ratified, and confirmed; and that all action therein or thereby taken or authorized by said Board of Directors and all action of every nature that has been or shall hereafter at any time be taken by any officer or officers of this Company in pursuance of said resolutions, action, or authorization of said Board of Directors be and it hereby is in all respects authorized, approved, ratified, and confirmed; and

RESOLVED FURTHER, That the Board of Directors of this Company

be and it hereby is authorized to take such further action and to authorize the execution and delivery of such further instruments in the name and in behalf of this Company and under its corporate seal or otherwise, and to do or authorize the doing of all such further acts and things as said Board of Directors shall deem necessary or proper in order to effect the assignment, transfer, and conveyance by this Company of all of its property and assets, including its goodwill and the right to the use of its corporate name, to said Corporation, or its nominee or nominees, in accordance with the terms and provisions of said agreement dated , 19.., and in order that this Company may perform all its obligations thereunder; and

RESOLVED FURTHER, That, in accordance with the agreement dated , 19.., between this Company and Corporation, a corporation, upon the assignment, transfer, and conveyance by this Company of all of its property and assets, including its goodwill and the right to the use of its corporate name, to said Corporation, or its nominee or nominees, this Company forthwith proceed to liquidate its affairs and to distribute among its shareholders the cash and shares of common stock of said Corporation which shall be received by this Company in exchange for all of its property and assets as aforesaid; and

RESOLVED FURTHER, That the holders of record of the common shares of this Company, the only class of shares of this Company which entitles the holders thereof to vote, declare that it is desirable to, and the Company does hereby elect to, wind up and dissolve as soon as possible after the assignment, transfer, and conveyance by this Company of all of its property and assets, including its goodwill and the right to the use of its corporate name, to said Corporation, or its nominee or nominees, shall have been accomplished as aforesaid; and

RESOLVED FURTHER, That said assignment, transfer, and conveyance having been accomplished as aforesaid, the President, or a Vice President, and the Secretary, or an Assistant Secretary, of this Company be and they hereby are authorized and directed to execute and file in the office of the Secretary of State of the State of a certificate, verified by their oath as required by law, and to do or cause to be done all such other acts and things as shall be necessary or proper in order that the dissolution of this Company may be forthwith accomplished; and

RESOLVED FURTHER, That said assignment, transfer, and conveyance having been accomplished as aforesaid and the certificate for the dissolution of this Company having been made, verified, and filed as re-

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quired by law, the Board of Directors of this Company be and it hereby is authorized and directed to divide and distribute, or to cause to be divided and distributed, among the shareholders of this Company, in such manner as said Board shall deem expedient, the cash and shares of the common stock of said Corporation which shall have been received by this Company in exchange for all of its property and assets as aforesaid, all in accordance with the provisions of the Articles of Incorporation of this Company and of said agreement dated, 19.., to the end that this Company shall cease to do business and its affairs shall be liquidated forthwith upon the consummation of the transaction covered by said agreement.

No. 721

Resolution of stockholders of subsidiary company, approving plan of liquidation, and transferring assets to parent company.

WHEREAS, The "AH" Company, Inc., by action of its directors and stockholders, has duly adopted the document presented to this meeting designated as "Plan of Liquidation, dated, 19.., of the "A" Company, the "B" Company, and the "C" Company," and

WHEREAS, the said Plan has been approved by the Board of Directors of this Company and has been submitted to the stockholders of this Company for action at this meeting, and

WHEREAS, by the terms of the said Plan, it shall be considered as adopted by this Company upon adoption by its stockholders of resolutions authorizing distribution of all of the assets of this Company in complete cancellation of all of its stock, and

WHEREAS, upon such adoption by the stockholders of this Company, the said Plan will become a binding agreement between this Company and the "AH" Company, Inc., be it

RESOLVED, That this Company distribute all of its assets in complete liquidation of all of its stock, upon the terms and conditions and in the manner specified in the said Plan, and that the adoption of this resolution shall effect and evidence the adoption of the said Plan by this Company; and

FURTHER RESOLVED, That this Company does hereby transfer, assign, and convey all of its property, real and personal, of every sort and description and wherever located, including specifically, but without being limited to, properties located in the States of,,,, and, to the "AH" Company, Inc., and that the officers of this Company are

hereby authorized and instructed to take all such action, and the President, or a Vice President, and the Secretary, or an Assistant Secretary, are hereby authorized and instructed to execute and deliver all such deeds, assignments, bills of sale, and other instruments as may be necessary or advisable to effect the foregoing transfer, assignment, and conveyance of its property; and

FURTHER RESOLVED, That this Company, the "A" Company, a corporation created and existing under the laws of the State of, do discontinue business as a corporation and surrender to the State of its charter and corporate franchises; and

FURTHER RESOLVED, That the President, or a Vice President, of this Company shall certify a copy of the foregoing resolution, under his hand and the seal of this Company, to the Secretary of State of the State of, and shall cause notice of the adoption thereof to be published once a week for at least two (2) successive weeks in a newspaper published or of general circulation in the County of, being the county in which the principal office of this Company is located.

No. 722

Resolution of directors (or stockholders) authorizing execution of bill of sale of all assets by officers.

RESOLVED, That the President and Secretary of this Company be and they hereby are authorized to execute and deliver to the
, Inc., a Bill of Sale granting, conveying, transferring, and assigning to the said, Inc., its successors and assigns, all its assets and property of every kind and character whatsoever, including (without limitation of the foregoing) fixtures, furniture, accounts and bills receivable, shares of stock, securities, cash in bank, moneys, patents, contracts, orders, trade-marks, and other properties and assets of every kind, whether or not herein specified, belonging to the Company and/or pertinent to the business conducted by it and shown on its books and records as of, 19...; and also said business as a going concern and the goodwill thereof, together with the right to the exclusive use of the name the
 Company; provided, however, that in said instrument, the, Inc., shall agree to take over and assume all the Company's outstanding contracts, to accept the foregoing assets, property, business, and goodwill subject to all the debts and liabilities of the Company as of, 19..., including (but not by way of limitation) the obligations of the Company, to assume and agree to pay and discharge said debts and liabilities, and to perform the

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covenants agreed to be performed by the Com-
pany under the mortgage and deed of trust to
Trust Company of, as Trustee, dated,
19.., securing an issue of \$1,000,000 principal amount of First Mort-
gage Leasehold 6½% Sinking Fund Bonds, and under a certain in-
denture of lease from "X," to the Company, dated
....., 19...

BE IT FURTHER RESOLVED, That the Secretary be authorized to at-
tach the corporate seal of the Company to said Bill of Sale.

No. 723

Written consent of more than majority of stockholders to sale of
all assets.

....., 19..
We, the undersigned, constituting more than a majority of the hold-
ers of the voting stock of the "A" Company issued and outstanding,
and the holders of more than a majority of such stock, do hereby au-
thorize by our written consent, and do hereby ratify and approve of,
the sale to "B" Corporation (made this .. day of, 19..) of
all of the properties and assets of this Company in consideration
for: (1) the assumption by the "B" Corporation of the Company's out-
standing bonded indebtedness of Six Hundred Thousand (\$600,000)
Dollars principal amount and all its other indebtedness and liabilities,
and of all duties, obligations, and liabilities of "A" Company under
the latter's deed of trust to Trust Company, dated
....., 19..; (2) One Million One Hundred Thousand (\$1,-
100,000) Dollars par amount of the common stock of the "B" Corpo-
ration; and (3) the opportunity to the stockholders of the Company,
during the period of forty-five (45) days from the date hereof, to pur-
chase at par shares (in amounts proportionate to their respective
holdings of the capital stock of the Company) of the "B" Corpora-
tion's preferred stock of the par value of One (\$1) Dollar per share, all
as is more fully set forth in the offer of "B" Corporation to the "A"
Company, dated, 19.. (a copy whereof, marked Ex-
hibit "A," is hereto attached).

And we do hereby further authorize by our written consent, and
hereby ratify and approve of, the sale (made this .. day of,
19..) of all of the properties and assets of the Company upon the
terms and conditions, which we deem expedient for the best interests
of the Company, set forth in the preambles and resolutions adopted by
the Board of Directors at a meeting held, 19.. (a
copy whereof, marked Exhibit "B," is hereto attached).

<i>Name of Stockholder</i>	<i>Number of Shares</i>
.....
.....
.....
.....
.....

No. 724

Written consent of all stockholders to sale of all assets of corporation.

We, the undersigned, stockholders of the Corporation, of City, a corporation duly organized pursuant to the laws of the State of, and holders of stock therein of the number of shares set opposite our names and amounting in all to three hundred shares, the entire capital stock of said Corporation, hereby agree for value received, and in consideration of the same number of shares and of the same par value of the stock of the Company, Inc., hereby consent to the transfer of all of the property of the Corporation to said Company, Inc., as existing on this date, subject, however, to the agreement of said Company, Inc. to assume and to pay at maturity all the debts and obligations of said Corporation of every name and nature, and consent to the exchange of the stock now held by us in the Corporation for the same par value of stock of the Company, Inc.

<i>Name of Stockholder</i>	<i>Number of Shares</i>
.....
.....
.....
.....

No. 725

Resolution of directors authorizing officers to vote stock owned by the corporation in another company in favor of sale of all the assets of the company.

RESOLVED, That the President, or a Vice President, of this Corporation be and he hereby is duly authorized to vote, in behalf of this Corporation, at any meeting of stockholders of Company, all the shares of stock of said Company owned by this Corporation, in favor of a resolution to consent to the sale by Company of all of its assets to Co., Inc., or to consent in writing thereto.

No. 726

Resolution of directors authorizing distribution of cash received
upon sale of corporate property.

RESOLVED, That the sum of (\$.....) Dollars per share be distributed to the stockholders of record of this Company, upon production to "X" & Co. of the certificate therefor, in order that the amount of said payment may be indorsed thereon.

RESOLVED, That all such payments be made by check marked "on account of liquidation of this Company."

RESOLVED, That "X" & Co. be requested, upon presentation of the certificate for that purpose, to stamp upon each certificate an indorsement showing the amount paid per share and the date of such payment.

RESOLVED, That the President and the Treasurer of this Company be authorized, upon receipt of the remaining payment stipulated in the agreement with the "B" Company and of the other amount due this Company, to make, from time to time, further distribution to the stockholders of this Company in liquidation of its assets, in the same manner as provided in the foregoing resolutions.

RESOLVED, That the Board of Directors does hereby approve of the plan to send to the stockholders of this Company the following letter prepared by the President, announcing the liquidation, together with a letter to "X" & Co., and that it does hereby approve the form of receipt for the certificate:

FORM OF LETTER ANNOUNCING LIQUIDATION

....., 19..

Dear Sir:

The property of the Company has, pursuant to authority given at the stockholders' meeting held 19.., been sold to the "B" Company for (\$.....) Dollars cash. Part of this amount has already been paid, and the balance is secured by bonds deposited with "X" & Co. as Trustee.

The Board of Directors has resolved that out of this sum there shall be distributed to the stockholders of record on the Company's books, in liquidation of the Company's affairs, as a first payment, the sum of (\$.....) Dollars per share, on presentation of the certificate of stock to "X" & Co., City, In order that the amounts now and hereafter to be paid may be noted thereon as made, please forward immediately your certificate of stock, with power of attorney properly signed and indorsed to "X" & Co., City,

Further distributions will be made from time to time as the balance of the purchase price is paid. These distributions should also be noted on the certificate. We therefore recommend that you authorize "X" & Co. to retain your certificate for this purpose and enclose a form of letter, to be filled in and signed by you to that effect. On receipt of the certificate of stock and the letter, "X" & Co. will give you a proper receipt.

Yours truly,
 "A" Company

 President

FORM OF TRANSMITTAL LETTER

....., 19...
 Messrs. "X" & Co.

Gentlemen:

In accordance with the instructions of the Company in its circular letter of, 19..., I herewith enclose certificates Nos. and for (.....) shares of the capital stock of the "A" Company, the property of the undersigned, in order that payment of (\$.....) Dollars per share in liquidation, now authorized, may be noted thereon. You may retain the same in order that subsequent payments, in liquidation, may be noted on them as made.

Please acknowledge and forward receipt for the enclosed certificate, as mentioned in the Company's letter.

Yours very truly,

FORM OF RECEIPT

RECEIVED, on, 19..., from, certificate No. for (.....) shares of the capital stock of the "A" Company standing in the name of, to be retained on deposit by the undersigned, in order that payments in distribution made on account of the liquidation of the affairs of the Company may be noted thereon, in accordance with the terms of the circular letter from the Company to its stockholders under date of, 19..., and with the terms of the letter addressed to the undersigned by you, dated, 19...
 "X" & Co.

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No. 727

Resolution of stockholders authorizing sale of stock received in payment for sale of corporate assets, for cash.

WHEREAS, this Company has heretofore sold, transferred, conveyed, and disposed of all its assets to the "X" Company of, and has received in payment therefor certain of the fully paid, first preferred, second preferred, and common no par value shares of stock of said Company, which shares are now owned by this Company and held in its treasury, and

WHEREAS, this Company has received a written offer from Company, investment bankers, a corporation organized under the laws of the State of, to purchase (.....) shares of said first preferred stock at (\$.....) Dollars per share and (.....) shares of said second preferred stock at (\$.....) Dollars per share, said payments, however, to include, cover, and pay for (.....) shares of the said common no par value stock, and

WHEREAS, it is the opinion of those present at this meeting that it is for the best interests of this Company to accept said offer of said Company;

NOW, THEREFORE, BE IT RESOLVED, That said offer of the said Company be and it hereby is accepted, and that the officers of this Company be and they hereby are authorized, instructed, and directed to do everything reasonably necessary and proper to carry out, bring about, or perfect said sale and transfer.

No. 728

Resolution of directors authorizing distribution of stock received upon sale of assets.

RESOLVED, That a dividend of the (.....) shares of the Corporation's stock, received as the purchase price for this Company's real and personal property, be and it hereby is declared; that the same be paid on the basis of (.....) shares of said Corporation's stock for every (.....) shares of this Company's stock; and that said dividend be paid by the Secretary to the stockholders of this Company pro rata according to their holdings as shown by the books of the Company, upon delivery by said stockholders to the Secretary of this Company, for cancellation, of all their certificates of stock in this Company, properly indorsed.

No. 729

Excerpt from minutes of special meeting of directors at which are considered stockholders' objections to sale of all assets of corporation and demand for fair cash value of shares.

The Chairman then made to the Board substantially the following statements:

Since the adjournment of the special meeting of the shareholders of this Company held on , 19.., for the purpose, among others, of authorizing the assignment, transfer, and conveyance by this Company of all its property and assets, including its goodwill, to "P" Corporation, certain holders of common shares of this Company, purporting to act pursuant to the provisions of Section of the General Code of, have in writing informed this Company of their objections to the transaction generally and have demanded that this Company pay to such holders certain amounts per share in the writings specified, which amounts such holders, respectively, have claimed in such writings to be the fair cash value of their shares. All except a few of such demands specified \$..... per share as the fair cash value of the common shares of this Company in respect of which such demands have been made. I submit to the meeting a copy of the form of writing by which most of such objections and demands have been made.

Counsel for the Company has not yet been able to determine the exact number of shares in respect of which the holders of common shares are entitled to make demands pursuant to the General Code of, but the number of shares in respect of which objections and demands have been received exceed

Counsel has advised me that under the provisions of the General Code of it is necessary that this Company, in writing, inform the holders of common shares of this Company who have made such objections and demands whether it will pay the amounts so demanded by them, and that, in case this Company is unwilling to pay the amounts so demanded, it is also necessary or advisable that this Company offer in writing to pay a specified amount per share for such shares. I herewith submit to the Board a copy of the form of writing which counsel has prepared for this purpose.

A copy of the form of demand and of the form of writing prepared to be sent by this Company to the holders of its common shares who have demanded payment for the common shares of this Company held by them in accordance with the statement which the Chairman made to the meeting, and which forms the Chairman submitted to the meeting, are, respectively, as follows:

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(Here insert forms.)

Thereupon the following preamble and resolutions were offered and their adoption duly moved and seconded:

WHEREAS, certain holders of common shares of this Company have objected in writing to the action taken by the holders of the common shares of this Company at a special meeting thereof held on , 19.., and adjournments thereof, authorizing the assignment, transfer, and conveyance by this Company of all its property and assets, including its goodwill, to "P" Corporation, a corporation, and have demanded that this Company pay to such holders, respectively, the fair cash value of the common shares of this Company held by them, respectively, and have claimed that such fair cash value is in amounts varying from \$..... per share to \$..... per share, and

WHEREAS, counsel for this Company has advised that under the General Code of it is necessary that this Company, within 10 days after the receipt of the aforesaid objections and demands, respectively, inform the holders of the common shares of this Company who have so objected to said action and have demanded payments as aforesaid whether it will pay the amounts so demanded by them, and that, if this Company shall refuse to pay such amounts, it is necessary or advisable that it offer to pay a specified amount as and for such fair cash value; be it

RESOLVED, That this Company inform such holders in writing that it will not pay the amounts so demanded by them, respectively, and that, pursuant to the General Code of, this Company in writing offer to pay to them, respectively, \$..... per share as and for the fair cash value thereof for all common shares of this Company in respect of which, they, respectively, have made the demands required by the provisions of said General Code and in respect of which, under the provisions of said General Code, they, respectively, are entitled to make such demands and to be paid; and

RESOLVED, That the form of letter to be used in informing such shareholders as aforesaid be substantially in the form of the proposed letter that the Chairman has submitted to this meeting, except in cases where the demands have been made by writings in forms other than the form of objection and demand which the Chairman has submitted to the meeting, and that in such excepted cases the letters whereby this Company shall inform holders of common shares of this Company that it will not pay the amount or amounts demanded by them and whereby it offers to pay said price of \$..... per share be in such form or forms as counsel for this Company shall approve; and

RESOLVED, That the Treasurer, or Assistant Treasurer, of this Company be and he hereby is authorized, under the direction of counsel for this Company, to send letters in the name of this Company in the form approved by or in the manner set forth in the foregoing resolution to each holder of common shares of this Company who has made an objection and demand in respect of common shares of this Company held by him, the blanks in such forms in each case being appropriately filled.

The aforesaid preamble and resolutions were thereupon discussed. Following the discussion a vote was taken upon the adoption of said preamble and resolutions, and the same were adopted, the vote being as follows:

Messrs.,,,,
.....,, and voted "aye."
Messrs.,, and voted "nay."
Messrs. and did not vote.

Mr. requested that the minutes show that some of the directors voted "nay," and he contended that in fixing the price, the directors should have before them the earnings of the Company, an appraisal of the physical properties of the Company, and the prices paid in sales of large blocks of shares, and that such dissenting directors consider the fair value of the shares to be far in excess of the amount fixed by the Board of Directors.

Said resolution was declared duly adopted by the directors, and there being no further business to come before the meeting, the same upon motion duly made, seconded, and adopted was adjourned.

No. 730

Resolution of directors abandoning proposed sale of assets after dissenting stockholder filed objections and petitioned for appraisal of stock.

WHEREAS, at a special meeting of stockholders of the Corporation, held on the .. day of, 19..., the Board of Directors and officers of the Corporation were authorized to sell and convey to the Company all the assets of this Corporation, and to accept in payment thereof shares of the capital stock of the purchasing corporation, and

WHEREAS, subsequently and within days after the date of the aforementioned special meeting of stockholders, written notice was served on this Corporation in behalf of, objecting to the sale of the assets of this Corporation hereinbefore men-

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tioned, and demanding that the Corporation purchase the stock of said person, and

WHEREAS, within days of the date of the aforementioned special meeting of stockholders, the said caused to be served on this Corporation a petition to the Court, County, and a notice of motion for that court to appoint three appraisers to appraise the stock of this Corporation and to direct the manner in which this Corporation should pay for the stock represented by the person so dissenting to the aforesaid sale, and

WHEREAS, this Corporation has not sufficient funds with which to purchase the stock of the person who has made the aforesaid petition to the Court, and cannot afford the necessary legal expense and the fees of appraisers incident to such a proceeding, and

WHEREAS, the Company has signified its willingness to permit this Corporation to withdraw its offer to sell all its assets to Company,

RESOLVED, That the Board of Directors and the officers of this Corporation take no action to carry out the resolution passed at the special meeting of stockholders held on the .. day of, 19..; and

FURTHER RESOLVED, That the proposed sale and transfer of the assets of this Corporation to the Company, as outlined in the resolutions passed at the aforementioned special meeting of the stockholders held on the .. day of, 19.., be and hereby is abandoned; and

FURTHER RESOLVED, That the President of this Corporation is hereby instructed to call a special meeting of stockholders to ratify and confirm the resolutions hereby adopted.

RESOLUTIONS RELATING TO CONTRIBUTIONS

No. 731

Resolution of directors declining to make charitable contribution.

WHEREAS, the Society has appealed to this Corporation for a contribution to the Fund, and

WHEREAS, counsel for this Corporation has advised this Board of Directors that it is beyond the powers of the Board to make such a contribution without the consent of all the stockholders, and

WHEREAS, this Board of Directors deems it inadvisable to present

the request of the said Society to the stockholders, be it

RESOLVED, That the request for a contribution to the Society be refused, and that the Secretary be directed to inform the said Society of the reasons for the failure of this Corporation to make a contribution.

No. 732

Resolution of stockholders authorizing contribution.

RESOLVED, That a contribution of (\$.....) Dollars be made by this Corporation to the, and that the Treasurer be and he hereby is authorized to pay the said sum immediately.

[*Note.* This resolution may also be used by the board of directors where authority to make contributions has been given to them by the stockholders.]

No. 733

Resolution of stockholders ratifying contribution made by directors.

WHEREAS, the Board of Directors of this Corporation did, on the .. day of, 19.., authorize a contribution of (\$.....) Dollars, to be made to, which said sum was paid by the Treasurer on the .. day of, 19.., be it

RESOLVED, That the action of the Board of Directors in making the contribution as aforesaid be and it hereby is ratified, approved, and confirmed.

CHAPTER 31

LEASE OF ASSETS

Definition of lease. A lease of corporate assets is a transfer of possession of all or part of specific corporate property upon proper authority, for a definite period of time, with the right to use such property, in exchange for rent to be paid to the lessor or to its stockholders.

There is no common law restriction upon the time for which property may be leased. Leases for 99 years and 999 years are often made in long-term transfers of possession. By statute in the various states, the period for certain leases may be restricted.

In the ordinary short-term lease, the tenant generally has only the right to use the premises, but under the provisions of most long-term leases, the tenant is required to make improvements, pay taxes, and manage the property. The two essential elements of a lease are the conveyance of the use of the property for a definite term and the agreement by the tenant to pay rent.

Where the owner of real estate grants and transfers possession, occupancy, and use of the property to the tenant for a long term for certain reservations of ground rental and other provisions, and the tenant pays taxes on the property and other charges incident thereto, the instrument of transfer is known as a *ground lease*.

Power to lease part of assets. A corporation has the power to lease its property as an incident of its power to own property, unless the right is expressly prohibited.¹ Furthermore, the power

¹ Dickinson v. Consolidated Traction Co., (1902) 114 F. 232, aff'd 119 F. 871; New York Mail & Newspaper Transp. Co. v. Anderson, (1916) 234 F. 590; Schneider v. Greater M. & S. Circuit, (1932) 144 N. Y. Misc. 534, 259 N. Y. Supp. 319.

Public service corporations that owe a duty to the public cannot lease their property without legislative authority. Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., (1893) 85 Me. 532, 27 A. 525; Penn. R. Co. v. St. Louis A. & T. H. R. Co., (1885) 118 U. S. 290, 6 S. Ct. 1094, 7 S. Ct. 24; Central Transp. Co. v. Pullman's Palace Car Co., (1890) 139 U. S. 24, 11 S. Ct. 478; St. Louis A. & T. H. R. Co. v. Terre Haute & I. R. Co., (1892) 145 U. S. 393, 12 S. Ct. 953. A railroad company may, however, grant a temporary use of a right of way that

to sell property includes the power to lease it.² Thus, a corporation that has the power to purchase, hold, or sell property and buildings has the power to lease them. A dry goods company, for example, may lease floor space to a millinery company for a percentage of the latter's net sales.³ A corporation may lease its property to a corporation engaged in an entirely different line of business,⁴ and an arrangement to receive as rental a share of the net profits of the business taking a lease upon the property will not invalidate the lease.⁵

Authority to make a lease of part of the corporate property rests with those who are vested with the power to manage the corporation's affairs—that is, the board of directors,⁶ the general manager, or other officer or agent of the corporation exercising managerial powers.⁷ Neither the president, secretary, nor treasurer⁸ of the corporation has power merely by virtue of his office to lease property of the corporation, and a lease made by an officer without authority is not binding unless ratified by the board of directors.⁹ Consent of the stockholders is generally not required for a lease of part of the corporate assets.¹⁰

Power to lease all assets. In the absence of express restriction in the corporate charter or in the statute, a strictly private corporation has the implied power to lease all its real or personal property for a period of years.¹¹ The power cannot, however, be exercised by the board of directors acting alone. Consent of the stockholders is required.¹²

does not interfere with the public use of the railroad. *Clark v. St. Louis I. M. & S. Ry. Co.*, (1918) 132 Ark. 257, 201 S. W. 111.

² *Staacke v. Routledge*, (1922) 111 Tex. 489, 241 S. W. 994; *Sylvester Watts Smyth Realty Co. v. Amer. Surety Co. of N. Y.*, (1922) 292 Mo. 423, 238 S. W. 494.

³ *Ogus, Rabinovitch & Ogus v. Foley Bros. Dry Goods Co.*, (1922) (Tex. Civ. App.) 241 S. W. 267, aff'd in (Tex. Civ. App.) 252 S. W. 1048.

⁴ *State v. New Orleans Warehouse Co.*, (1902) 109 La. 64, 33 So. 81.

⁵ *State v. New Orleans Warehouse Co.*, supra (Note 4). See also *Nantasket Beach Steamboat Co. v. Shea*, (1902) 182 Mass. 147, 65 N. E. 57.

⁶ *Beveridge v. New York El. R. Co.*, (1889) 112 N. Y. 1, 19 N. E. 489. See also *Seal of Gold Min. Co. v. Slater*, (1911) 161 Cal. 621, 120 P. 15.

⁷ *Holwick v. Walker*, (1935) 6 Cal. App. (2d) 669, 45 P. (2d) 374; *Louisville, H. & St. L. Ry. Co. v. United States*, (1937) 20 F. Supp. 483; *Louis Schlesinger, Inc. v. Burstein Realty Co.*, (1939) 123 N. J. L. 190, 8 A. (2d) 327.

⁸ *Duplex Envelope Co. v. Denominational Envelope Co.*, (1935) 80 F. (2d) 179.

⁹ *Franklin v. Havalena Min. Co.*, (1914) 16 Ariz. 200, 141 Pac. 727.

¹⁰ *Beveridge v. New York El. R. Co.*, (1889) 112 N. Y. 1, 19 N. E. 489; *Dickinson v. Consolidated Traction Co.*, (1902) 114 F. 232, aff'd in 119 F. 871.

¹¹ *Cambria Steel Co. v. M'Coach*, (1915) 225 F. 278; *New York Mail & Newspaper Transp. Co. v. Anderson*, (1916) 234 F. 590.

¹² *Cass v. Manchester Iron & Steel Co.*, (1881) 9 F. 640. But see *Beveridge v.*

The statutes in many states specifically authorize the lease of all the assets of the corporation upon the consent of a fixed proportion of the stockholders.¹³ The courts are divided as to whether, in the absence of such statutory provision, the consent of all the stockholders is required,¹⁴ or whether a majority consent is sufficient.¹⁵

Leases to directors personally of premises occupied by corporation. The directors of a corporation, as was earlier indicated,¹⁶ occupy a fiduciary relation toward the corporation, and they cannot profit personally at the expense of the corporation.¹⁷ A director who, as such, knows the peculiar value of premises which the corporation is occupying would be prevented, by equity, when removed from his position as president and treasurer, from taking a lease of the premises in his own name for his own benefit.¹⁸ An officer or a director who takes a lease of premises occupied by the corporation, in his own name, or in the name of others, for his benefit, when the interest of the corporation requires that the renewal of the lease should be made to the corporation, may be liable to the corporation for any loss resulting directly from the breach of duty.¹⁹ A director is not prevented from dealing with the landlord in respect to the premises occupied by the corporation, after a renewal of the lease has been refused definitely by the landlord to the corporation.²⁰ The "expectancy of renewal," which some authorities hold runs

N. Y. El. R. Co., (1889) 112 N. Y. 1, 19 N. E. 489. See also *Piedmont Press Ass'n v. Record Pub. Co.*, (1930) 156 S. C. 43, 152 S. E. 721, followed in *Spartanburg Herald-Journal Co. v. La Varre*, (1930) 155 S. C. 425, 152 S. E. 728.

¹³ The statutory provisions covering leases are generally included with those regulating sale of all assets. See statutes in each state, collected in *Prentice-Hall Corporation Service*.

¹⁴ Unanimous consent of stockholders was held to be necessary in *Mills v. Central R. Co.*, (1886) 41 N. J. Eq. 1, 2 A. 453. In *Hennessey v. Muhleman*, (1899) 40 N. Y. App. Div. 175, 57 N. Y. Supp. 854, it was held that the directors could lease the entire property of the corporation.

¹⁵ Consent of a majority of stockholders to a lease of all the assets was held to be sufficient in *Anderson v. Shawnee Compress Co.*, (1906) 17 Okla. 231, 87 P. 315; *Bartholomew v. Derby Rubber Co.*, (1897) 69 Conn. 521, 38 A. 45.

¹⁶ See page 235, for a discussion of the corporation's right to set aside contracts made by directors with themselves as individuals.

¹⁷ *Paw Paw Saving Bank v. Free*, (1919) 205 Mich. 52, 171 N. W. 464.

¹⁸ *Girard Co. v. Lamoureux*, (1917) 227 Mass. 277, 116 N. E. 572. See also *Meinhard v. Salmon*, (1928) 249 N. Y. 458, 164 N. E. 545, which case, however, refers to a joint adventure.

¹⁹ *Acker, Merrall & Condit Co. v. McGaw*, (1907) 106 Md. 536, 68 A. 17. See also *Hopkins v. Bryant*, (1939) (W. Va.), 6 S. E. (2d) 246.

²⁰ *Crittenden & Cowles Co. v. Cowles*, (1901) 66 N. Y. App. Div. 95, 72 N. Y. Supp. 701.

with each lease, is of value to the corporation, and no director is permitted to profit by taking a renewal while this "expectancy" exists. When the landlord has declared against the renewal, the "expectancy" no longer exists, and the director does the corporation no harm and takes from it no right, by dealing with the landlord as an individual.²¹

Lease of corporate property to directors or stockholders. A lease of the corporate property may be made to persons who are directors or stockholders of the corporation, if it is made in good faith and for the best interests of the corporation, and is supported by an adequate consideration.²² Such transactions, however, are carefully scrutinized by the courts, which regard the fact that the lease runs to persons who are directors as a suspicious circumstance.

Procedure in leasing all assets. The procedure generally followed in effecting a lease of all the assets of a corporation is similar in many respects to that used upon a sale of all the assets: ²³ (1) the board of directors of the lessor corporation, at a meeting duly called for that purpose, adopts a resolution recommending the lease and calling a meeting of the stockholders to consider the transaction; (2) a stockholders' meeting is held upon proper notice, and a resolution is adopted by the stockholders approving the lease; (3) a written agreement leasing the property is executed by both parties to the transaction; ²⁴ and (4) any additional statutory requirements are complied with, such as the recording of the lease with a designated public official.

Modifications of a lease must be executed with the same formalities and upon the same consent of stockholders as required by statute for an original lease.²⁵

Continued existence of lessor. A corporation that has leased all its assets may withdraw from all owning and operating activities or control, the lessee undertaking all the duties and obligations imposed upon the lessor and performing for the lessor

²¹ Ibid.

²² *Nye v. Storer*, (1897) 168 Mass. 53, 46 N. E. 402; *Meeker v. Winthrop Iron Co.*, (1883) 17 F. 48; *Fowler Memorial Hospital Co. v. Nicholson*, (1925) 189 N. C. 44, 126 S. E. 94.

²³ See page 874.

²⁴ In the case of quasi-public corporations, the consent of some official body may be required before the lease may be executed.

²⁵ *Continental Ins. Co. v. N. Y. & H. R. Co.*, (1907) 187 N. Y. 225, 79 N. E. 1026, affirming 103 N. Y. App. Div. 282, 93 N. Y. Supp. 27.

its charter responsibility to the state. Or the corporation leasing its property may continue to operate a part of the property, allowing the lessee to operate the portions of the property leased to it. In either event, the leasing corporation is kept alive, for, even though all the corporate property is leased, the corporation must remain in existence in order (1) to protect its corporate franchise, (2) to see that the terms of the lease are not broken, and (3) to afford a means of representing the stockholders in dealing with the lessee in matters concerning the terms of the lease, the financing of additions to property, and similar business. For example, a modification of a lease must be executed with the same formalities and with the same vote as required by statute in case of an original lease.²⁶ The corporation, therefore, must maintain its existence for this purpose.

Consideration for lease of all assets. Under the terms of a lease that transfers all the corporate property to the lessee, the consideration paid by the lessee may include: (1) assumption of all the lessor's debts, such as taxes, salaries of officers, rent of offices; (2) the payment of interest on the lessor's bonds; (3) the payment of an annual sum for organization expenses of the lessor corporation; and (4) the payment of a definite compensation. This may take the form of (a) a fixed annual sum or rent, (b) a percentage of the gross revenue with a minimum or maximum stipulated, (c) a percentage of the net earnings, or (d) a fixed rate of dividends upon the lessor's stock, which in practice is usually paid directly to the lessor's stockholders by the lessee. In some cases, the arrangements made under the terms of the lease have led the courts to hold that the arrangement was not a lease at all, but an operating contract.²⁷

Rights of stockholders dissenting from lease of all assets. In many of the states, the rights of stockholders who object to a lease of all the corporation's assets are defined by statute. These rights are generally the same as the rights of stockholders dissenting from a sale of all the assets.²⁸ The dissenting stockholder is required to file written objection to the lease, and is entitled to an appraisal of his shares and payment of its fair value in cash.

²⁶ *Continental Ins. Co. v. N. Y. & H. R. Co.*, (1907) 187 N. Y. 225, 79 N. E. 1026, aff'g 103 N. Y. App. Div. 282, 93 N. Y. Supp. 27.

²⁷ See *Dalton City Co. v. Dalton Mfg. Co.*, (1862) 33 Ga. 243; *St. Joseph & St. L. R. Co. v. St. Louis I. M. & S. Ry. Co.*, (1896) 135 Mo. 173, 36 S. W. 602.

²⁸ See page 884.

In the absence of a statute covering the rights of dissenting stockholders, their rights depend upon whether the lease may be entered into at all without their consent. If unanimous consent of the stockholders is required to effect the lease, and the corporation enters into a lease against the wishes of some of the stockholders, these dissenting stockholders may have the lease set aside.²⁹ Where the courts have held that a majority of the stockholders could not lease all the property of the corporation for a period of years in the absence of any showing that the corporation was not prosperous, a dissenting stockholder could enjoin a contemplated transaction.³⁰

Rights of creditors upon lease of all assets. The existence of a corporation is not terminated by a lease of all its assets.³¹ While the directors surrender control over the property of the corporation, they remain directors, and their general duties and powers continue.³² The corporation remains in existence for the following purposes: to protect its franchise, to see that the terms of the lease are complied with, to represent stockholders in dealing with the lessee, to finance additions to the property, and to take other similar action.

A corporation that leases all its assets continues nevertheless to be liable to its creditors for its debts. In the absence of an agreement to assume the debts of the lessor, the lessee is not liable to pay the debts of the lessor.³³ However, when there is a misappropriation of the funds of a corporation through lease of all its assets, which prevents application of the property to the satisfaction of the corporation's debts, the creditors may follow the funds so diverted.³⁴

All debts arising out of the operation of the property after the lease has been executed are debts for which the lessee is liable. Thus, a lessor cannot be held liable for labor performed or

²⁹ *Parsons v. Tacoma Smelting & Refining Co.*, (1901) 25 Wash. 492, 65 P. 765.

³⁰ *Small v. Minneapolis Electro Matrix Co.*, (1891) 45 Minn. 264, 47 N. W. 797.

³¹ *Title Guaranty Trust Co. v. Sessinghaus*, (1930) 325 Mo. 420, 28 S. W. (2d) 1001.

³² *Schneider v. Greater M. & S. Circuit*, (1932) 144 N. Y. Misc. 534, 259 N. Y. Supp. 319.

³³ *Johnson v. Western Union Telegraph Co.*, (1944) 293 N. Y. 379, 57 N. E. (2d) 721.

³⁴ *Mellen v. Moline Iron Works*, (1889) 131 U. S. 352, 366; *Chicago, etc., Railway Co. v. Chicago Bank*, (1890) 134 U. S. 276. See also Cuquet, "The Liability of a Successor Corporation for the Obligations of Its Predecessors," 14 *Tulane Law Rev.* 273, 281 (1940).

material furnished the lessee company in the operation or maintenance of its property.³⁵

Power of corporation to take property on lease. A corporation has the power to take a lease upon property, provided the property is necessary for carrying on the purposes of the corporation.³⁶ This is true even if the lease is created for a term beyond the duration of the corporation.³⁷ But a lease for a purpose which is entirely foreign to the purposes for which the corporation was organized is not within the power of the corporation.³⁸

Authority of officers to take a lease for the corporation. Authority to enter into the lease in behalf of the corporation generally rests with the board of directors.³⁹ The officers have no implied power, merely by virtue of their office, to execute a lease for the corporation.⁴⁰ They may, however, be authorized to do so expressly or impliedly. A general manager, for example, may have implied authority to execute and renew leases of property necessary to carry on the business of the corporation.⁴¹ The president of a corporation who has been given managerial powers by the board of directors with authority to sign contracts in behalf of the corporation has authority to lease premises for the use of the corporation.⁴²

Where a corporation wishes to take a lease of property, it is considered good practice for the board of directors to adopt a resolution authorizing the proper officer to take and execute the lease.⁴³ Such a resolution is, however, not essential. The au-

³⁵ *Empire Trust Co. v. Egypt Ry. Co.*, (1910) 182 F. 100.

³⁶ *Crawford v. Longstreet*, (1881) 43 N. J. L. 325.

³⁷ *Brown v. Schleier*, (1902) 118 F. 981; *People v. O'Brien*, (1888) 111 N. Y. 1, 37 N. E. 692; *State v. Laclede Gaslight Co.*, (1890) 102 Mo. 472, 482, 14 S. W. 974, 15 S. W. 383. See also *Woodward v. Fox West Coast Theatres*, (1930) 36 Ariz. 251, 284 P. 350; *Schipper v. Block & Kuhl Co.*, (1936) 283 Ill. App. 486.

³⁸ *Occum Co. v. Sprague Mfg. Co.*, (1868) 34 Conn. 529; *Hedges v. Signal Amusement Co.*, (1933) 16 Tenn. App. 361, 64 S. W. (2d) 534.

³⁹ A director may lease his own property to the corporation where the rights of the corporation are fully protected. See *Veeder v. Horstmann*, (1903) 85 N. Y. App. Div. 154, 83 N. Y. Supp. 99.

⁴⁰ See *Stoneman v. Fox Film Corporation*, (1936) 295 Mass. 419, 4 N. E. (2d) 63.

⁴¹ *Peninsular Savings & Loan Ass'n v. C. J. Breier Co.*, (1926) 137 Wash. 641, 243 P. 830; *Georgia Casualty Co. v. Massey*, (1918) 201 Ala. 601, 79 So. 33; *Sherman, Clay & Co. v. Buffum & Pendleton*, (1919) 91 Ore. 352, 179 P. 241. See also *Daly Lumber Co. v. Brunswick-Balke-Collender Co.*, (1935) (Iowa) 263 N. W. 234; *McMillan v. Marathon Oil Co.*, (1934) 188 Ark. 937, 68 S. W. (2d) 473.

⁴² *Hawley v. Gray Bros. Artificial Stone Paving Co.*, (1895) 106 Cal. 337, 39 P. 609.

⁴³ Failure to affix the corporate seal to the acceptance of a lease was held not

thority of an officer to take the lease in behalf of the corporation may be implied from his right to enter into contracts for the corporation⁴⁴ or from other surrounding circumstances.⁴⁵ A lease taken by an officer without authority may also be ratified by the corporation. If a corporation enters into possession under a lease taken by the president without authority and exercises control over the property leased, the corporation will be bound under the terms of the lease.⁴⁶

Assignment of a lease. Most leases make provision in the instrument as to the right of the lessee to assign the lease or to sublease the property. If the lease contains no provision to the contrary, a lessee has the right to assign his lease or to sublet the property of the lessor. The difference between an assignment of a lease and a sublease is as follows: Under an assignment of a lease, the whole interest of the lessee in the leased premises is transferred. The original lessee's liability to the lessor is ended, and the assignee becomes directly liable to the lessor.⁴⁷ The assignee of the lease also assumes and is bound by the covenants of the original lease.⁴⁸ Under a sublease, the sublessee is liable to the sublessor only, and not to the original lessor; the sublessor remains liable to the original lessor as lessee of the premises. The sublessee is not liable to the owner upon covenants contained in the contract between the owner and the lessee, unless he has contracted to become so.⁴⁹

Termination of a lease. A corporation that has the power to execute a lease has equal power to cancel a lease with the consent

to destroy its validity. *Raleigh Banking & Trust Co. v. Safety Transit Lines*, (1930) 198 N. C. 675, 153 S. E. 158.

⁴⁴ See footnote 42.

⁴⁵ *McQuaide v. Enterprise Brewing Co.*, (1910) 14 Cal. App. 315, 111 P. 927.

⁴⁶ *Jacksonville, etc. Railway v. Hooper*, (1895) 160 U. S. 514, 16 S. Ct. 379. See also *Patton v. Texas Pac. Coal & Oil Co.*, (1920) (Tex. Civ. App.) 225 S. W. 857; *Bradford v. Graham*, (1923) 287 F. 686.

⁴⁷ But where the lessee assigns the lease to an *alter ego* of the lessee, with the sole object of preventing the lessors from collecting rents because of the insolvency of the assignee, the lessor may hold the lessee liable for rents. *Shea v. Leonis*, (1938) 29 Cal. App. 184, 85 P. (2d) 491.

⁴⁸ *St. Joseph & St. Louis Railroad Co. v. St. Louis Iron Mountain & Southern Railway Co.*, (1896) 135 Mo. 173, 36 S. W. 602. Where a corporation, organized to serve the purposes of assignee of a lease, actually goes into possession of the leased premises and enjoys the benefits of the lease, the lessor may recover rent from such corporation even in the absence of any written assignment of the lease to such corporation. *Maas v. Lutz*, (1939) 231 Wis. 422, 285 N. W. 345.

⁴⁹ *Missouri K. & T. Ry. Co. of Texas v. Keahy*, (1904) 37 Tex. Civ. App. 330, 83 S. W. 1102.

of the lessee.⁵⁰ Corporate action is required for a surrender of a lease,⁵¹ and the same consent is necessary to authorize the cancellation of a lease as is required for the execution of the lease in the first place.⁵² A president of a corporation who has no power to authorize a lease has no inherent authority to surrender a lease.⁵³ On the other hand, an officer who has authority to sign a lease and who is charged with the duty of giving possession of the premises, of looking after the making of repairs, collecting rents, and attending to other negotiations would also have authority to effect a surrender of a lease.⁵⁴

⁵⁰ *Lancaster County v. Lincoln Auditorium Assn.*, (1910) 87 Neb. 87, 127 N. W. 226.

⁵¹ *Laing v. Price*, (1914) 75 W. Va. 192, 83 S. E. 497, which held that an implied surrender of a mining lease does not arise from mere notice of intention on the part of the lessee not to pay further rentals, where there was no abandoning of actual operations under the lease, none having been commenced.

⁵² *Henry v. Pittsburgh & C. R. Co.*, (1895) 2 Ohio N. P. 118. See also *March v. Eastern R. Co.*, (1862) 43 N. H. 515. The directors generally have the power to terminate a lease given by the corporation. Neither the president nor the secretary of the corporation, by virtue of his office alone, has such power. *Klein v. Journal Square Bank Bldg. Co.*, (1932) 110 N. J. Eq. 607, 160 A. 812.

⁵³ *Laing v. Price*, *supra* (Note 51); *Klein v. Journal Square Bank Bldg. Co.*, *supra* (Note 52).

⁵⁴ *Commercial Hotel Co. v. Brill*, (1905) 123 Wisc. 638, 101 N. W. 1101. See also *Jaeger Mach. Co. v. Mirau*, (1939) 206 Minn. 468, 289 N. W. 51, in which a salesman's authority to accept notice of termination of a lease was held to be a question for the jury to decide.

• CHAPTER 32

RESOLUTIONS RELATING TO LEASE OF ASSETS

No. 734

Excerpt of minutes of meeting of directors of lessor, approving form of, and authorizing officers to execute and deliver, lease and bill of sale.

The Chairman referred to the special meeting of the Common and Preferred Stockholders held, 19.., at which the Stockholders had assented to this Company's leasing of its business and certain of its assets, and the sale of certain other assets, to the "B" Company, and had empowered and directed this Board to take action in connection therewith. He presented to the meeting the form of lease from this Company to the "B" Company that had been presented to and approved by the special Stockholders' meeting above referred to.

On motion duly made and seconded, the following preambles and resolutions were unanimously adopted:

WHEREAS, the Stockholders of this Company at their special meeting held, 19.., assented to the making of a lease by this Company of its business and the assets, set forth in a form of lease presented to their meeting, to the "B" Company, for the term of 99 years commencing at midnight, December 31, 19.., and empowered and directed this Board to authorize and cause certain officers of this Company to execute, acknowledge, and deliver a lease in the form presented to that meeting, or with limited changes therein considered advisable or appropriate by this Board or the officers executing such lease, and

WHEREAS, this Board deems it advisable and in the interest of this Company that such lease be consummated and carried into effect, be it

RESOLVED, That the form of lease presented to this meeting of the business and the therein-described assets of this Company to the "B" Company, for the term of 99 years commencing at midnight, December 31, 19.., in consideration, among other things, of a rental of (\$.....) Dollars per annum, plus the payment of taxes and insurance on the leased property, be and it hereby is approved; and that the President or any Vice President, and the Secretary or an Assistant

Secretary, be and they hereby are authorized and directed in behalf of this Company to execute, acknowledge, and deliver a lease in the form presented to this meeting, or with such additions thereto, omissions therefrom, or other changes therein as may be within the general purposes and intent expressed in the form of lease presented to this meeting, and as do not change the duration of the lease or decrease the rental below (\$.....) Dollars per annum, plus the payment of taxes and insurance on the leased property included therein, as the officers executing such lease shall consider advisable or appropriate; and such execution shall be conclusive evidence of such advisability or appropriateness; and further

RESOLVED, That any and all officers of this Company be and they hereby are, and each of them hereby is, authorized and directed to do or cause to be done all such acts and things as may be necessary or advisable or convenient and proper in connection with the execution and delivery of the lease authorized at this meeting and in connection with or incidental to the consummation and carrying into effect during its full term of the lease so made, including, without limitation on the scope of the foregoing, the execution, acknowledgment, and delivery of any and all instruments and documents that reasonably may be required of this Company under such lease or may be considered supplemental thereto.

The Chairman then presented to the meeting the form of agreement and bill of sale from this Company to the "B" Company that had been presented to and approved by the special Stockholders' meeting on , 19...

On motion duly made and seconded, the following preambles and resolutions were unanimously adopted:

WHEREAS, the Stockholders of this Company at their special meeting held , 19.., assented to the sale by this Company of its assets, described in a form of agreement and bill of sale presented to their meeting, to the "B" Company, and empowered and directed this Board to authorize and cause certain officers of this Company to execute, acknowledge, and deliver an agreement and bill of sale in the form presented to that meeting or with limited changes therein considered advisable or appropriate by this Board or the officers executing such agreement and bill of sale, and

WHEREAS, this Board deems it advisable and in the interest of this Company that such sale and the proposed agreement therefor be consummated and carried into effect, be it

RESOLVED, That the form of the agreement and bill of sale presented to this meeting providing for the sale to the "B" Company of the

therein-described assets of this Company as of midnight, December 31, 19.., in consideration, among other things, of the assumption or cancellation by the purchaser of certain of the debts and liabilities of this Company appearing on its balance sheet as of December 31, 19.., amounting to (\$.....) Dollars (which sum includes moneys borrowed from or otherwise due to the purchaser), the transfer and delivery to this Company of (.....) shares of Common Stock and (.....) shares of Common Stock B of the "B" Company, with two thirds of the dividends thereon payable, 19.., and the payment to this Company of (\$.....) Dollars in cash, be and it hereby is approved; and that the President or any Vice President, and the Secretary or an Assistant Secretary, be and they hereby are authorized and directed in behalf of this Company to execute, acknowledge, and deliver an agreement and bill of sale in the form presented to this meeting, or with such additions thereto, omissions therefrom, or other changes therein as may be within the general purposes and intent expressed in the form of agreement and bill of sale presented to this meeting and as do not substantially change in amount the property or consideration therefor included and provided for therein, as the officers executing such agreement and bill of sale shall consider advisable or appropriate, and such execution shall be conclusive evidence of such advisability or appropriateness; and further

RESOLVED, That any and all officers of this Company be and they hereby are, and each of them hereby is, authorized and directed to do or cause to be done all such acts and things as may be necessary or advisable or convenient and proper in connection with the execution and delivery of the agreement and bill of sale authorized at this meeting, and in connection with or incidental to the consummation and carrying of the same into effect, including, without limitation on the scope of the foregoing, the execution, acknowledgment, and delivery of any and all instruments and documents that reasonably may be required of this Company under such agreement and bill of sale or may be considered supplemental thereto.

No. 735

Minutes of directors' meeting ratifying acts of officers in executing and delivering lease and bill of sale.

..... .., 19..

The President reported that on, 19.., pursuant to action taken by the stockholders of this Company at a special meeting of the stockholders held on, 19.., and pursuant to authority given by this Board at a meeting held on,

19.., the officers of this Company had executed and delivered to the "B" Company a 99-year lease of the business and certain of the assets of this Company, and an agreement and bill of sale relating to certain other assets of this Company, and, pursuant to said lease and said agreement and bill of sale, had executed and delivered various deeds, leases, agreements, assignments, and other instruments, and had delivered possession pursuant thereto of the property included therein.

On motion duly made and seconded, it was unanimously

RESOLVED, That the acts of the officers of this Company in executing and delivering to the "B" Company said 99-year lease and said agreement and bill of sale and, pursuant thereto, in executing and delivering said deeds, leases, agreements, assignments, and other instruments, and in delivering possession of the property included therein, be and the same hereby are approved, ratified, and confirmed.

No. 736

Resolution of directors (or stockholders) authorizing execution of lease of plants to another company.

RESOLVED, That the officers of this Corporation be and they hereby are authorized and directed to lease to the Co., plants Nos. 2, 3, and 4, at an annual rental of 80 per cent of the net income of said Co., after it shall have paid all taxes and expenses in the maintenance and operation of all its plants, and after it shall have set aside, out of its profits, the quarterly sum of (\$.....) Dollars, for its own use, which said lease shall be in the form presented to this meeting.

No. 737

Resolution of stockholders of lessor authorizing lease of railroad property for 999 years.

RESOLVED, That the "B" Railway Company does lease its railroad, property, and franchises to the "A" Railroad Company, for the term of nine hundred and ninety-nine (999) years from the .. day of, 19.., upon the terms and conditions set forth in the form of indenture of lease now submitted to this meeting, which form is hereby adopted and approved; that the President of the "B" Railway Company is hereby authorized and directed, for and in behalf of the "B" Railway Company, for and as its act and deed, to affix its corporate seal to the said indenture of lease, to sign the same as such President, to cause the same to be duly attested by the Secretary, and also to cause the said indenture of lease to be signed by any two directors and members of the Company other than the President and to be

attested by witnesses; and that the President of the "B" Railway Company is hereby authorized and directed, when the said indenture of lease is so executed, to acknowledge the same, to cause the same to be acknowledged, to deliver and record the same, and to do and perform any act, matter, or thing that may be necessary to put the "A" Railroad Company into possession and operation of the railroad, property, and franchises of the "B" Railway Company under the terms of said lease.

No. 738

Resolution of directors of lessor (or lessee) ratifying lease made by officer.

RESOLVED, That the Board of Directors of the Company hereby confirms the action of its President,, in executing the lease of the property located at, dated, 19.., for the term of fifteen years from, 19.., (to) from of (from) to this Corporation, upon the terms mentioned in the lease.

No. 739

Resolution of directors of lessor consenting to assignment of lease.

WHEREAS, the Company, Lessee under an instrument of lease between this Corporation as Lessor and the said Company, dated the .. day of, 19.. (and recorded in), has requested the consent of this Corporation to an assignment of said lease, be it

RESOLVED, That this Corporation does hereby give and grant its consent to the Company for the assignment and transfer of said lease above mentioned to, and the President and the Secretary of this Corporation be and they hereby are authorized, empowered, and directed to prepare and execute, in the name and in behalf of this Corporation and under its corporate seal, a sufficient instrument, as required by the terms of said lease, giving the consent of this Corporation to the said assignment.

No. 740

Resolution of directors of lessor demanding accounting from lessee.

WHEREAS, by agreement of lease, duly executed and dated, 19.., this Company leased to, as Lessee, all the property of this Company of whatever kind and wheresoever situated, then owned or which might thereafter be acquired, said property consisting principally of patents, drawings, office furniture, equipment,

and all things incident to and necessary in the carrying on of the business of this Company, upon certain terms and conditions as therein set forth, and

WHEREAS, said has failed to account for and to pay to this Company the amounts due and owing to it under the terms of said lease, for a period since , 19.., and

WHEREAS, the stockholders of this Company have been dissatisfied with the accounts rendered by said prior to , 19.., under the terms of said lease, by reason of certain unauthorized payments and expenditures, such dissatisfaction having been expressed from time to time as such accounts were rendered, and

WHEREAS, this Company has been dissatisfied with the manner in which the said has been conducting said business under the lease agreement above mentioned, be it

RESOLVED, That said, as Lessee, under the terms of said agreement, be required to account forthwith to this Company for all dealings, transactions, expenditures, receipts, etc., pertaining to the business conducted by him under the terms of said lease from the date of said lease to the present time, and that he be further required to pay to this Company and to its stockholders, as provided by said agreement, on or before , 19.., all amounts found to be due and owing to this Company and to its stockholders; and

RESOLVED FURTHER, That, upon the failure of said so to account and pay, on or before , 19.., as above set forth, such steps as are necessary be taken to compel the said to account and pay as aforesaid, and for this purpose the following stockholders—namely,,, and—be and they hereby are appointed a committee with full power to act in behalf of this Company and to take such steps as may be necessary to carry this resolution into effect; and

RESOLVED FURTHER, That the Secretary of this Company be and he hereby is instructed to mail forthwith to said, by registered mail, directed to his business office at, a true and correct copy of this resolution; and

RESOLVED FURTHER, That the Secretary of this Company be and he hereby is instructed to give formal notice to said, Lessee, of the action of this Board, and to make formal demand upon him for the accounting and the payment of the moneys due in accordance with the provisions of the above resolution.

No. 741

Resolution of stockholders of lessor ratifying assignment by lessee of agreement to lease.

WHEREAS, it appears that has assigned the agreement to lease, dated, 19.., between this Company and himself, to the "A" Company, a corporation organized under the laws of, be it

RESOLVED, That said assignment be and it hereby is ratified and confirmed, and that the said "A" Company be hereafter treated as a party of said agreement to lease in place of

No. 742

Resolution of directors of lessor authorizing notice of forfeiture to be sent to lessee upon default in payment.

WHEREAS, under an indenture made on the .. day of, 19.., between this Company and the Traction Company, a lease was duly executed wherein the Traction Company, Lessee, agreed, among other things, to pay a rental or a compensation for the use of the property of this Company, certain amounts representing five (5%) per cent of the bonds of the Company, and a dividend of five (5%) per cent of the capital stock thereof, and

WHEREAS, under the same indenture, it was provided that, if the Lessee shall make default in the payments of said rental and such default shall continue for a period of thirty days after the time for such payment, it is the right of this Company to declare said lease forfeited and at an end, and if, within thirty days after notice of such intended forfeiture, the Lessee does not make the payments or perform the covenants in regard to which it has so defaulted, then this lease shall be ended and determined, and

WHEREAS, the payment of the semiannual dividend of two and one-half (2½%) per cent on the capital stock due and payable on the .. day of, 19.., was passed and default was made therein, and said default still exists;

THEREFORE, RESOLVED, That this Company so notify the Lessee that this default was made and still exists, and that, unless payment be made within thirty days from this date, the lease shall be and hereby is declared forfeited and at an end, and this Company shall enter in and retake possession of its property and make claim for such defaulted payments and such other damages as may have been sustained by reason of such lease and forfeiture.

No. 743

Resolution of directors of lessor authorizing termination of lease.

WHEREAS,, Lessee under an instrument of lease between this Corporation as Lessor and the said, dated the .. day of, 19.., relating to the premises at (Street), City of, State of, has defaulted in the payment of rent for the months of and, 19.., and has defaulted in the performance of other terms and conditions of said lease, be it

RESOLVED, That the President of this Corporation be and he hereby is authorized and directed to instruct, attorney for this Corporation, to serve a notice upon said to vacate the premises because of said defaults, and that the President is further authorized and directed to cause suit to be brought, and to take such proceedings as he may deem necessary to obtain possession of the said property and to collect any claims for damages or losses that may have been sustained by this Corporation by reason of said defaults and forfeiture of said lease.

No. 744

Excerpt of minutes of meeting of directors of lessee, approving form of and authorizing officers to execute lease and bill of sale.

The Chairman referred to the discussions, particularly at the meeting of this Board on, 19.., relating to the proposed lease to this Company of the business and certain of the assets of "A" Company, including its plants, equipment, and manufacturing facilities and real estate (with the exception of that located in the States of and) and all its brands, trade-marks, business, goodwill, and certain other property used in connection with the business, for the term of 99 years commencing at midnight, December 31, 19.., at an annual rental of (\$.....) Dollars, plus the payment of insurance and taxes on the leased property; and also the proposed sale to this Company as at midnight, December 31, 19.., of certain other property of "A" Company, including, in process, manufactured, supplies, certain amounts receivable, real estate located in the States of and, certain shares of the Common Stock of "A" Company and its investment in "C" Company, but excluding other securities and certain other assets, in consideration of the assumption or cancellation of debts and liabilities as of December 31, 19.., amounting to (\$.....) Dollars, including moneys due to this Company, the transfer and delivery of (.....) shares of Common Stock and (.....) shares of Common

Stock B of this Company and some minor cash adjustment. The Chairman presented to the meeting a form of lease and a form of agreement and bill of sale to give effect to the foregoing transactions.

On motion duly made, seconded, and adopted, it was unanimously

RESOLVED, That the form of lease presented to this meeting of the business and the therein-described assets of "A" Company to this Company for the term of 99 years commencing at midnight, December 31, 19.., and the form of agreement and bill of sale presented to this meeting of the therein-described assets of "A" Company to this Company as of midnight, December 31, 19.., be and each of them hereby is approved; and that the President or any Vice President, and the Secretary or an Assistant Secretary, of this Company be and they hereby are authorized in its behalf to execute, acknowledge, and deliver such lease and such agreement and bill of sale, either in the forms in which the same have been presented to this meeting or with such additions thereto, omissions therefrom, or other changes therein as the officers executing such instruments shall consider advisable or appropriate; and such execution shall be conclusive evidence of such advisability or appropriateness; and further

RESOLVED, That any and all of the officers of this Company be and they hereby are and each of them hereby is authorized to do or to cause to be done all such further acts and things as they or any of them shall deem necessary or advisable or convenient and proper in connection with the execution and delivery of the lease and the agreement and bill of sale authorized at this meeting and in connection with or incidental to the consummation and carrying of the same or either thereof into effect, including without limitation on the scope of the foregoing, the execution, acknowledgment, and delivery of any and all instruments and documents which may reasonably be required of this Company under such lease or agreement and bill of sale, or which may be considered supplemental to either thereof.

No. 745

**Excerpt of minutes of meeting of directors of subsidiary company,
authorizing taking over from parent company of depart-
ment of a business and certain assets held by
parent company under a lease.**

Mr. stated that the "B" Company, the sole stockholder of this Corporation, had arranged to lease the business and certain of the assets and to purchase certain other of the assets of the "A" Company, and in that connection had suggested that this Corporation take over the business (other than the and foreign business) and certain of the assets of the Department of the "A" Company. He presented a communication

to this Corporation from the "B" Company offering to transfer or cause to be transferred to this Corporation certain real estate located in the State of and certain other assets as the same would, except for transactions outside the ordinary and normal conduct of business on , 19.., be shown on the books of the Department of the "A" Company, on the basis of the depreciated cost thereof as so shown on the books of the "A" Company. He also stated that if this Corporation were to take over such business of the Department of the "A" Company, it would be advisable for this Corporation to take leases from the "A" Company of certain property located at (*insert list of locations*), and presented the proposed forms of leases to the meeting. He further stated that it would also be desirable for this Corporation to acquire the rights and assume the obligations of the "A" Company under certain contracts or agreements connected with such business of its Department, and also the rights and obligations of the "A" Company as tenant under certain leases.

On motion duly made and seconded, it was unanimously

RESOLVED, That it is advisable and for the best interests of this Corporation that it take over the business (other than the and foreign business) of the Department of the "A" Company; and be it further

RESOLVED, That this Corporation accept the offer made to it by the "B" Company to transfer or cause to be transferred to it certain real estate located in the State of and certain other assets as the same would, except for transactions outside the ordinary and normal conduct of business on , 19.., be shown on the books of the Department of the "A" Company on the basis of the depreciated cost thereof as so shown on the books of the "A" Company; and be it further

RESOLVED, That this Corporation lease from the "A" Company its property located at (*insert list of locations*), and to that end execute leases in the forms presented to this meeting, with such additions thereto, omissions therefrom, or other changes therein as the officers executing the same shall consider advisable or appropriate; and be it further

RESOLVED, That this Corporation acquire the rights and assume the obligations of the "A" Company under such contracts or agreements connected with the business of its Department, and also the rights and obligations of the "A" Company as tenant under such leases, as the officers of this Corporation shall consider necessary or advisable; and be it further

RESOLVED, That the officers of this Corporation be and they hereby

are authorized, empowered, and directed to execute and deliver such agreements, leases, and other instruments and to do any and all such further acts and things as they, or any of them, shall deem necessary or advisable or convenient and proper in connection with or to effectuate the purpose and intent of the foregoing resolutions.

No. 746

Resolution of stockholders ratifying lease of railroad to corporation.

RESOLVED, That the lease of the railroad and property of the Railroad Co. to this Company, dated
..., 19..., executed by the Presidents of the parties thereto under the authority of their respective Boards of Directors, and this day submitted to this meeting for ratification, be and the same hereby is approved.

No. 747

Resolution of directors of lessee approving lease of entire properties, subject to ratification by stockholders.

RESOLVED, That the lease by the Company to this Corporation, of its entire properties as this day read, be and it hereby is approved, subject to ratification by the stockholders, and that the President and the Secretary be and they hereby are authorized, empowered, and directed to execute said lease in the name and under the seal of this Corporation substantially in the form as this day read to this Board of Directors, and generally to do all proper acts to carry the same into effect, upon ratification by the stockholders.

No. 748

Resolution of directors authorizing company to take lease of premises occupied by it.

RESOLVED, That this Company take a lease from the Corporation, of the premises now occupied by this Company on the (*insert complete description*), for a term of (*.....*) years from
..., 19..., in accordance with the terms and conditions set forth and contained in the instrument of lease presented to and read at this meeting; that the President, the Vice President, and the Treasurer be and they hereby are authorized in behalf of the Company to execute and deliver said lease presented at this meeting and a duplicate thereof, and to attach the seal of the Company thereto.

RESOLVED FURTHER, That the rent to be paid by this Company to the Corporation for the use and occupancy of the premises described in the lease received from said Corporation, dated
..., 19..., for a period of

(.....) years from the said last-named date, shall be
 (\$.....) Dollars per annum, payable in advance in installments of
 (\$.....) Dollars per month, the first payment to be made
 on, 19.., and that the President, the Vice President,
 and the Treasurer of this Company are hereby authorized in behalf
 of the Company to execute under the corporate seal an agreement to
 that effect.

No. 749

Resolution of directors authorizing corporation to take lease of offices.

WHEREAS, an offer has been made to this Corporation to lease to it for a period of (.....) years the offices located on the..... floor of (Street), City of, State of, at a rental of (\$.....) Dollars per annum, and

WHEREAS, it is the opinion of this Board of Directors that said offices are suitable for the purposes of this Corporation, and that said rental is reasonable, be it

RESOLVED, That the President of this Corporation be and he hereby is authorized and directed in behalf of this Corporation to execute a lease in duplicate for the offices above mentioned, for a period of (.....) years, beginning on the .. day of, 19.., and continuing up to and including the .. day of, 19.., at a rental of (\$.....) Dollars per annum, the said lease to contain the usual covenants set forth in office leases in this city.

No. 750

Resolution of directors authorizing president to execute lease and to contract for option to purchase leased property.

RESOLVED, That, President of this Corporation, be and he hereby is authorized to lease from the Company, for the full term of (.....) years, beginning on the .. day of, 19.., and continuing up to and including the .. day of, 19.., the following property (*insert full description*), and to contract with the Company for an option to purchase said property during the calendar year 19.., at such price and subject to such terms and conditions as he shall consider to be for the best interests of this Corporation; and

RESOLVED FURTHER, That said, President of this Corporation, be and he hereby is authorized and empowered to sign and execute, in the name of this Corporation, such leasehold agreement and option contract as he may find necessary in carrying out the power above conferred, and to deliver the same for and in behalf of this Corporation.

No. 751

Resolution of directors of lessee authorizing sublease of premises.

WHEREAS, this Corporation occupies the premises at
 (Street), City of, State of, under a lease from
 the Company as Lessor, dated the .. day of,
 19.., which lease expires on the .. day of, 19.., and

WHEREAS, said premises have become too small for the business con-
 ducted by this Corporation, and

WHEREAS, an offer has been made to this Corporation by
 to sublease the said premises during the remainder of the
 unexpired term, at the rental fixed in said lease between this Corpora-
 tion and the Company, and subject to the cove-
 nants, conditions, and stipulations set forth in said lease, and

WHEREAS, the Company, Lessor, has given its
 consent to the subletting of the premises as aforesaid, be it

RESOLVED, That the offer of be and it hereby is
 accepted; that the Corporation sublease the premises now occupied by
 it at (Street), City of, State of,
 under the above-mentioned lease, to, from the ..
 day of, 19.., to the termination of said lease, to wit, the
 .. day of, 19.., at the same rental and subject to the
 covenants, conditions, and stipulations set forth in the instrument of
 lease between this Corporation and the Company,
 dated the .. day of, 19..; and that the President of this
 Corporation be and he hereby is authorized and directed to execute, in
 the name and in behalf of this Corporation, an instrument of sublease
 in the form as prepared by, Esq., and as this day
 submitted to the Board of Directors, and generally to do all things
 necessary to carry this resolution into effect.

No. 752

Resolution of directors accepting sublease of premises.

WHEREAS, "A" is the lessee of the premises located at
 (Street), under a lease from, owner of said prem-
 ises, and

WHEREAS, the said "A" has consented to sublease said premises to
 this Corporation, be it

RESOLVED, That this Corporation, through its Board of Directors,
 does hereby accept from said "A" a sublease, according to the terms
 mentioned in the sublease, and does hereby authorize,
 President of this Corporation, to sign and accept said lease for the use
 and benefit of this Corporation.

No. 753

Resolution of directors of lessee authorizing assignment of lease of premises.

WHEREAS, this Corporation occupies the premises at
 (Street), City of, State of, under a lease from
 the Company as Lessor, for a period of
 (.....) years from the .. day of, 19.., and

WHEREAS, the rental payable under said lease is considerably less
 than the current rental for other property in the neighborhood, and
 the lease has therefore become valuable, and

WHEREAS, it would be profitable for this Corporation to assign and
 transfer all its right, title, and interest in said lease for a money con-
 sideration, and to remove the offices of this Corporation to some other
 suitable location where rents are lower, and

WHEREAS, has offered to accept an assignment
 of said lease for and during the remainder of the term of
 (.....) years mentioned in said lease, subject to rents, covenants,
 conditions, and stipulations therein mentioned, and to pay for the said
 assignment the sum of (\$.....) Dollars, be it

RESOLVED, That the offer of said be and it
 hereby is accepted; and that the President be and he hereby is author-
 ized and directed to execute an instrument, for and in behalf of this
 Corporation, assigning, transferring, and setting over unto said
 all the right, title, and interest of this Corporation
 in the lease dated, 19.., between the
 Company as Lessor and this Corporation as Lessee (and re-
 corded in), subject to rents, covenants, conditions,
 and stipulations therein contained, and to deliver said instrument of
 assignment upon receipt from said of the sum
 of (\$.....) Dollars.

No. 754

Resolution of directors of lessee authorizing surrender of lease of premises.

WHEREAS, this Corporation occupies the premises at
 (Street), City of, State of, under a lease from
 as Lessor, for a period of (.....) years
 from the .. day of, 19.., and

WHEREAS, said Lessor has offered to pay this Corporation the sum
 of (\$.....) Dollars for the surrender of said lease, and

WHEREAS, it is the opinion of this Board of Directors that said offer
 should be accepted, be it

RESOLVED, That the offer of said, Lessor under an instrument of lease between said and this Corporation as Lessee, dated the .. day of, 19.., and expiring on the .. day of, 19.., to pay to this Corporation the sum of (\$.....) Dollars for the surrender of said lease, be and it hereby is accepted; that the President of this Corporation be and he hereby is authorized and directed to execute an instrument surrendering and yielding up unto, the Lessor under said lease, the land and premises demised by said lease, and agreeing to waive any further notice to quit and to vacate the premises on or before the .. day of, 19.., and to give full possession thereof to the said; and that the President hereby is authorized to deliver said instrument upon receipt from said of the sum of (\$.....) Dollars.

No. 755

Resolution of directors of lessee authorizing officer's compensation for securing lease and providing conditional payment.

WHEREAS, at the request of this Corporation, has expended large sums of money and has rendered valuable services to this Corporation outside the line of his employment, in negotiating and securing for this Corporation that certain lease from the Company to this Corporation dated, 19.., and set forth in these minutes on pages,, and, and will render further valuable services to this Corporation by securing for this Corporation a continuation of said lease, thereby securing large profits to this Corporation, be it

RESOLVED, That this Corporation do pay said, as compensation for said services heretofore rendered and hereafter to be rendered, the sum of Forty-five Thousand (\$45,000) Dollars in the manner following—to wit: Eleven Thousand (\$11,000) Dollars forthwith, the further sum of Ten Thousand (\$10,000) Dollars ninety days from this date, the further sum of Twelve Thousand (\$12,000) Dollars five months from this date, and the further sum of Twelve Thousand (\$12,000) Dollars six months from date; provided that, if the earnings of this Corporation shall not be sufficient to make said deferred payments at the respective times above provided, then said deferred payments shall be made to said when and as the earnings of this Corporation will permit. The President and the Secretary are hereby authorized and directed to make the payments herein provided and to take receipts therefor as made.

CHAPTER 33

CONSOLIDATION AND MERGER

Definition of consolidation. A consolidation occurs when two or more corporations combine and unite their interests to form a new corporation, having the combined rights, privileges, franchises, and properties of the constituent companies.¹ All the combining companies lose their corporate existence.² For example, a consolidation occurs when A and B combine to form C Corporation.

Definition of merger. A merger is the absorption of one or more corporations by another existing corporation, which retains its identity and takes over all the rights, privileges, franchises, and properties of the absorbed companies.³ The absorbing corporation continues its existence, while the life of the other companies terminates.⁴ For example, if companies A and B combine so that A is absorbed by B, the companies have merged.

Importance of distinction between consolidation and merger. The terms "consolidation" and "merger" are often used interchangeably. Technically, however, each represents a distinct type of combination,⁵ and in certain instances the difference be-

¹ *Royal Palm Soap Co. v. Seaboard Air Line Ry. Co.*, (1924) 296 F. 448; *Graeser v. Phoenix Finance Co.*, (1934) 218 Iowa 1112, 254 N. W. 859; *Central Illinois Co. v. Swanson*, (1937) 290 Ill. App. 165, 8 N. E. (2d) 371; *Mercantile Home Bank & Trust Co. v. United States*, (1938) 96 F. (2d) 655; *Irving Trust Co. v. United States*, (1940) 30 F. Supp. 696.

² *Electric Bond & Share Co. v. State*, (1937) 249 N. Y. App. Div. 371, 293 N. Y. Supp. 175; *Helvering v. Winston Bros. Co.*, (1935) 76 F. (2d) 381; *Graeser v. Phoenix Finance Co.*, (1934) 218 Iowa 1112, 254 N. W. 859; *Purellas Ice & Cold Storage Co. v. Comm. of Int. Rev.*, (1932) 57 F. (2d) 188. See also footnote 1.

³ *State v. Atlantic Coast Line R. Co.*, (1919) 202 Ala. 558, 81 So. 60; *Union Indemnity Co. v. Railroad Commission*, (1925) 187 Wisc. 276, 205 N. W. 492; *Carolina Coach Co. v. Hartness*, (1930) 198 N. C. 524, 152 S. E. 489; *Windhurst v. Central Leather Co.*, (1930) 105 N. J. Eq. 621, 149 A. 36; *Cortland Specialty Co. v. Commissioner of Internal Revenue*, (1932) 60 F. (2d) 937; *Berks County Trust Co. v. Kotzen*, (1937) 326 Pa. 541, 192 A. 638; *Mercantile Home Bank & Trust Co. v. United States*, (1938) 96 F. (2d) 655; *Irving Trust Co. v. United States*, (1949) 30 F. Supp. 696; *Barnes v. Liebig*, (1941) 146 Fla. 219, 1 So. (2d) 247.

⁴ *United States v. Borden Co.*, (1939) 28 F. Supp. 177. See also footnote 3.

⁵ See 30 *Mich. Law Rev.* 1072 (1932); *Purellas Ice & Cold Storage Co. v.*

tween them may be highly important. The distinction between a merger and a consolidation may assume particular significance in questions involving the payment of taxes, jurisdiction of the courts, and special statutory privileges and exemptions.⁶ It may also be important to creditors who seek satisfaction of unpaid claims against the constituent companies.⁷

Distinction between consolidation or merger and sale of assets. It is often difficult to determine whether a particular transaction is a consolidation or merger, or a sale of assets.⁸ This is particularly true under a sale of all assets of a corporation to another corporation, where stock of the purchasing corporation is given in consideration of the transfer and distributed to stockholders of the selling corporation, and the selling corporation is, in turn, dissolved. The distinction between a merger or consolidation on the one hand, and a sale of assets on the other, should be kept clearly in mind, for the procedure required for the one differs from that prescribed for the other, and the incidents ensuing may vary.⁹ A merger or consolidation is strictly statutory; a sale of assets is essentially contractual, although

Comm. of Int. Rev., (1932) 57 F. (2d) 188; *Cole v. National Cash Credit Ass'n*, (1931) 18 Del. Ch. 47, 156 A. 183. See also *Freeman v. Hiznay*, (1944) 349 Pa. 89, 36 A. (2d) 509.

⁶ See "Statutory Merger and Consolidation of Corporations," 45 *Yale Law Journal* 105 (1935); *Pennsylvania Co. v. Comm. of Int. Rev.*, (1935) 75 F. (2d) 719; *Alabama Power Co. v. McNinch*, (1937) 94 F. (2d) 601; *Irving Trust Co. v. United States*, (1940) 30 F. Supp. 696.

⁷ *Irvine v. N. Y. Edison Co.*, (1913) 207 N. Y. 425, 101 N. E. 358.

⁸ In the following cases, the transaction was held to be a merger or consolidation, and not a sale. *Chicago, S. F. & C. Ry. Co. v. Ashling*, (1895) 160 Ill. 373, 43 N. E. 373; *Collinsville Nat. Bank v. Esau*, (1918) 74 Okla. 45, 176 P. 514; *Brabham v. So. Exp. Co. et al.*, (1922) 124 S. C. 157, 117 S. E. 368; *Gibson v. Amer. Ry. Exp. Co.*, (1923) 195 Iowa 1126, 193 N. W. 274; *Drug v. Hunt*, (1933) 35 Del. 339, 168 A. 87; *Helvering v. Metropolitan Edison Co.*, (1939) 306 U. S. 522, 59 S. Ct. 634, aff'g 98 F. (2d) 807, 812, cert. granted 59 S. Ct. 358; *General Gas & Electric Corp. v. Commissioner of Int. Rev.*, (1939) 306 U. S. 530, 59 S. Ct. 638, rev'g 98 F. (2d) 561, cert. granted 59 S. Ct. 358; *Jones v. Noble Drilling Co.*, (1943) 135 F. (2d) 721.

In the following cases, the transaction was held to be a sale and not a merger or consolidation: *McAlister v. American Ry. Co.*, (1920) 179 N. C. 556, 103 S. E. 129; *City of Albany v. Georgia-Alabama Power Co.*, (1921) 152 Ga. 119, 108 S. E. 528; *First Nat. Bank v. Lock*, (1925) 113 Okla. 30, 237 P. 606; *Graeser v. Phoenix Finance Co.*, (1934) 218 Iowa 1112, 254 N. W. 859; *In re Daily's Estate*, (1936) 323 Pa. 42, 186 A. 754; *Argenbright v. Phoenix Finance Co. of Iowa*, (1936) 21 Del. Ch. 288, 187 A. 124; *Mercantile Home Bank & Trust Co. v. United States*, (1938) 96 F. (2d) 655. See also *U. S. v. Niagara Hudson Power Corporation*, (1944) 53 F. Supp. 796.

⁹ See *Electric Bond & Share Co. v. State*, (1937) 249 N. Y. App. Div. 371, 293 N. Y. Supp. 175.

today both devices are governed by statute in many states.¹⁰ Following are some outstanding differences:

1. *Consent of stockholders.* In a merger or consolidation, consent of a fixed proportion of stockholders of each participating corporation must be obtained. In a sale of all assets, only stockholders of selling corporation may be required to authorize the transactions.

2. *Appraisal of shares.* The statutes governing merger or consolidation generally provide for appraisal of shares of dissenting stockholders. In states having no statutory provision governing sale of assets, stockholders who refuse to take under the plan of distribution may block the entire transaction, for unanimous consent of stockholders to the sale is required (see page 874).¹¹

3. *Existence of corporation.* In a merger or consolidation, all constituent corporations except the surviving or consolidated corporation may lose their existence upon the transfer; formal dissolution is generally not required. Upon a sale of assets, the selling company continues in existence until it has been formally dissolved.

4. *Transfer of title.* Title passes by execution of the agreement of merger or consolidation. But a deed or bill of sale may be required to transfer title upon a sale of assets.

Power of corporation to consolidate or merge. No matter how desirable or beneficial a consolidation or merger may be, a corporation has no power to consolidate or merge unless the power is conferred by the laws of the state of its incorporation.¹² Each of the corporations entering into the combination must have such authorization; otherwise the attempt to consolidate or merge will be an absolute nullity.¹³ In most states, the power to consolidate or merge is granted in the general statutes. In

¹⁰ See 45 *Yale Law Journal* 105 (1935) for a discussion of the difference between a merger or consolidation and a sale of assets. See also *In re King's Estate*, (1944) 349 Pa. 27, 36 A. (2d) 504.

¹¹ See 20 *Calif. Law Rev.* 421 (1932), which discusses the typical difficulties in a sale of assets.

¹² *McRoberts v. Minier*, (1933) 270 Ill. App. 1; *Agoodash Achim, Inc. v. Temple Beth-El*, (1933) 147 N. Y. Misc. 405, 263 N. Y. Supp. 81; *Carolina Coach Co. v. Hartness*, (1930) 198 N. C. 524, 152 S. E. 489; *Jones v. Rhea*, (1921) 130 Va. 345, 107 S. E. 814; *Bonnet v. First Nat. Bank*, (1900) 24 Tex. Civ. App. 613, 60 S. W. 325. See also *Imperial Trust Co. v. Magazine Repeating Razor Co.*, (1946) 138 N. J. Eq. 20, 46 A. (2d) 449, discussed in 45 *Mich. Law Review* 214 (1946).

¹³ See 45 *Yale Law Journal* 105 (1935); 81 *U. Pa. Law Rev.* 219 (1932); *First State Bank v. Lock*, (1925) 113 Okla. 30, 237 P. 606; *Louisville & N. R. Co. v. Kentucky*, (1896) 161 U. S. 677, 16 S. Ct. 714.

other states, the power may be granted by special act or by the corporation's charter.¹⁴

A corporation may not effect a merger or consolidation which violates the Federal laws.¹⁵

Provisions of statutes governing consolidation and merger. The statutes in the various states authorizing merger and consolidation generally make provision with respect to the following:

1. The types of corporations that may consolidate. Formerly, the privilege was extended only to corporations organized for the same purpose and engaged in similar business; today, this restriction generally applies only to public utility corporations, insurance companies, banks, and trust companies.¹⁶ In some states, the power to merge or consolidate is confined to domestic corporations; in others, domestic corporations are expressly permitted to merge or consolidate with corporations of other states.¹⁷ In a few states, domestic corporations are permitted to consolidate or merge with Federal corporations.

2. The proportion of stockholders who must consent to the

¹⁴ Where a charter provision for consolidation conflicts with the statutory provision, the latter prevails. *Jones v. St. Louis Structural Steel Co.*, (1932) 267 Ill. App. 576.

¹⁵ For a study of the application of the Federal antitrust laws to mergers and consolidations, see "Mergers and the Law," National Industrial Conference Board (1929). See also Milton Handler, "Industrial Mergers and the Anti-trust Laws," 32 *Columbia Law Review* 179 (1932). For application of Civil Aeronautics Act of 1938 to consolidation and merger, see 11 *Air Law Review* 310 (1940).

Acquisitions by public utility companies of securities, assets, and interests in other businesses may require the approval of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. Mergers or consolidations of public utility holding companies may also be required to be effected under the supervision of the Securities and Exchange Commission under the provisions of the Public Utility Holding Company Act of 1935 requiring simplification of holding company systems. See *Prentice-Hall Securities Regulation Service*.

For a discussion of various aspects of consolidation and merger, see James J. Fuld, "Some Practical Aspects of a Merger," 60 *Harvard Law Review* 1092 (1947).

¹⁶ See *Alpren v. Consolidated Edison Co. of New York*, (1938) 168 N. Y. Misc. 381, 5 N. Y. Supp. (2d) 254. A general statute authorizing merger of corporations does not prohibit merger of a parent company with its wholly owned subsidiary. *Federal United Corporation v. Havender*, (1940) 24 Del. Ch. 318, 11 A. (2d) 331, rev'g 6 A. (2d) 618.

¹⁷ Where corporations of different states consolidate, the following questions arise: (1) Is a new corporate entity created? (2) In which state is the consolidated corporation organized as a domestic corporation? (3) Are the constituent corporations automatically dissolved? These problems were considered in 45 *Yale Law Journal* 105 (1935).

merger or consolidation.¹⁸ Under the statutes of the various states, the proportion ranges from a simple majority to three-quarters in some states and two-thirds in others. It has been held that if the statute does not provide the proportion of stockholders whose consent is required, a majority vote of the stock will be sufficient to authorize consolidation.¹⁹

3. The procedure to be followed in effecting the merger or consolidation.²⁰

These statutes must be strictly complied with, and in every instance before any steps are taken toward consolidation, they should be carefully examined.²¹

Procedure to effect consolidation or merger. While the statutes vary in detail, they are similar in the general procedure to be followed in bringing about a consolidation or merger. If the statute does not clearly designate the procedure for consolidating or merging, but merely authorizes such action in general language, the combining corporations may agree upon the terms of the consolidation or merger and the method of putting it into effect.²² Following are the steps generally required by statute:

1. *Agreement of consolidation or merger.*²³ The boards of directors of the corporations proposing to consolidate or merge prepare an agreement of consolidation or merger. This agreement generally sets forth the terms and conditions of the merger or consolidation, the mode of carrying it into effect, the name and principal place of business of the new or consolidated corporation, its capitalization, and other details such as those

¹⁸ Under the common law, a consolidation or merger cannot be effected without unanimous consent of stockholders. See *Garrett v. Reid-Cashion Land & Cattle Co.*, (1928) 34 Ariz. 245, 270 P. 1044.

¹⁹ *Dady v. Georgia & A. Ry. Co.*, (1900) 112 F. 838.

²⁰ As to notice of stockholders' meeting to pass on merger, see discussion in *MacCrone v. American Capital Corp.*, (1943) 51 F. Supp. 462. See also *Wilson v. Rensselaer & Saratoga Railroad Co.*, (1945) 184 N. Y. Misc. 218, 52 N. Y. S. (2d) 847, discussed in 54 *Yale Law Journal* 840 (1945).

²¹ See *Beardstown Pearl Button Co. v. Oswald*, (1906) 130 Ill. App. 290. Failure to observe required procedural steps, however, does not permit repudiation of lawful obligations of the merged corporation. *Commonwealth v. Merchants Nat. Bank of Allentown*, (1936) 323 Pa. 145, 185 A. 823; *Helvering v. Metropolitan Edison Co.*, (1939) 306 U. S. 522, 59 S. Ct. 634, aff'g 98 F. (2d) 807, 812, cert. granted 59 S. Ct. 358.

²² *Dimpfel v. Ohio, etc., R. Co.*, (1879) 9 Biss. (U. S.) 127.

²³ In some instances, where the consolidating corporations are large and the stock is widely held, the board of directors may adopt a plan for consolidation and appoint a committee to carry out the plan under a deposit agreement. Stockholders signify their assent to the plan by depositing their stock under the terms of the deposit agreement.

required to be set forth in an original certificate of incorporation or necessary to effect the merger or consolidation. The chief problem in drafting the agreement is to arrive at a basis for exchange of outstanding shares held by stockholders of the constituent companies which will properly reflect their interests in the consolidated or surviving corporation.²⁴

2. *Meetings of boards of directors.* The directors of each of the constituent companies hold a meeting at which the proposed agreement of consolidation or merger is approved by resolution of the board. The resolution also authorizes the proper officers to execute the agreement under the seal of the corporation upon approval of the stockholders to be given at a special meeting called to vote upon the proposed consolidation or merger.

3. *Meetings of stockholders.* Most of the statutes indicate that a special meeting of the stockholders shall be called, and that notice of the meeting, indicating the time, place, and object of the meeting, shall be given in writing to the stockholders a certain number of days before the meeting. The agreement of consolidation or merger is submitted to the stockholders of each of the consolidating corporations separately, at the respective meetings of the stockholders. A resolution is offered authorizing the merger or consolidation, approving the agreement proposed by the directors, and empowering the proper corporate officers to execute and file articles of merger or consolidation and take any other action necessary to consummate the transaction. The resolution should be voted upon by ballot for adoption or rejection. Under some statutes, written consent of the required proportion of stockholders may dispense with the necessity for a stockholders' meeting and resolution.

4. *Certificate or articles of consolidation or merger.* The secretary of each of the constituent corporations executes an instrument certifying that the required proportion of stockholders of the corporation has consented to the merger or consolidation. The agreement of merger or consolidation, so certified, is filed in the office of the secretary of state or in some other official place designated by statute, and constitutes the agreement or act of consolidation of the combining companies. The form of this certificate or articles depends upon the requirements of each state. Some states require the filing of a statement to the effect

²⁴ For right of stockholder to enjoin a combination where his interest in the assets of the new corporation is unfairly diminished, see Meisenholder, "Recapitalization by Statutory Merger and Consolidation," 38 *Mich. Law Rev.* 214 (1939).

that the required action has been taken, accompanied by certified copies of the resolutions adopted at the meetings of the stockholders. Several states furnish official forms to be executed upon merger or consolidation.

5. *Additional statutory requirements.* In mergers or consolidations of certain classes of corporations, such as public utility and railroad companies, the state laws require the approval of some state regulatory body as a condition precedent to filing of the certificate or articles of merger or consolidation. The Federal Government also imposes similar requirements on certain classes of corporations engaged in interstate commerce. The proposed issuance of securities by the consolidated corporation may require the approval of the state Blue Sky Commission, just as in the organization of a corporation. Registration under the Federal Securities Acts will generally not be required.²⁵

6. *Taxes and fees.* Some statutes require the new corporation to pay organization fees in the same amount as is payable by a corporation upon incorporation. Many statutes, however, provide that a tax is payable only upon the amount of capitalization in excess of the aggregate capitalization of the constituent companies.

7. *Exchange of stock.* Securities of the constituent companies are exchanged for certificates of stock of the surviving or consolidated corporation, in accordance with the terms and conditions of the consolidation agreement.²⁶

8. *Dissolution of constituent corporations.* All the constituent corporations, except the surviving or consolidated corporation, lose their existence by virtue of the merger or consolidation, and ordinarily no formal dissolution of these corporations is required. In some states, however, it may be necessary to file a formal certificate of dissolution for the companies whose existence is terminated.

Rights of stockholders consenting to consolidation or merger. The rights of stockholders who consent to consolidation or merger are generally determined by the statute under which the combination is authorized and by the terms of the agreement. Usually, the stockholders of the constituent corporations become

²⁵ See *Prentice-Hall Securities Regulation Service*.

²⁶ Where the time within which the stock must be surrendered is not fixed, the stockholder has a reasonable time within which to present his stock for exchange *McKay v. Rochester & Lake Ontario W. Serv. Corp.*, (1936) 247 N. Y. App. Div. 499, 286 N. Y. Supp. 801, *aff'd* 272 N. Y. 528, 4 N. E. (2d) 432.

the stockholders of the consolidated corporation or the acquiring corporation upon an agreed basis.

It has been held that dividends accumulated on preferred stock may be extinguished by merger of the corporation, where the merger provisions are fair and equitable.²⁷

Right of dissenting stockholders to payment of their shares, under statute. Many of the statutes permitting consolidation or merger of corporations upon consent of less than all the stockholders include provisions for appraisal of shares of dissenting stockholders and payment to them of the value²⁸ of their interest in the corporation.²⁹ These appraisal statutes can be invoked by a dissenting stockholder only upon strict compliance with the procedure prescribed in the state where the constituent corporation was organized.³⁰ It is not necessary, however, that the dissenting stockholder be a registered stockholder at the record date set by the board of directors for determining those entitled to

²⁷ *Federal United Corporation v. Havender*, (1940) 24 Del. Ch. 318, 11 A. (2d) 331, rev'g 6 A. (2d) 618, discussed in 24 *Minn. Law Rev.* 992 (1940), 25 *Wash. Univ. Law Qu.* 614 (1940), and in 53 *Harvard Law Review* 877 (1940); *Hubbard v. Jones & Laughlin Steel Corp.*, (1941) 42 F. Supp. 432; *Zobel v. American Locomotive Co.*, (1943) 182 N. Y. Misc. 323, 44 N. Y. S. (2d) 33; *Anderson v. Int. Min. & Chem. Corp.*, (1946) 295 N. Y. 343, 67 N. E. (2d) 573; *Langfelder v. Universal Laboratories*, (1947) 163 F. (2d) 804. For general principles governing right to eliminate dividend arrearages, see page 725.

The right to future dividends may also be terminated by consolidation. *Bowden v. Central Bank & Trust Corp.*, (1924) 2 F. (2d) 596.

²⁸ In some states, the statutes provide that the stockholder shall be paid the "value" of his shares; in others, "the fair value"; in still others, the "fair cash value." These statutes do not specify any definite measure for computing value, and the question is left to the courts for determination. See 47 *Harvard Law Review* 847 (1934), outlining the various methods used to determine "value." The cases dealing with the valuation of stock of dissenters are reviewed in the following articles: Norman D. Lattin, "Remedies of Dissenting Stockholders under Appraisal Statutes," 45 *Harvard Law Review* 233 (1931); Joseph L. Weiner, "Payment of Dissenting Stockholders," (1927) 27 *Columbia Law Review* 547; 15 *Cornell Law Quarterly* 420 (1930). See also *Ahlenius v. Bunn & Humphreys*, (1934) 358 Ill. 155, 192 N. E. 824; *Chicago v. Munds*, (1934) 20 Del. Ch. 142, 172 A. 452; *American General Corporation v. Camp*, (1937) 171 Md. 629, 190 A. 225; *Republic Finance & Investment Co. v. Fenstermaker*, (1937) 211 Ind. 251, 6 N. E. (2d) 541; *Application of Behrens*, (1946) 61 N. Y. S. (2d) 179; *Adams v. U. S. Distributing Corporation*, (1945) 184 Va. 134, 34 S. E. (2d) 244.

²⁹ Where the statute gave shareholders the right to dissent and outlined the procedure, this right was held not to apply to a subscriber for stock. The subscriber became entitled to an accounting against the corporation's successor. *Goodesson v. North American Securities Co.*, (1931) 40 Ohio App. 85, 178 N. E. 29.

³⁰ See *American General Corporation v. Camp*, (1937) 171 Md. 629, 190 A. 225, discussed in 1 *Maryland Law Rev.* 338 (1937); *Roselle Park Trust Co. v. Ward Baking Corporation*, (1939) 177 Md. 212, 9 A. (2d) 228; *In re Northwestern Water Co.*, (1944) (Del. Ch.) 38 A. (2d) 918.

vote on the proposed merger.^{30a} Since these statutes are enacted for the protection of dissenting stockholders, they should be liberally construed in favor of such stockholders.³¹ The requirements vary as to: (1) the manner in which the stockholder must voice his objection to the merger or consolidation; (2) the manner in, and time within,³² which he must demand payment of the value of his shares;³³ (3) the method of appointing appraisers and of determining the value of the dissenting stockholders' shares; and (4) the procedure to be followed in the event of disagreement as to the value of the shares.

The courts are divided as to whether the statutory remedy of appraisal of a dissenting stockholder's shares is exclusive.³⁴ The weight of authority seems to support the view that it is not exclusive, and that a dissenting stockholder may elect to bring an action in a court of equity to recover the value of his shares rather than to resort to appraisal under the statute.³⁵

Right of dissenting stockholders to payment of their shares, in absence of statute. In the absence of statutory provisions in

^{30a} *Lewis v. Corroon & Reynolds*, (1948) (Del. Ch.) 57 A. (2d) 632.

³¹ *Manning v. Brandon Corp.*, (1931) 163 S. C. 178, 161 S. E. 405; *Schenck v. Salt Dome Oil Corporation*, (1943) (Del. Ch.) 34 A. (2d) 249.

³² Demand for payment cannot be legally made after expiration of the time fixed. *Roselle Park Trust Co. v. Ward Baking Corporation*, (1939) 177 Md. 212, 9 A. (2d) 228. Where the statute provides that a dissenting stockholder may, at the meeting or 20 days thereafter, demand payment for his shares, the stockholder is entitled to make his demand within 20 days after the meeting, even if the merger agreement is consummated before that time. *In re Camden Trust Co.*, (1938) 121 N. J. L. 222, 1 A. (2d) 475.

³³ Demand must generally be made on the new corporation and not on a constituent company. *Stephenson v. Commonwealth & Southern Corp.*, (1931) 18 Del. Ch. 91, 156 A. 215. See also *Friedman v. Booth Fisheries Corp.*, (1944) (Del. Ch.) 39 A. (2d) 761.

³⁴ In the following cases, the remedy by appraisal was held to be exclusive: *Spencer v. Seaboard Airline R. Co.*, (1904) 137 N. C. 107, 49 S. E. 96; *Beechwood Securities Corp. v. Associated Oil Co.*, (1939) 104 F. (2d) 537, discussed in Lattin, "A Reappraisal of Appraisal Statutes," 38 *Mich. Law Rev.* 1165 (1940); *Perkins v. New Hampshire Power Co.*, (1940) 90 N. H. 534, 11 A. (2d) 811, aff'd 13 A. (2d) 475; *O'Hara v. Pittston Co.*, (1947) 186 Va. 325, 42 S. E. (2d) 269; *Meade v. Pacific Gamble Robinson Co.*, (1947) (Del. Ch.) 51 A. (2d) 313. See also Ballantine & Sterling, "Upsetting Mergers and Consolidations: Alternative Remedies of Dissenting Shareholders in California," 27 *Calif. Law Rev.* 644 (1939).

³⁵ *Colby v. Equitable Trust Co.*, (1907) 55 N. Y. Misc. 355, 106 N. Y. Supp. 801, rev'd, on other grounds, in 124 N. Y. App. Div. 262, 108 N. Y. Supp. 978; *Winfree v. Riverside Cotton Mills*, (1912) 113 Va. 717, 75 S. E. 309; *General Inv. Co. v. Lake Shore & M. S. Ry. Co.*, (1918) 250 F. 160, aff'g 226 F. 976; *Cole v. National Credit Assn.*, (1931) 18 Del. Ch. 47, 156 A. 183; *Weiss v. Atkins*, (1943) 52 F. Supp. 418. See also 30 *Michigan Law Review* 1072 (1932), and Davidson, "The Rights of Dissenting Stockholders Arising from Corporate Mergers and Consolidations," 3 *John Marshall Law Qu.* 258 (1937).

regard to appraisal of shares of stockholders objecting to consolidation or merger and payment to them of the value of their shares, an objecting stockholder is bound by a consolidation or merger which is lawful, effected in good faith, and in accordance with statutory requirements.³⁶ But if the consolidation was effected without authority, or wrongfully and without the consent of the suing stockholder,³⁷ or if fraud was committed,³⁸ the dissenting stockholder may sue for the value of his shares.

Right of stockholders to payment of shares under contract. Stockholders have in some instances been allowed to recover the par value of their stock by suit for specific performance of preferred stock contracts.³⁹ Preferred stock is often issued with the provision that the stockholder shall be entitled to the par value of his shares upon dissolution of the corporation. Whether or not stockholders can enforce this provision upon merger or consolidation depends upon whether the word "dissolution," as used in the preferred stock agreement, means cessation of corporate existence upon merger or consolidation, or refers only to a technical dissolution within the purview of the dissolution statutes. If the former, the stockholder is entitled to recover the par value of his shares; otherwise he is not.⁴⁰

Right of stockholder to enjoin or set aside consolidation or merger. A stockholder may sue in equity to enjoin a proposed merger⁴¹ or to have a merger set aside upon the ground that no statutory authority to merge exists,⁴² that the proposed merger is illegal,⁴³ that the procedure required for merger has not been

³⁶ In re Interborough Consolidated Corp., (1921) 277 F. 455; Mayfield v. Alton Ry. Gas & Electric Co., (1902) 198 Ill. 528, 65 N. E. 100; Jones v. St. Louis Structural Steel Co., (1932) 267 Ill. App. 576.

³⁷ See Mayfield v. Alton Ry., G. & E. Co., supra, footnote 36.

³⁸ Jones v. Missouri-Edison Electric Co., (1906) 144 F. 765; Wunsch v. Consolidated Laundry Co., (1921) 116 Wash. 44, 198 P. 383. See also Clarke v. Gold Dust Corporation, (1934) 6 F. Supp. 313.

³⁹ Petry v. Harwood Leather Co., (1924) 280 Pa. 142, 124 A. 302. See, however, Windhurst v. Central Leather Co., (1927) 101 N. J. Eq. 543, 138 A. 772.

⁴⁰ This question is discussed in 45 *Yale Law Journal* 105 (1935), and in 30 *Michigan Law Review* 1072 (1932).

⁴¹ William B. Riker & Son Co. v. United Drug Co., (1912) 79 N. J. Eq. 580, 82 A. 930; New Jersey, etc. R. Co. v. American Electrical Works, (1911) 82 N. J. Law 391, 81 A. 989, aff'g 81 N. J. Law 34, 78 A. 670; Outwaters v. Public Service Corp., (1928) 103 N. J. Eq. 461, 143 A. 729; Paterson v. Shattuck Arizona Copper Co., (1932) 186 Minn. 611, 244 N. W. 281; In re Beckman, (1939) 334 Pa. 81, 5 A. (2d) 342.

⁴² Garrett v. Reid-Cashion Land & Cattle Co., (1928) 34 Ariz. 245, 270 P. 1044.

⁴³ De Roven v. Lake Shore & M. S. Ry. Co., (1914) 216 F. 955; Outwater v. Public Service Corporation, (1928) 103 N. J. Eq. 461, 143 A. 729, aff'd (1929) 104

complied with,⁴⁴ or that the merger or consolidation was fraudulent.⁴⁵ To have a standing in equity, it must generally appear that the dissenting stockholder was a stockholder at the time the merger or consolidation was submitted to the stockholders of his constituent corporation for their approval,⁴⁶ that he did not vote in favor of the merger,⁴⁷ and that his application for relief was timely.⁴⁸

Liability of consolidated or surviving corporation for debts and liabilities of constituent companies. A consolidation or merger may be entered into without the consent of the creditors of the constituent companies. Their rights, however, are preserved. The consolidation statutes generally provide that the rights of creditors and all liens upon the property of all corporations entering into a consolidation or merger shall be unim-

N. J. Eq. 490, 146 A. 916; *General Inv. Co. v. Lake Shore & M. S. Ry. Co.*, (1918) 250 F. 160. See also *Clarke v. Gold Dust Corporation*, (1939) 106 F. (2d) 598, in which it was held that the test of whether or not a court of equity will grant relief to a stockholder claiming illegality of a merger is the fairness of the merger plan to the stockholders, and that weight must also be given to the fact that suit is brought by the holder of a very few shares of a large issue of stock.

⁴⁴ See *Milner v. Van Higgins*, (1933) 227 Ala. 333, 149 So. 872.

⁴⁵ *Thomle v. Soundview Pulp Co.*, (1935) 181 Wash. 1, 42 P. (2d) 19; *Cole v. National Cash Credit Ass'n*, (1931) 18 Del. Ch. 47, 156 A. 183; *Jones v. Missouri-Edison Electric Co.*, (1906) 144 F. 765. But a consolidation agreement is not voidable at the election of a stockholder merely because directors making or controlling the agreement were the common directors of both the consolidating companies. *Voigt v. Remick*, (1932) 260 Mich. 198, 244 N. W. 446. See also *Hubbard v. Jones & Laughlin Steel Corp.*, (1941) 42 F. Supp. 432; *Hottenstein v. York Ice Machinery Corporation*, (1942) 45 F. Supp. 436, discussed in 43 *Columbia Law Review* 230 (1943); *Porges v. Vadsco Sales Corp.*, (1943) (Del. Ch.) 32 A. (2d) 148, discussed in 42 *Michigan Law Review* 332 (1943); *Wilson v. Rensselaer & Saratoga R. R. Co.*, (1945) 184 N. Y. Misc. 218, 52 N. Y. S. (2d) 847, discussed in 54 *Yale Law Journal* 840 (1945). See *Skelly v. Dockweiler*, (1948) 75 F. Supp. 11, holding that actual, not merely constructive, fraud must be proved. See also Davidson, "The Rights of Dissenting Stockholders Arising from Corporate Mergers and Consolidations," 3 *John Marshall Law Quarterly* 258 (1937); Meisenholder, "Recapitalization by Statutory Merger and Consolidation," 38 *Michigan Law Rev.* 214 (1939).

⁴⁶ The fact that a bona fide owner of stock did not have the stock transferred to his name on the corporation's books until after receiving notice of a proposed merger did not prejudice his right to object and have his stock appraised. *Application of Bazar*, (1944) 183 N. Y. Misc. 736, 50 N. Y. S. (2d) 521.

⁴⁷ See *Drake v. N. Y. Suburban Water Co.*, (1898) 26 N. Y. App. Div. 499, 50 N. Y. Supp. 826.

⁴⁸ A delay of two months after notice of merger was held to preclude a stockholder from maintaining action. *Rankin v. Interstate Equities Corp.*, (1935) 21 Del. Ch. 39, 180 A. 541. See also *Jones v. Missouri-Edison Electric Co.*, supra (Note 45); *Clarke v. Gold Dust Corporation*, (1939) 106 F. (2d) 598; *Peterson v. New England Furniture & Carpet Co.*, (1941) 210 Minn. 449, 299 N. W. 208.

paired,⁴⁹ and that the debts and liabilities of the former corporations shall attach to the consolidated corporation and be enforceable against it to the same extent as if the debts and liabilities had been incurred by the consolidated corporation. The agreement of consolidation or merger also usually provides for assumption by the consolidated or surviving company of the debts and liabilities of the constituent companies.⁵⁰ Mere inadequacy of consideration is no bar to enforcement of the agreement to assume the obligations of the constituent companies.⁵¹ A provision in the agreement absolving the new corporation from liability for debts of the constituent companies is inoperative as to creditors who were not parties to the agreement.⁵²

In the absence of statutory provision or express assumption of liability, the surviving or consolidated corporation is nevertheless answerable for the debts, liability, and obligations of each of the constituent companies.⁵³ According to the weight of authority, however, this liability is limited to the extent of the property acquired from the constituent corporation whose liability is sought to be enforced against the consolidated corporation.⁵⁴ It

⁴⁹ The terms "rights of creditors" and "liens" do not include the derivative right of stockholders of the old corporation to sue its directors for misfeasance and nonfeasance. *Arnstein v. Bethlehem Steel Corporation*, (1937) 18 F. Supp. 916.

⁵⁰ For right of assignee of creditor to enforce agreement to pay indebtedness of transferor, see *Anderson v. Calaveras Cent. Mining Corporation*, (1936) 13 Cal. App. (2d) 338, 57 P. (2d) 560.

⁵¹ *State v. American Bonding & Casualty Co.*, (1931) 213 Iowa 200, 238 N. W. 726.

⁵² *In re Utica Nat. Brewing Co.*, (1897) 154 N. Y. 268, 48 N. E. 521.

⁵³ *Berks County Trust Co. v. Kotzen*, (1937) 326 Pa. 541, 192 A. 638; *Malone v. Red Top Cab Co. of Los Angeles*, (1936) 16 Cal. App. (2d) 268, 60 P. (2d) 543; *American Gas & Elec. Co. v. Comm. of Internal Revenue*, (1936) 85 F. (2d) 527; *Shaw v. Monongahela Railway Co.*, (1931) 110 W. Va. 155, 157 S. E. 170; *Camden Interstate R. Co. v. Lee*, (1905) 27 Ky. Law Rep. 75, 84 S. W. 332. See also Cuquet, "The Liability of a Successor Corporation for the Obligations of Its Predecessors," 14 *Tulane Law Rev.* 273, 278 (1940). See also *Wolff v. Shreveport Gas, etc. Co.*, (1916) 138 La. 743, 70 So. 789; *Ruedy v. Toledo Factories Co.*, (1939) 6 Ohio App. 21, 22 N. E. (2d) 293; *Commissioner of Insurance v. Lloyds Ins. Co.*, (1939) 287 Mich. 599, 283 N. W. 703, discussed in 87 *Univ. of Pa. Law Rev.* 874 (1939); *Helvering v. Metropolitan Edison Co.*, (1939) 306 U. S. 522, 59 S. Ct. 634, aff'g 98 F. (2d) 807, cert. granted 59 S. Ct. 358; *Globe Indemnity Co. v. McDowell*, (1942) (Mo. App.) 159 S. W. (2d) 822; *Whirls v. Trailmobile Co.*, (1945) 64 F. Supp. 713.

⁵⁴ *Kinsella v. Marquette-Easton Finance Corp.*, (1930) (Mo. App.) 28 S. W. (2d) 427; *Amer. Ry. Exp. Co. v. F. S. Royster Guano Co.*, (1925) 141 Va. 602, 126 S. E. 678. In *Atlantic & B. Ry. Co. v. Johnson*, (1906) 127 Ga. 392, 56 S. E. 482, the court discusses the meaning of the limitation "at least to the extent of the assets of the absorbed corporation" added in some of the decisions to the statement of liability of the new corporation. See also *Yantiss v. Osborn*, (1935)

is not essential to the liability of the consolidated corporation that the constituent companies shall cease to exist. Going out of existence is merely the cessation of all actual transactions of business, as a going concern. The existence of the corporation for the purpose of winding up its affairs is immaterial.⁵⁵ The same principle applies to a merger of corporations. If one corporation goes entirely out of existence by being merged into another, the liabilities of the old corporation are enforceable against the acquiring corporation, just as if no change had been made.⁵⁶

To facilitate suits by creditors where the surviving or consolidated corporation is a corporation of a state other than that in which a constituent corporation was organized, the statutes in some instances expressly provide that the consolidated corporation shall submit to process in the state in which the constituent corporation was organized, and the secretary of state is appointed agent to accept such service of process.

Rights of creditors with specific liens. If a creditor has a specific lien upon the property of a constituent corporation, that lien is not disturbed, unless the holder of the specific lien otherwise agrees. This rule applies whether the combination is effected by a statutory merger or a consolidation, a purchase of the corporation's assets, or other acquisition of the corporation's property.⁵⁷ Thus, if Company A and Company B consolidate into Company M, and there is a mortgage on the property of Company A, the mortgage creditors of Company A have a first claim upon the property of the A corporation.

Right of general creditors to follow assets by suit in equity. A general creditor may follow the assets of the corporation against which he has a claim into the hands of the consolidated corporation, by resorting to an action in equity, and have the

102 Ind. App. 249, 197 N. E. 686; *Morrison v. American Snuff Co.*, (1901) 79 Miss. 330, 30 So. 723; *General Gas & Elec. Corp. v. Commissioner of Int. Rev.*, (1938) 98 F. (2d) 561, cert. granted 305 U. S. 593, 59 S. Ct. 358.

⁵⁵ *Amer. Ry. Exp. Co. v. Fleishman, Morris & Co.*, (1928) 149 Va. 200, 141 S. E. 253; *Amer. Ry. Exp. Co. v. F. S. Royster Guano Co.*, *supra* (Note 54).

⁵⁶ *Camden Interstate R. Co. v. Lee*, (1905) (Ky.) 84 S. W. 332.

⁵⁷ *Central R. R. & Banking Co. v. Georgia*, (1875) 92 U. S. 665. See also *In re New York, S. & W. R. Co.*, (1940) 109 F. (2d) 988, cert. denied 60 S. Ct. 1075, 310 U. S. 633, in which it was held that a mortgage of property thereafter to be acquired by the mortgagor or its subsidiaries extended to property thereafter acquired by a successor corporation organized through consolidation of the mortgagor company. See also R. A. C., "The Effect of Consolidation, Merger, and Sale Upon the After Acquired Property Clause in Corporate Mortgages," 26 *Virginia Law Review* 104 (1939).

property applied to the payment of his debt, unless he has released the original debtor and agreed to look to the new corporation alone for payment.⁵⁸ If the consolidated corporation no longer has the property because it has been sold to a bona fide purchaser for value, the creditor cannot follow it.⁵⁹ The right to follow the property into the hands of a consolidated corporation does not mean that the unsecured creditor has a lien upon the property in the hands of the consolidated corporation, as against subsequent mortgagees and creditors. Whether the consolidated corporation takes the property of each of the old corporations charged with a lien for the payment of the debts of that corporation depends upon the terms of the consolidation agreement and the statute under whose authority the consolidation is effected.⁶⁰

Right of creditors to enforce liability by action at law. Instead of bringing an action in equity to follow the assets of the consolidating or merging corporation, a creditor may bring an action at law against the consolidated corporation to enforce the liability of the new corporation, or the acquiring corporation, for the debts of the constituent or merged corporations.⁶¹ In some of the states, the statutes provide that the corporations entering into a consolidation or merger shall continue in existence for the purpose of adjusting their liabilities. Thus, in a merger of Company A into Company B, the former may cease to exist for most purposes, but, so far as the rights of its creditors are concerned, the A Company is still an existing corporation as if no merger had taken place and may be sued by a creditor.⁶² Such a statutory provision does not prevent a creditor from bringing an action against the consolidated or acquiring corporation.⁶³

⁵⁸ *Morrison v. American Snuff Co.*, (1901) 79 Miss. 330, 30 So. 723; *Lowther et al. v. Lowther-Kaufman Oil & Coal Co.*, (1914) 75 W. Va. 171, 83 S. E. 49; *Cole v. National Cash Credit Ass'n*, (1931) 18 Del. Ch. 47, 156 A. 183. See 14 *Tulane Law Review* 273 (1940).

⁵⁹ *McMahan v. Morrison*, (1861) 16 Ind. 172.

⁶⁰ *Wabash, etc., R. Co. v. Ham*, (1885) 114 U. S. 587.

⁶¹ *Wolff v. Shreveport Gas, etc., Co.*, (1916) 138 La. 743, 70 So. 789.

⁶² See *Irvine v. N. Y. Edison Co.*, (1913) 207 N. Y. 425, 101 N. E. 357; *People ex rel. Huff v. Warden & Keeper of Prison of City of New York*, (1922) 118 N. Y. Misc. 681, 194 N. Y. Supp. 862.

⁶³ *Warren v. Mobile & M. R. Co.*, (1873) 49 Ala. 582.

CHAPTER 34

RESOLUTIONS RELATING TO CONSOLIDATION AND MERGER

No. 756

Resolution of directors authorizing officers to enter into negotiations with a view to consolidation.

WHEREAS, a proposition has been made to this Corporation by the Company, a corporation existing under the laws of the State of, to consolidate the two corporations into a single new corporation, and

WHEREAS, this Board of Directors deems it advisable that this Corporation enter into negotiations with the Company with a view to consolidating the two corporations; be it

RESOLVED, That the President and the Secretary of this Corporation be and they hereby are authorized and directed to enter into negotiations with the Company with a view to consolidating the two corporations, and also to prepare a proposed form of Agreement of Consolidation, prescribing the terms and conditions of consolidation, and the mode of carrying the same into effect, as well as the manner of converting the shares of each of the constituent corporations into shares of the consolidated corporation, with such other details and provisions as may be necessary; and

RESOLVED FURTHER, That the proposed form of Agreement of Consolidation be presented to the Board of Directors at its next regular meeting, or at a special meeting called for the purpose of considering the proposed Agreement of Consolidation.

No. 757

Resolution of directors accepting proposed consolidation agreement, subject to ratification by stockholders.

RESOLVED, That this Company be consolidated with the Corporation, under the name of, and that the terms and conditions of such consolidation, the mode of carrying the same into effect, and the manner of distributing the shares of the new cor-

poration among the shareholders of the constituent corporations shall be as set forth in the proposed Agreement of Consolidation submitted to this meeting; and

RESOLVED FURTHER, That the President and the Secretary, representing a majority of the directors, be and they hereby are authorized and directed to sign the proposed Agreement of Consolidation, under the corporate seal of this Company; and

RESOLVED FURTHER, That the said Agreement of Consolidation be presented to the stockholders of this Company for their approval at a special meeting, which is hereby called to be held at the office of the Company, (Street), City of, State of, on the .. day of, 19.., at o'clock in the noon, and the Secretary be and he hereby is directed to publish notice of such meeting at least once a week for (.....) successive weeks, in one or more newspapers published in the County, and to mail a copy of such notice to each stockholder, addressed to him at his last-known post-office address, at least (.....) days prior to the date of said meeting, as required by law and the By-laws of this Company.

No. 758

Resolution of directors authorizing execution of articles of consolidation.

RESOLVED, That the "A" Railroad Company has agreed and hereby does consent to the consolidation and merger of the capital stock, franchises, privileges, and properties of the "B" Railroad Company, the "C" Railroad Company, and the "D" Railroad Company, with and into the capital stock, franchises, privileges, and properties of the "A" Railroad Company, on the terms and conditions set forth in the Articles of Consolidation and Merger now submitted to the Board of Directors, and the President of the Company is authorized, in behalf of the Company, to execute the said Articles of Consolidation and Merger under its seal, attested by the Secretary, and to acknowledge and deliver the same.

No. 759

Resolution of directors authorizing execution of articles of consolidation upon ratification by stockholders.

RESOLVED, That the President and the Secretary of this Company be and they hereby are authorized to execute the Articles of Consolidation with the Company, which have been read at this meeting, when said Articles of Consolidation shall have been duly approved and authorized by the stockholders of said Companies.

Resolution of directors approving proposed agreement of consolidation, and calling stockholders' meeting for ratification.

RESOLVED, That the consolidation of Company and Company with this Corporation, in accordance with the terms and conditions of the Agreement of Consolidation submitted to this meeting, with such changes therein as counsel may approve, be and the same hereby is approved; and that a majority of the Board of Directors of this Corporation is hereby authorized and directed to enter into an agreement, in the form of that submitted to this meeting, with such changes therein as counsel may approve, with a majority of the Board of Directors of the Company and with a majority of the Board of Directors of the Company, providing for the consolidation of the three corporations into one corporation under the charter of this Corporation and under the title of "The Corporation" in accordance with the provisions of the Law.

RESOLVED, That a copy of said Agreement of Consolidation, when so executed, be attached to the minutes of this meeting.

RESOLVED, That a special meeting of the shareholders of the Corporation be called to convene at the head office of this Corporation, (Street), City of, State of, on, 19.., at o'clock in the noon, for the purpose of voting upon the ratification and confirmation of the terms and conditions agreed upon by a majority of the Board of Directors of the Company, by a majority of the Board of Directors of the Company, and by a majority of the Board of Directors of this Corporation, for the consolidation of said three corporations under the charter and name of "The Corporation," and for the transaction of such other business as may properly come before said meeting.

RESOLVED, That the books for the transfer of the shares of the capital stock of this Corporation be closed at the close of business on, 19.., and, unless otherwise ordered by this Board, be reopened at the opening of business on, 19...

RESOLVED, That the officers of this Corporation be authorized and directed to give notice of said meeting to the shareholders of this Corporation in accordance with the provisions of the by-laws of this Corporation and of the provisions of law applicable thereto.

RESOLVED, That it is the judgment of this Board that if such Agreement of Consolidation shall be ratified and confirmed and an increase of the capital stock of this Corporation from (.....) shares

to (.....) shares shall be authorized as therein provided, (a) (.....) of the new or additional shares of this Corporation shall be allotted to the shareholders of the Company on the effective date of the consolidation, as provided in said Agreement of Consolidation, (b) (.....) of said new or additional shares of this Corporation shall be allotted to the shareholders of Company on the effective date of the consolidation, as provided in said Agreement of Consolidation, and (c) (.....) of said new or additional shares of such authorized capital stock shall be issued and sold at the fair value, but at not less than the par value thereof, in such manner and to such parties as the Board of Directors of this Corporation shall approve, as provided in said Agreement of Consolidation.

RESOLVED, That Messrs., and be appointed as representatives of this Corporation upon the Committee of six provided for in the Agreement of Consolidation between this Corporation, The Company, and Company, with full power and authority to pass upon the assets to be contributed by each of the consolidating corporations, and to take any and all further action which may be required on the part of said Committee in order to carry out the true intent and purpose of said Agreement of Consolidation and of the resolutions heretofore adopted by this Board at this meeting.

RESOLVED, That if any shareholder of the Company or any shareholder of Company shall, in connection with the allotment of shares of this Corporation provided for in said Agreement of Consolidation, be entitled to receive fractional shares of the capital stock of this Corporation, one or more scrip certificates in respect of such capital stock expressed in one-hundredths shall be issued in the name of such shareholder; that the scrip certificate so to be issued shall be in such form as the Chairman of the Board or the President or any Vice President and counsel may approve; and that the proper officers of this Corporation be authorized to execute, under its corporate seal or otherwise as they shall deem proper, and to deliver scrip certificates substantially in such form when required as aforesaid.

RESOLVED, That the officers of this Corporation be authorized and directed from time to time to take all proceedings, execute and deliver all instruments, and do and perform all acts necessary, convenient, or proper, as advised by counsel, to carry into effect the full intent and purpose of the resolutions heretofore adopted by this Board at this meeting with respect to said consolidation.

RESOLVED, That the officers of this Corporation be authorized and

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directed to send to the shareholders of this Corporation a circular letter briefly summarizing the matters authorized by the resolutions heretofore adopted at this meeting with respect to said consolidation, together with a formal notice of said special meeting of shareholders.

No. 761

Resolution of directors to merge corporation, where merging corporation owns all of capital stock of other corporation.

WHEREAS, this Corporation now owns all the stock of Corporation, a stock corporation organized under the laws of the State of, and engaged in business similar and incidental to that of this Corporation, and

WHEREAS, it is deemed advisable that this Corporation merge with said Corporation in order that all the estate, property, rights, privileges, and franchises of said Corporation shall vest in and be possessed by this Corporation; be it

RESOLVED, That this Corporation merge with said Corporation and assume all its obligations; and

RESOLVED FURTHER, That this Corporation relinquish its corporate name and assume in place thereof the name of the said merged Corporation—to wit, the name “..... Corporation”; and

RESOLVED FURTHER, That the President or the Vice President, and the Secretary or the Treasurer of this Corporation, be and they hereby are authorized and directed to make and execute, in the name and under the corporate seal of this Corporation, a certificate of ownership of all the stock of said Corporation, and of the adoption and date of adoption of these resolutions, and to file such certificate in the office of the Secretary of State of the State of, and to do all other acts and things that may be necessary to carry out and effectuate the purpose of these resolutions.

No. 762

Resolution of directors authorizing officers to enter into merger agreement and to purchase assets of another company.

RESOLVED, That the merger agreement providing for the merging of “A” Company with this Company, hereinafter in these resolutions set forth, be and it hereby is approved, and that the President or Vice President of this Company be and he hereby is authorized and directed to make, in the name of this Company and in its behalf, under its corporate seal, duly attested by its Secretary or an Assistant Secretary, a written agreement in duplicate between this Company and “A” Company, in substantially the following form (*insert a full copy of the merger agreement*).

RESOLVED FURTHER, That this Board of Directors does hereby determine that it is expedient and for the best interests of this Company to purchase all the assets of "C" Company, upon the terms and conditions contained in the form of agreement hereinafter in these resolutions set forth, and that, in the judgment of said Board, the value of said assets, after the deduction of all the liabilities of "C" Company, is equal to the value of shares of the par value of \$..... each of the capital stock of this Company, and that the President or a Vice President of this Company be and he hereby is authorized and directed to make, in the name of this Company and in its behalf, under its corporate seal, duly attested by its Secretary or an Assistant Secretary, a written agreement in duplicate between this Company and "C" Company, providing for the purchase by this Company of all the assets of "C" Company, in substantially the following form (*insert a full copy of agreement to purchase*).

RESOLVED FURTHER, That a special meeting of the stockholders of this Company be and it hereby is called to be held at the principal office of the Company at (Street), in (City), on, 19.., at o'clock .. M., for the following purpose or purposes: (1) to vote upon the proposition to merge "A" Company with this Company; (2) to approve the merger agreement to be submitted at said meeting pursuant to the authority hereinabove contained; and (3) to act upon any and all matters connected with or incidental to said proposition which may properly come before said meeting.

RESOLVED FURTHER, That a special meeting of the stockholders of this Company be and it hereby is called to be held at the principal office of the Company, at (Street), in (City), on, 19.., at o'clock .. M., for the following purpose or purposes: (1) to vote upon the proposition to purchase all the assets and assume all the liabilities of "C" Company, and to issue shares of this Company of an aggregate par value of \$....., consisting of shares of the par value of \$..... each, in payment therefor; (2) to vote upon the proposition to increase the capital stock of this Company from \$....., consisting of shares of the par value of \$..... each, to \$....., consisting of shares of the par value of \$..... each, in order to provide shares issuable when the merger of "A" Company with this Company becomes effective, and when the purchase by this Company of all the assets of "C" Company is completed; and (3) to act upon any and all matters connected with or incidental to said propositions which may properly come before said meeting.

RESOLVED FURTHER, That and be and they hereby are appointed Inspectors of Election to act at the

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above-mentioned special meetings of the stockholders to be called as aforesaid.

RESOLVED FURTHER, That when the merger hereinabove referred to becomes effective, the number of directors of this Company shall be increased to

RESOLVED FURTHER, That the officers of this Company be and they hereby are each authorized and directed, in behalf of this Company, to take all such steps and to do and authorize to be done all such acts and things as may be necessary or advisable or convenient and proper for the purpose of carrying out the foregoing resolutions and the intent thereof, and for the purpose of fully effectuating and carrying out the plan, the merger, and the purchase referred to in the foregoing resolutions.

No. 763

Excerpt of minutes of stockholders' meeting, showing resolution authorizing consolidation.

The Secretary presented and read a proposed Certificate of Consolidation. After consideration thereof, upon motion duly made and seconded, the following resolutions were adopted by the affirmative vote of the holders of record of (.....) shares, representing more than (*insert fraction required by statute*) of the outstanding stock of this Corporation entitled to vote thereon:

RESOLVED, That this Corporation be consolidated with the Corporation, under the name of; and

RESOLVED FURTHER, That the terms and conditions of such consolidation, the mode of carrying the same into effect, and the manner of distributing the shares of the new corporation among the shareholders of the constituent corporations shall be as set forth in the proposed Certificate of Consolidation, submitted to this meeting; and

RESOLVED FURTHER, That the President or the Vice President, and the Secretary or an Assistant Secretary of this Corporation, be and they hereby are authorized and directed to execute and file in the proper offices a Certificate of Consolidation, in the form presented to this meeting, and to do all things that may be essential to effectuate such consolidation; and

RESOLVED FURTHER, That the Secretary be and he hereby is directed to spread a copy of the proposed Certificate of Consolidation, in the form presented to this meeting, upon the minutes of this meeting (*insert Certificate of Consolidation*).

No. 764

Resolution of stockholders approving agreement of merger adopted by directors of merging companies.

RESOLVED, That the stockholders of, Incorporated, hereby approve the adoption of a certain Agreement of Merger, approved on, 19.., by the respective Boards of Directors of, Incorporated, and Corporation, a corporation of the State of, and entered into by a majority of the directors of each of such corporations, respectively, on such date, in which Agreement of Merger are prescribed the terms and conditions of the proposed merger of Corporation into, Incorporated, and the mode of carrying the same into effect; and

FURTHER RESOLVED, That the said Agreement of Merger and the terms and conditions therein set forth and provided be and the same hereby are in all respects approved, adopted, authorized, and agreed to; and

FURTHER RESOLVED, That if and in the event that said Agreement of Merger shall have been duly executed, acknowledged, and certified, and all other action in regard to the execution and adoption of said Agreement of Merger shall have been duly and properly taken by, Incorporated, and by Corporation, the proper officers of this Corporation be and they hereby are authorized and directed to file said Agreement of Merger, so executed, acknowledged, and certified, in the office of the Secretary of State of the State of, as and for the agreement and act of merger of, Incorporated, and Corporation; and

FURTHER RESOLVED, That a copy of said Agreement of Merger submitted to this meeting be and the same hereby is ordered to be filed with the minutes of this meeting.

No. 765

Resolution of stockholders authorizing consolidation.

RESOLVED, That this Company consolidate and merge its stock, property, franchises, and privileges into and with the stock, property, franchises, and privileges of the "A" Railroad Company, the "B" Railroad Company, and the "C" Railroad Company, or into and with the stock, property, franchises, and privileges of either or any of them, upon such terms and conditions as the Board of Directors of this Company may deem proper, and the Board is hereby invested with full authority and power to execute, acknowledge, and deliver, or

cause to be executed, acknowledged, and delivered, such contracts or Articles of Consolidation in such manner as may be deemed proper to carry the same into effect.

No. 766

Resolution of stockholders authorizing merger and retention of name of acquired corporation.

RESOLVED, That the stockholders of this Corporation do hereby authorize the merger of the Company with this Corporation, and that to that end the officers of this Corporation be and they hereby are empowered to acquire the entire capital stock, assets, and goodwill of the said Company; to issue in exchange therefor, (\$.....) Dollars par value of preferred stock, and (\$.....) Dollars par value of common stock of this Corporation; to assume the debts and liabilities of said Company; and either wholly to discontinue said Company and organize a new corporation of that name with nominal capitalization, or to reduce the capitalization of said Company to a nominal amount, and retain control of said name by continuing the nominal corporate existence of said Company.

No. 767

Resolution of stockholders ratifying agreement for merger.

RESOLVED, That the agreement for the merger of the Corporation with the Company, dated, 19.., authenticated by the signature of, President, and submitted to this meeting, be and hereby is approved, and the directors and officers of this Corporation be and hereby are authorized and directed to take whatever proceedings, to execute and deliver whatever instruments, and to do whatever acts may be necessary or expedient to consummate and carry out said agreement of merger.

No. 768

Resolution of stockholders' committee to extend time to make deposits or take action under agreement of merger.

The Stockholders' Committee constituted under the Agreement of Deposit, dated, 19.., providing for the deposit of stock of Company, does hereby adopt the following resolution as of, 19..:

RESOLVED, That the Committee extend the time for the making of

deposits of stock, for delivering proxies or consents, or for taking any further action or proceeding under the plan and agreement of merger, to and including, 19...

By
Proxy
By
Proxy
By
Proxy

No. 769

Written consent of stockholders to consolidation.

We, the undersigned, holders of the number of shares of
Stock of Corporation hereinafter set opposite our
respective names, do hereby consent to the consolidation of
Corporation and Company, to form the,
Inc., upon the terms and provisions of the Agreement of Consolidation
dated , 19...
Dated , 19..

<i>Name of Stockholders</i>	<i>Number of Shares</i>
.....
.....
.....

CHAPTER 35

RECAPITALIZATION, REORGANIZATION, AND DISSOLUTION

Introduction. Various expedients are open to a corporation that finds itself in financial difficulties. They are: recapitalization, reorganization, assignment for the benefit of creditors, bankruptcy, and dissolution. Receivership may be involved in any situation of reorganization or termination of corporate existence. In this book we treat briefly only those expedients of broadest interest to corporate secretaries—recapitalization, reorganization, and dissolution. For more complete explanations of these subjects, and for information on assignments, bankruptcy, insolvency, and receivership, the reader must refer to texts devoted to the particular subjects. However, the resolutions that may be necessary in carrying through any of the expedients are included, since they are not as readily available in other works as are the principles.

Recapitalization and reorganization distinguished. The terms “recapitalization,” “readjustment,” and “reorganization” are often used interchangeably, in relation to a reconstruction in the organization of a corporation in financial difficulties. Strictly speaking, however, while recapitalization and readjustment are synonymous, they must be distinguished from reorganization. Recapitalization (or readjustment) is a voluntary reestablishment of the capital structure of a corporation without resort to the courts. Reorganization, on the other hand, is the rearrangement of the interests of creditors and security holders through enforcement of some legal right, generally with the aid of the courts.¹

Recapitalization

Methods of recapitalization. Recapitalization is most commonly effected by a reclassification of the corporation's capital

¹ For a discussion of recapitalization and reorganization, see E. M. Dodd, Jr., “Fair and Equitable Recapitalizations,” 55 *Harvard Law Review* 780 (1942).

stock and the exchange of new stock for outstanding securities. This method generally involves an amendment of the articles of incorporation. Recapitalization may also be effected by formation of a new corporation organized to take over the assets of the old corporation. This method involves a sale of assets. The proportion of stockholders whose consent must be obtained and the procedure to be followed in each case depends upon the statutes governing amendments of the articles of incorporation and sale of assets in the state in which the corporation is organized.

Examples of recapitalization involving charter amendments. The types of recapitalizations involving amendments of the articles of incorporation or charter are so varied that no exhaustive list can be given. The following examples will, however, serve to illustrate some common forms of recapitalization:

1. *Recapitalization through increase of stock.* The outstanding capital stock of a corporation is \$100,000, the full amount that the corporation is authorized under its articles of incorporation to issue. The corporation wishes to raise funds by the sale of additional stock. It amends the articles of incorporation to increase the amount of its capital stock to \$200,000, and issues additional stock to the extent of \$100,000.²

2. *Recapitalization through decrease of stock.* The par value of a corporation's capital stock is \$800,000; its assets are \$700,000; its liabilities, \$300,000. The corporation accordingly has a deficit of \$400,000. It decreases its capital stock to \$400,000 by amending its articles or in some other manner provided by statute. New certificates of stock are then issued to the stockholders in the proportion of one-half share of new stock for each full share of old stock.³

3. *Recapitalization through change of stock from par value to no par value.* A corporation with assets of \$700,000 and liabilities of \$300,000 has a capital stock of \$800,000, consisting of 8,000 shares of the par value of \$100 each. It wishes to wipe out the deficit of \$400,000. The corporation changes its par value shares to shares with no par value by an amendment of its articles of incorporation or in some other manner provided by statute, and states its capital as \$400,000 divided into 8,000 shares of no par stock.⁴ Each holder of a share of stock with a

² See Chapter 25, page 715.

³ See Chapter 25, page 719.

⁴ See Chapter 25, page 720.

par value of \$100 receives in exchange a share of no par stock entitling him to a proportionate share in the net assets of the company. The deficit disappears.⁵

4. *Recapitalization through split-ups of stock.* Such a recapitalization usually takes place in a successful corporation, the shares of which reflect the prosperity of the company by a high market price. Suppose a corporation with stock having a par value of \$100 has a surplus and earnings high enough to give the stock a market value of \$500 a share. There are two main objections to this situation: (1) the price of the stock limits its marketability; and (2) the high dividend rate which the corporation is paying or is able to pay leads the public to believe that the corporation is earning too great a return upon its capital. The corporation, to remedy the situation, will therefore change its capital stock from stock with par value to stock without par value, or decrease the par value of each share, and split each original share into several parts. The effects of such a change are: (1) the market value of the stock is decreased; (2) wider distribution of the stock is obtained; (3) the surplus and earnings are distributed at a rate that does not seem extraordinary; (4) as the stock is split without affecting the surplus account, the corporation may distribute its surplus in the form of a cash dividend. The corporation also avoids the antagonism that high-priced stocks provoke.

5. *Recapitalization through reverse split-ups of stock.* This method of recapitalization usually takes place when the stock is selling at a very low figure. The value of the shares is increased by reducing the number. Thus, each stockholder receives, for example, one share for two. Management, however, is often reluctant to take this step, because it may be considered by the stockholder as an admission of the loss in value of the stock. Logically, it should make no difference whether a person owns 10 shares of \$100 stock or 100 shares of \$10.00 stock.

Examples of recapitalization through sale of assets. Many examples may be given of recapitalization through the sale of corporate assets to a new corporation organized for the purpose of acquiring the property of the old. Following are some of the more usual purposes of such recapitalization:

1. *Recapitalization to widen distribution of stock.* A chain of stores, the stock of which is held by a few people, has been built

⁵ See Chapter 23, page 611, relative to the methods of eliminating deficits.

up and is earning steadily about 60 per cent on its capital investment. The corporation undertakes to capitalize the earnings upon an 8 per cent or a 10 per cent basis. Thus, if the corporation has earned an average of \$500,000 a year, it will be capitalized at about \$5,000,000. The old corporation will sell all its property and assets, and transfer all its liabilities to a new corporation with the same or some other name, in consideration of the payment to the old stockholders of cash and stock in the new corporation. The new corporation is organized with its capital stock of \$5,000,000 divided into preferred and common stock. The preferred stock is sold to the public and the cash thus furnished is used to pay the original stockholders for the sale to the new corporation. The common stock is retained by the original owners, who continue as the managers. If additional capital is needed, common stock may also be sold to the public. The old corporation generally goes out of existence.

2. *Recapitalization to reduce taxes.* A corporation desiring to operate in a foreign state may find that the taxes imposed by the state for the privilege of doing business will be heavier if the corporation qualifies as a foreign corporation than if it organizes a separate domestic corporation with a smaller capitalization under the laws of the foreign state. By organizing a subsidiary company in the foreign state, the corporation may conduct the business desired and at the same time reduce the expenses involved.

3. *Recapitalization to separate branches of business.* A corporation may desire to sever its assets into units and operate different branches of its business through separate companies. This result may be effected by the formation of a holding company, to acquire all the stock of the separate subsidiaries organized to operate the respective branches of the business, and to maintain control of all the units as a central organization.

Procedure to effect recapitalization. The board of directors formulates a plan of recapitalization. After it has approved the plan, notice is sent to stockholders of the corporation, advising them of the proposed plan of recapitalization, and outlining its provisions. A notice is also sent to stockholders of a special meeting at which the plan will be voted upon. Stockholders may be requested to file assents to the plan or to execute proxies for the meeting at which the plan will be submitted for approval. In some instances they are asked to deposit their securities with some designated trust company as depositary, to evidence ac-

ceptance of the plan. At the meeting of stockholders called to consider the plan, the necessary resolutions to carry out the plan are proposed, and if the required number of stockholders approve the resolutions, they are duly adopted. Stockholders are notified of the approval of the plan, and are requested to present their securities for exchange pursuant to the terms of the plan. A trust company may be designated as depositary to effect the exchange. If the recapitalization involves an amendment of the charter, any other statutory requirements for amendment must be complied with. If the recapitalization involves a transfer of assets to a new corporation, the new corporation is organized and the property conveyed to it.

Rights of creditors upon recapitalization. Recapitalization that takes place upon the consent of stockholders does not affect the rights of creditors.⁶ Where the recapitalization is effected through an amendment of the articles of incorporation, the corporation continues in existence, and the creditors can look to the corporation for payment. Where recapitalization takes place through formation of a new corporation to which the assets of the old corporation are transferred, the new corporation takes the property subject to payment of debts, and subject to liability on contracts of the old corporation.⁷

Reorganization

Methods of reorganization. As previously indicated, reorganization is the process of rearranging the interests of creditors and security holders of a corporation in order to relieve the corporation from financial difficulties and to enable it to continue operations profitably.⁸ Where such arrangement is effected by consent of the stockholders without court proceedings,⁹ the transaction is, strictly speaking, not a reorganization, but a readjustment. Reorganization is therefore confined to recon-

⁶ See, however, page 722, for creditors' rights on a decrease in capital stock.

⁷ For rights of creditors where a transfer constitutes a sale of assets to another corporation and not a recapitalization of the corporation, see page 886.

⁸ For a definition of reorganization, see *Warner Bros. Pictures v. Lawton-Byrne-Bruner Ins. A. Co.*, (1935) 79 F. (2d) 804. For definition of reorganization under Federal income tax law, see *Prentice-Hall Federal Tax Service*.

⁹ In a few states, the statutes specifically authorize corporations to reorganize by consent of a fixed proportion of stockholders. See statutory provision in each state, collected in *Prentice-Hall Corporation Service*. It should be noted that such reorganizations under statutes are actually sales of assets of one corporation to another.

struction of the corporation under court supervision. The method of reorganization in vogue today is the procedure provided for reorganization under Chapter X of the Bankruptcy Act.¹⁰ The proceedings may be initiated by the debtor or by three creditors whose claims aggregate \$5,000 or over, "liquidated as to amount and not contingent as to liability." Chapter X does not, however, outlaw the old form of equity receivership reorganization. The statutes in some states specifically authorize reorganization in dissolution or receivership proceedings.

Corporations may also effect an arrangement under Chapter XI of the Bankruptcy Act where only unsecured debts are to be adjusted.¹¹ Only a debtor, that is the corporation, may initiate reorganization proceedings under Chapter XI.

Reorganization by equity receivership suit.¹² Prior to enactment in 1934¹³ of provisions for corporate reorganization under supervision of the bankruptcy courts, the usual way of reorganizing a corporation under court supervision was through equity

¹⁰ The reorganization procedure provided by Chapter X of the Bankruptcy Act (sometimes referred to as the Chandler Act) supersedes the provision formerly contained in Sec. 77B of the Bankruptcy Act. The Bankruptcy Act was completely revised on June 22, 1938, and Sec. 77B was amended and incorporated into the Bankruptcy Act as Chapter X.

For a discussion of the changes in procedure for reorganization effected by the Chandler Act, see Heuston, "Corporate Reorganizations under the Chandler Act," (1938) 38 *Columbia Law Review* 1199; Gerdes, "Corporate Reorganizations and Changes Effected by Chapter X of the Bankruptcy Act," (1938) 52 *Harvard Law Review* 1; Teton, "Reorganization Revised," (1939) 48 *Yale Law Jour.* 573. See also Billyun, "A Decade of Reorganization Under Chapter X," (1949) 49 *Columbia Law Review* 456.

For a comparison of the cost of reorganization under Chapter X and under Sec. 77B, see "The Cost of Corporate Reorganization Under the Chandler Act," (1939) 52 *Harvard Law Review* 1349. See also McCaffery, "Corporate Reorganization Under the Chandler Bankruptcy Act," (1938) 26 *Cal. L. Rev.* 643; 72 *U. S. Law Review* 368 (1938); Shidler, "Reorganization under the Chandler Act," (1938) 13 *Wash. Law Review* 347.

¹¹ For complete analysis of Chapters X and XI, comparison of procedures and appropriateness of remedies under each, see Securities and Exchange Com'n v. United States R. & Imp. Co., (1940) 310 U. S. 434, 60 S. Ct. 1044; see also Knoeller, "Reorganization Procedure Under the New Chandler Act," 24 *Marquette Law Review* 12 (1939).

For a discussion of the authority to petition for a Chapter X reorganization, see "Right of a Stockholder to File a Petition for Corporate Reorganization under Chapter X of the Bankruptcy Act," 54 *Yale Law Journal* 151 (1944).

¹² For a list of cases in which the development of the equity method of reorganization may be traced, see Warner Bros. Pictures v. Lawton-Byrne-Bruner Ins. A. Co., (1935) 79 F. (2d) 804.

¹³ Sec. 77B of the Bankruptcy Act, providing for corporate reorganizations under supervision of the bankruptcy courts, was enacted June 7, 1934.

receivership proceedings in the Federal courts, popularly known as the "friendly equity suit." Equity receivership reorganizations have now been generally supplanted by proceedings under Chapter X of the Bankruptcy Act. As previously indicated, however, Chapter X does not outlaw equity receivership reorganizations.¹⁴

Dissolution

Definition of dissolution. A corporation is dissolved when its existence is terminated, its charter extinguished,¹⁵ its affairs wound up, and its assets distributed among creditors and stockholders. Dissolution is not effected by mere failure of the corporation to exercise the powers granted to it by its charter.¹⁶ Nor does dissolution take place simply by reason of the sale of all the assets of the corporation,¹⁷ appointment of a receiver,¹⁸ purchase of entire stock by one person,¹⁹ or assignment for benefit of creditors.²⁰

Methods of dissolution. Dissolution may be effected: (1) voluntarily, by a surrender of the charter or upon an application for dissolution in the manner provided by statute; or (2) involuntarily, upon the application of a creditor or minority stockholder, by expiration of the charter, or by forfeiture.

¹⁴ See Hallows, "Corporate Reorganization in Equity," 24 *Marquette Law Review* 81 (1940).

¹⁵ *Parker v. Bethel Hotel Co.*, (1896) 96 Tenn. 252, 34 S. W. 209. See also *Moore v. Los Lugos Gold Mines*, (1933) 172 Wash. 570, 21 P. (2d) 253, in which a dissolution of a corporation was defined as the death of the corporation, a disintegration, a separation, a going out of business.

¹⁶ *Lincoln v. Kuskokwin Fishing & Transportation Co.*, (1921) 118 Wash. 137, 203 P. 62; *Parker v. Bethel Hotel Co.*, (1896) 96 Tenn. 252, 34 S. W. 209. Non-user may, however, be grounds for forfeiture of the charter by the state in a proper proceeding (see page 994). See also *Graham-Newman Corp. v. Franklin Distilling Co.*, (1942) (Del. Ch.) 27 A. (2d) 142; *Coleman v. Woodland Hills Co.*, (1945) 72 Ga. App. 92, 33 S. E. (2d) 20.

¹⁷ *Hunn v. United States*, (1932) 60 F. (2d) 430; *In re Clark's Will*, (1931) 257 N. Y. 487, 178 N. E. 766; *Beidenkopf v. Des Moines Life Ins. Co.*, (1913) 160 Iowa 629, 142 N. W. 434; *Schneider v. Schneider*, (1941) 347 Mo. 102, 146 S. W. (2d) 584.

¹⁸ *Standard Roller Bearing Co. v. Hess-Bright Mfg. Co.*, (1921) 275 F. 916; *In re Beaver Cotton Mills*, (1921) 275 F. 498; *State v. Dyer*, (1947) 145 Tex. 586, 200 S. W. (2d) 813.

¹⁹ *Parker v. Bethel Hotel Co.*, (1896) 96 Tenn. 252, 34 S. W. 209; *Long v. Mayo*, (1937) 271 Ky. 192, 111 S. W. (2d) 633; *Coleman v. Woodland Hills Co.*, (1945) 72 Ga. App. 92, 33 S. E. (2d) 20.

²⁰ The reason an assignment does not operate as a dissolution of the corporation is that, theoretically at least, the assignment contemplates the payment of claims out of the corporate assets and the return to the corporation of any excess. *McKey v. Swenson*, (1925) 232 Mich. 505, 205 N. W. 583.

Authority for voluntary dissolution. According to the weight of authority, a corporation may dissolve voluntarily only with the permission of the state which granted its charter,²¹ and in the absence of any contrary statutes, only with the consent of all the stockholders.²² In most of the states, however, statutes have been enacted authorizing dissolution upon the consent of a specified proportion of the stockholders. These statutes generally prescribe the procedure to be followed to effect the dissolution, and the formalities prescribed must be strictly complied with to effect a valid dissolution.²³

Ordinarily, the courts will refuse to interfere with the determination of the stockholders as to the advisability of dissolving the corporation.²⁴ If the statute provides that it may be terminated upon a certain vote, the court will not inquire into the motive inducing the vote once it has been obtained.²⁵ However,

²¹ See *In re North American Coal & Mining Co.*, (1906) 99 Minn. 475, 109 N. W. 1116; *Leventhal v. Atlantic Finance Corporation*, (1944) 316 Mass. 194, 55 N. E. (2d) 20; *In re F. E. Schundler Feldspar Co.*, (1945) 70 S. D. 513, 19 N. W. (2d) 337.

²² *Barton v. Enterprise Loan & Bldg. Ass'n of Wabash*, (1888) 114 Ind. 226, 16 N. E. 486. See, however, *Bowditch v. Jackson Co.*, (1912) 76 N. H. 351, 82 A. 1014, in which it was held that a majority in interest had power to close out the affairs of the corporation. The question of whether minority stockholders are bound by the action of a majority in dissolving the corporation has lost its importance, in view of the statutes providing that a specified proportion of stockholders may authorize a dissolution.

²³ *In re Wolf Mfg. Industries*, (1932) 56 F. (2d) 64. See also *Chorpenning v. Yellow Cab Co.*, (1933) 113 N. J. Eq. 389, 167 A. 12; *Moore v. Los Lugos Gold Mines*, (1933) 172 Wash. 570, 21 P. (2d) 253; *In re F. E. Schundler Feldspar Co.*, (1945) (S. D.) 19 N. W. (2d) 337.

The dissolution of a corporation may also be governed by Federal law, as where the corporation is liquidated in a proceeding under Chapter X of the Bankruptcy Act. See Cary, "Liquidation of Corporations in Bankruptcy Reorganization," 60 *Harvard Law Review* 173 (1946).

²⁴ *Major v. American Malt & Grain Co.*, (1920) 110 N. Y. Misc. 132, 181 N. Y. Supp. 152. Unless it is shown that at a legal meeting of the stockholders, two-thirds of the stockholders voted to dissolve a corporation voluntarily, the court is without jurisdiction to order its dissolution. *Farmers Union Co-op. Brokerage v. Palisade Farmers Union Local No. 714*, (1943) 69 S. D. 126, 7 N. W. (2d) 293. In the absence of fraud or bad faith, a court will not interfere with directors, backed by a majority of the stockholders, who refuse to initiate proceedings for the dissolution of a corporation. *Hayman v. Brown*, (1941) 176 N. Y. Misc. 176, 26 N. Y. S. (2d) 898.

²⁵ *Rossing v. State Bank of Bode*, (1917) 181 Iowa 1013, 165 N. W. 254; *J. H. Lane & Co. v. Maple Cotton Mills*, (1915) 226 F. 692. But see *Kavanaugh v. Kavanaugh Knitting Co.*, (1919) 226 N. Y. 185, 123 N. E. 148. In a suit to enjoin the dissolution of a corporation, it was held that the resolution to terminate the corporate existence must be based upon the belief that the welfare of the corporation and the stockholders would be promoted by their action.

as the majority interest always occupies a fiduciary relation to the corporation and to the minority stockholders, the utmost good faith must be exercised, and the dissolution will not be allowed if it works a fraud upon the minority interests.²⁶

Procedure for dissolution on consent of proportion of stockholders. Details of the procedure prescribed by statute for voluntary dissolution on consent of stockholders vary from state to state. Following are, however, the usual steps required to be taken:

1. The directors adopt a resolution at a meeting of the board, duly called and held, recommending dissolution of the corporation, and directing that the proposed dissolution be submitted to the stockholders at a meeting.

2. Notice of the meeting to consider the advisability of dissolving the corporation is given to the stockholders within the time and in the manner provided by statute.

3. A resolution authorizing dissolution of the corporation is adopted by a fixed proportion of the stockholders at the meeting of the stockholders duly called and held.²⁷

4. A certificate stating that the required consent of stockholders to the dissolution has been obtained is executed by the proper corporate officers and filed with a designated state official.²⁸

5. Notice of the dissolution is given to creditors by publication of the certificate of dissolution, by mailing a copy of the certificate of dissolution to each known creditor, or in some other specified manner.

6. The assets of the corporation are liquidated by the trustees

²⁶ *Reade v. St. James Theatre Co.*, (1925) 99 N. J. Eq. 282, 132 A. 477; *Stevenson v. Sicklesteel Lumber Co.*, (1922) 219 Mich. 18, 188 N. W. 449; *Welt v. Beachcomber, Inc.*, (1937) 166 N. Y. Misc. 29, 1 N. Y. Supp. (2d) 177; *Weisbecker v. Hosiery Patents*, (1947) 356 Pa. 244, 51 A. (2d) 811.

²⁷ For a discussion of the right of holders of nonvoting stock to vote on the question of dissolution, see 40 *Harvard Law Review* 994.

²⁸ The form of certificate will vary from state to state. See *Chorpenning v. Yellow Cab Co.*, (1933) 113 N. J. Ch. 389, 167 A. 12, in which it was held that dissolution proceedings were insufficient because of the fact that the certificate of dissolution failed to contain the consent of the stockholders as required by statute. See also *Tripplett v. Com. of Internal Revenue*, (1941) 118 F. (2d) 764, holding that an instrument authorizing the liquidation of a Texas corporation, that was not filed in the office of the Texas Secretary of State, was without legal effect; and *City of Newark v. Jos. Hollander*, (1945) 136 N. J. Eq. 539, 42 A. (2d) 872, holding that where the certificate of dissolution was not filed until three years after the corporate assets were distributed to stockholders, such distribution effected an unlawful dissolution of the corporation.

in dissolution and after payment of debts the remaining assets are distributed among the stockholders.

In some states, provision is made for dissolution on written consent of all the stockholders without calling a meeting.

Even if the statute does not expressly require formal action, in order to avoid any controversy it has been held that such action should be taken.²⁹

Application to court for dissolution. In some states, a corporation may, at its option, apply to the courts for supervision of its dissolution.³⁰ In other states, dissolution may be effected only by application to the courts, and upon entry of a decree after a hearing.³¹ Where such an application is authorized, although the statute may not require it, the board of directors should, as in the case of a dissolution upon the consent of the stockholders without court proceedings, adopt a resolution setting forth the advisability of the application for dissolution, and call a meeting of stockholders to authorize it. The application to the court is usually signed by a majority of the board of directors or the officers of the corporation.

Creditors may appear to resist the dissolution either upon the ground of fraud or that the necessary consent has not been duly obtained.³²

Surrender of franchise. In many states, a simple method for the surrender of the corporate charter is provided where, before the commencement of business and before the payment of capital stock, the incorporators decide to abandon the enterprise. The incorporators merely file a certificate with the Secretary of State or some designated authority and the dissolution thereupon becomes effective.

Involuntary dissolution by equity suit of stockholder or creditor. Irrespective of statutory provision, dissolution of a corporation may be effected by suit in equity, where such dissolution appears to be necessary to protect the interests of stock-

²⁹ *In re Friedlieb*, (1920) 184 N. Y. Supp. 753.

³⁰ See *In re Buse & Caldwell*, (1937) 328 Pa. 211, 195 A. 9.

³¹ See *Moore v. Los Lugos Gold Mines*, (1933) 172 Wash. 570, 21 P. (2d) 253. Creditors may oppose the dissolution. *State v. White*, (1928) 223 Mo. App. 36, 7 S. W. (2d) 474. Dissolution obtained by fraud or deceit may be set aside on the application not only of a creditor, but of anyone whose rights are injuriously affected. *Elston v. Elston & Co.*, (1932) 131 Me. 149, 159 A. 731.

³² *State ex rel. New First Nat. Bank v. White*, (1928) 223 Mo. App. 36, 7 S. W. (2d) 474, in which it was held that creditors had the right, under the statute, to appear and resist dissolution, and to appeal from final adverse holdings on their objection to the dissolution.

holders or creditors.³³ Such protection may be required in case of fraud on the part of majority stockholders,³⁴ mismanagement by directors or officers,³⁵ or dissension among stockholders rendering continuation of the business impossible.³⁶

A receiver is generally appointed by the equity court to take the property of the corporation into his possession, to wind up the affairs of the corporation, and to make distribution among creditors and stockholders.³⁷ A receivership is, however, recognized as a radical remedy, and is invoked only when no other relief would be adequate.³⁸

The statutes in some states specifically grant jurisdiction to courts of equity to liquidate the assets and terminate the business of a corporation upon suit of stockholders or creditors. In several states, such suit may be brought by a stockholder when it is made to appear: (1) that the directors are deadlocked in the management of the corporate affairs, and that irreparable injury to the corporation is threatened thereby;³⁹ (2) that the acts of

³³ This is the present rule according to the weight of authority. See *Rugger v. Mt. Hood Electric Co.*, (1933) 143 Ore. 193, 20 P. (2d) 412; *Goodwin v. Milwaukee Lithographing Co.*, (1920) 171 Wis. 351, 177 N. W. 618; *Exchange Bank v. Bailey*, (1911) 29 Okla. 246, 116 P. 812; *Wall and Beaver Street Corp. v. Munson Line, Inc.*, (1943) 58 F. Supp. 101. See also E. G. Rudolph, "Dissolution at Suit of a Minority Stockholder," 41 *Michigan Law Review* 714 (1943).

³⁴ *Stott Realty Co. v. Orloff*, (1933) 262 Mich. 375, 247 N. W. 698; *Rugger v. Mt. Hood Electric Co.*, (1933) 143 Ore. 193, 20 P. (2d) 412, petition for rehearing denied, 21 P. (2d) 1100; *Metropolitan Fire Ins. Co. v. Middendorf*, (1916) 171 Ky. 771, 188 S. W. 790; *Exchange Bank v. Bailey*, (1911) 29 Okla. 246, 116 P. 812; *Bailey v. Proctor*, (1947) 160 F. (2d) 78.

³⁵ *Rugger v. Mt. Hood Electric Co.*, (1933) 143 Ore. 193, 20 P. (2d) 412; *Burnham v. Arcola Sugar Mills Co.*, (1932) 2 F. Supp. 738; *Goodwin v. Milwaukee Lithographing Co.*, (1920) 171 Wis. 351, 177 N. W. 618. See also *Green v. National Advertising & Amusement Co.*, (1917) 137 Minn. 65, 162 N. W. 1056; *Hyman Mercantile Co. v. Kiersky*, (1941) 192 Miss. 195, 4 So. (2d) 881; *Bailey v. Proctor*, (1947) 160 F. (2d) 78.

³⁶ *Flemming v. Heffner & Flemming*, (1933) 263 Mich. 561, 248 N. W. 900; *Bowen v. Bowen-Romer Flour Mills Corp.*, (1923) 114 Kan. 95, 217 P. 301; *Nashville Packet Co. v. Neville*, (1921) 144 Tenn. 698, 235 S. W. 64; *McDougall v. Hepden*, (1940) 3 Wash. (2d) 603, 101 P. (2d) 570; *Merlino v. Fresno Macaroni Mfg. Co.*, (1944) 64 Cal. App. (2d) 462, 148 P. (2d) 884; *In re Bob's Fashion Furriers*, (1944) 52 N. Y. S. (2d) 279; *Cowin v. Salmon*, (1946) 248 Ala. 580, 28 So. (2d) 633; *Guaranty Laundry v. Pulliam*, (1948) (Okla.) 191 P (2d) 975.

³⁷ See *Tri-City Electric Service Co. v. Jarvis*, (1933) 206 Ind. 5, 185 N. E. 136; *Nat. Ben. Life Ins. Co. v. Shaw-Walker Co.*, (1940) 111 F. (2d) 497; *Levin v. Fisk Rubber Corporation*, (1947) (Del. Ch.) 52 A. (2d) 741.

³⁸ *Rugger v. Mt. Hood Electric Co.*, (1933) 143 Ore. 193, 20 P. (2d) 412; *Schuster v. Largman*, (1932) 308 Pa. 520, 162 A. 305. See also *Schneider v. Schneider*, (1941) 347 Mo. 102, 146 S. W. (2d) 584; *Neff v. Progress Bldg. Materials Co.*, (1947) 139 N. J. Eq. 356, 51 A. (2d) 443.

³⁹ *Application of Landau*, (1944) 183 N. Y. Misc. 876, 51 N. Y. S. (2d) 651.

the directors or those in control are illegal, oppressive, or fraudulent; or (3) that the corporate assets are being misapplied or wasted. Such suit may be brought by a creditor whose claim either has been reduced to judgment and execution or has been returned unsatisfied, or whose claim is admitted by the corporation, when it appears that the corporation is unable to pay its debts and obligations in the regular course of business as they mature.

Involuntary dissolution by expiration of charter. The articles of incorporation, pursuant to statutory authority, often provide that the corporation shall have perpetual existence. However, the duration of the life of the corporation may be limited to a fixed number of years, and, at the end of the term for which it was created, the corporation is dissolved and automatically ceases to exist.⁴⁰ No judgment of a court is necessary in such an event to terminate its life.⁴¹ However, the corporation retains some of its powers to the extent necessary to enable it to settle its affairs by disposing of its property, discharging its obligations, and distributing the remaining assets among its shareholders.⁴² In some states, the life of the corporation is extended for a definite period after the expiration of its charter.⁴³ It is the duty of the corporation to close out its business on expiration of the charter if no application is made for renewal.⁴⁴ Where the directors are made trustees upon the expiration of the charter, the statute usually imposes upon them the burden of winding up the business. If the statute makes no provision for closing out the corporate affairs, the corporation is normally wound up without interference by the courts, for a court will not concern itself with the adjustment of corporate affairs⁴⁵ unless the assets are in serious danger of being impaired.

Some states provide by statute for continuation of corporate

⁴⁰ *Mason v. Pewabic Mining Co.*, (1885) 25 F. 882; *Bradley v. Reppell*, (1895) 133 Mo. 545, 32 S. W. 645; *Bonfils v. Hayes*, (1921) 70 Colo. 336, 201 P. 677; *Grand Rapids Trust Co. v. Carpenter*, (1925) 229 Mich. 582, 201 N. W. 882; *In re F. H. Koretke Brass & Mfg. Co., Ltd.*, (1940) 195 La. 415, 196 So. 917.

⁴¹ *Matter of Friedman*, (1917) 177 N. Y. App. Div. 755, 164 N. Y. Supp. 892.

⁴² *McCarthy Co. v. Central Lumber & Coal Co.*, (1927) 204 Iowa 207, 215 N. W. 250.

⁴³ The usual period is three years; in several states it is five years. See *Kash v. Lewis*, (1928) 224 Ky. 679, 6 S. W. (2d) 1098. No definite period is fixed by statute in Kentucky. It was held in this case, however, that the corporation does not cease to exist simply because its charter expires, but that it has an existence beyond the life of its charter for the purpose of winding up its affairs.

⁴⁴ *Grand Rapids Trust Co. v. Carpenter*, *supra* (Note 40).

⁴⁵ *McCarthy Co. v. Central Lumber & Coal Co.*, *supra* (Note 42).

existence after expiration of the original period by renewal of the corporation's charter either through amendment of its articles or through filing of a certificate of renewal with designated authorities.⁴⁶

Involuntary dissolution through forfeiture of charter by state. The state which gives life to a corporation may, under some circumstances, take it away.⁴⁷ It may impose certain conditions upon the corporation and may provide that particular acts or omissions shall operate to end the corporate existence.⁴⁸ Following are the most usual grounds of forfeiture:

1. Abuse of corporate privileges, or misuser.⁴⁹
2. Failure to exercise the franchise, or non-user.⁵⁰

The state may also repeal a charter without cause if the right to do so has been reserved by the state either by the law in force at the time the charter was granted, or by the terms of the charter itself.⁵¹ The statutes in the various states generally enumerate the grounds upon which forfeiture of the charter may be declared by the state. These include, in addition to misuser and non-user for a fixed number of years, fraud practiced on the state in procuring the franchise, failure to file annual reports,⁵²

⁴⁶ See page 712.

⁴⁷ *Sun River Stock & Land Co. v. Montana Trust & Savings Bank*, (1928) 81 Mont. 222, 262 P. 1039; *Four-S Razor Co. v. Guymon*, (1922) 110 Kan. 745, 205 P. 635.

⁴⁸ *Four-S Razor Co. v. Guymon*, *supra* (Note 47).

⁴⁹ *In re Opinion of the Justices*, (1921) 237 Mass. 619, 131 N. E. 29; *State ex rel. Langer v. Gamble-Robinson Fruit Co.*, (1919) 44 N. D. 376, 176 N. W. 103; *Southerland v. Decimo Club, Inc.*, (1928) 16 Del. Ch. 183, 142 A. 786; *State v. Retail Credit Men's Ass'n of Chattanooga*, (1931) 163 Tenn. 450, 43 S. W. (2d) 918. See also *Burnham v. Arcola Sugar Mills Co.*, (1932) 2 F. Supp. 738; *Commonwealth v. Neptune Club of City of Philadelphia*, (1936) 321 Pa. 574, 184 A. 542; *Commonwealth v. United Warehouse Co.*, (1943) 293 Ky. 502, 169 S. W. (2d) 300.

⁵⁰ *Mylrea v. Superior & St. C. Ry. Co.*, (1896) 93 Wis. 604, 67 N. W. 1138; *City of Livingston v. Monidah Trust*, (1919) 261 F. 966; *State v. Dilbeck*, (1927) (Tex. Civ. App.) 297 S. W. 1049; *State ex inf. Gentry v. Ramona Kennel Club*, (1928) (Mo.) 8 S. W. (2d) 1; *State ex rel. Shields v. Farmers Union Cooperative Brokerage*, (1944) 70 S. D. 14, 13 N. W. (2d) 809; *J. & I. Block v. Hi-lo Corporation*, (1944) 182 N. Y. Misc. 414, 48 N. Y. S. (2d) 894; *Geisendorfer v. Rainbow Mill & Lumber Co.*, (1945) 70 Cal. App. (2d) 705, 161 P. (2d) 561.

⁵¹ See *Greenwood v. Freight Company*, (1881) 105 U. S. 13.

⁵² *Italiani v. Higbee Coal Mining Co.*, (1932) 331 Mo. 362, 53 S. W. (2d) 1050; *Bergeron v. Belisle*, (1931) 256 Mich. 225, 239 N. W. 277; *A. R. Young Const. Co. v. Dunne*, (1927) 123 Kan. 176, 254 P. 323; *Knotts v. Clark Const. Co.*, (1921) 191 Ind. 354, 131 N. E. 921; *Bunn v. City of Laredo*, (1919) (Tex. Civ. App.) 213 S. W. 320; *New York & L. I. Bridge Co. v. Smith*, (1896) 148 N. Y. 540, 42 N. E. 1088; *In re Davis Bros. Stone Co.*, (1944) 245 Wis. 130, 13 N. W. (2d) 512.

failure to pay franchise taxes,⁵³ failure to maintain a statutory agent, and the like.

Procedure for declaring forfeiture of charter. As a general rule, a forfeiture can be effected upon the judgment of a competent court in a direct proceeding brought for that purpose by the state.⁵⁴ The state alone can claim the forfeiture of the corporate charter. Private citizens cannot maintain a proceeding to test the legality of the corporation's existence.⁵⁵ The action by which the state ousts the corporation and revokes the privileges granted to it is called a proceeding in the nature of a quo warranto.⁵⁶ It is not primarily an action in the interest of any individual, but is a proceeding intended to protect the public generally against the unauthorized and unlawful exercise of the corporate franchise,⁵⁷ or the failure to exercise the franchise.

Some states provide by statute that, upon breach of the conditions imposed, the charter shall be automatically forfeited. The statute in that case is self-executing,⁵⁸ and no judgment of

⁵³ *Tradesmen's Nat. Bank & Trust Co. v. Johnson*, (1931) 54 F. (2d) 367; *A. R. Young v. Dunne*, (1927) 123 Kan. 176, 254 P. 323; *Wuerfel v. F. H. Smith Co.*, (1940) (Del. Ch.) 13 A. (2d) 601. In some states, failure to pay taxes suspends the charter, and the charter is revived upon payment. See *Jarvis v. Chapman Properties, Inc.*, (1933) 110 Fla. 17, 147 So. 860; *Bengel v. Kenney*, (1932) 126 Cal. App. 735, 14 P. (2d) 1031. In *Stephens County v. J. N. McCammon, Inc.*, (1932) 122 Tex. 148, 54 S. W. (2d) 880, it was held that the failure to pay the franchise tax was not an act of dissolution, but that it suspended the corporation's right to sue or to seek affirmative relief in the courts. See also *State ex rel. New Arlington Hotel Co. v. Hinkle*, (1921) 115 Wash. 298, 197 P. 4; *Brady v. State Tax Commission*, (1941) 176 N. Y. Misc. 1053, 29 N. Y. S. (2d) 88; *John J. Gamalski Hardware v. Baird*, (1941) 298 Mich. 662, 299 N. W. 757; *Nebraska Central Bldg. & Loan Ass'n v. Yellowstone, Inc.*, (1942) 141 Neb. 679, 4 N. W. (2d) 762.

⁵⁴ *Reichert v. Ellis Ferry Co.*, (1919) 184 Ky. 150, 211 S. W. 403; *Lyon v. Carpenters' Hall Ass'n of San Francisco*, (1924) 66 Cal. App. 550, 226 P. 942. See also *Ex parte Amos*, (1927) 94 Fla. 1023, 114 So. 760; *Attorney Gen. v. Chicago & Evanston R. R. Co.*, (1884) 112 Ill. 520; *Mylrea v. Superior & St. C. R. Co.*, (1896) 93 Wis. 604, 67 N. W. 1138; *Bergeron v. Belisle*, (1931) 256 Mich. 225, 239 N. W. 277; *Rosenblum v. Dingfelder*, (1940) 111 F. (2d) 406; *State of Missouri v. A. B. Collins & Co.*, (1940) 34 F. Supp. 549, discussed in 29 *Georgia Law Journal* 511 (1941); *American Home Benefit Ass'n v. United American Benefit Ass'n*, (1942) 63 Idaho 754, 125 P. (2d) 1010; *State v. Dyer*, (1947) 145 Tex. 586, 200 S. W. (2d) 813.

⁵⁵ *Sherwood v. Greater Mammoth Vein Coal Co.*, (1922) 193 Iowa 365, 185 N. W. 279; *State ex rel. Hutt v. Anthes Force Oiler Co.*, (1946) 237 Iowa 722, 22 N. W. (2d) 324, discussed in 32 *Iowa Law Review* 558 (1947).

⁵⁶ See *State ex rel. Snyder v. Portland Natural Gas & Oil Co.*, (1899) 153 Ind. 483, 53 N. E. 1089.

⁵⁷ *State ex inf. McAllister ex rel. Cole v. Norborne Land Drainage Dist. Co. of Carroll County*, (1921) 290 Mo. 91, 234 S. W. 344.

⁵⁸ *Young Const. Co. v. Dunne*, (1927) 123 Kan. 176, 254 P. 323. For case de-

the court is necessary. However, it must plainly appear from the language employed in the statute that such was the legislative intent.⁵⁹ In the absence of such a provision the charter does not automatically become void. It is not self-executing and the forfeiture can be enforced only by resort to a judicial tribunal.⁶⁰

The courts are extremely reluctant to adjudge a forfeiture of the corporate franchise, and, where a proceeding is brought for that purpose, will exercise their discretion and refuse to grant the forfeiture unless no other adequate remedy is available.⁶¹

Statutory continuation of existence after dissolution. When a corporation is dissolved, it ceases to exist for any purpose whatsoever, in the absence of a statute to the contrary.⁶² It cannot hold property⁶³ or convey it;⁶⁴ it cannot sue or be sued;⁶⁵ it can-

claring statute to be self-executing see *Fidelity Metals Corporation v. Risley* (1946) 77 Cal. App. (2d) 377, 175 P. (2d) 592.

⁵⁹ *Turner v. Western Hydro-Electric Co.*, (1927) 241 Mich. 6, 216 N. W. 476, quoting from Cook's *Principles of Corp. Law*, page 708: "The Secretary of State cannot forfeit a charter even though the statute prescribes forfeiture for nonpayment of taxes; but it is constitutional to provide by statute, as is the case in New Jersey and some other states, that the charter and all corporate powers shall be void and cease upon the nonpayment of taxes. The New York courts have held that a provision in a charter that unless certain things are done within a certain time the company shall forfeit the rights acquired does not work a forfeiture ipso facto." See also *Motor City Engineering Co. v. Fred E. Holmes Co.*, (1928) 241 Mich. 446, 217 N. W. 25; *Bunn v. City of Laredo*, (Tex. Civ. App.) 1919, 213 S. W. 320.

⁶⁰ See *Turner v. Western Hydro-Electric Co.*, supra (Note 59).

⁶¹ *State ex rel. Smith v. Hutchinson Gas Co.*, (1928) 125 Kan. 337, 264 P. 44.

⁶² *Klorfine v. Cole*, (1927) 121 Ore. 76, 252 P. 708. See also *U. S. v. Safeway Stores*, (1944) 140 F. (2d) 835.

⁶³ *Klorfine v. Cole*, supra (Note 62).

⁶⁴ *Bradley v. Reppell*, (1895) 133 Mo. 545, 32 S. W. 645.

⁶⁵ *Atkinson v. Reid*, (1932) 185 Ark. 301, 47 S. W. (2d) 571; *U. S. Truck Co. v. Pennsylvania Surety Corp.*, (1932) 259 Mich. 422, 243 N. W. 311; *Ewen v. American Fidelity Co.*, (1921) 271 F. 848; *Ocean Park Bath & Amusement Co. v. Pacific Auto Park Co.*, (1940) 37 Cal. App. (2d) 158, 98 P. (2d) 1068; *Chicago Riding Club v. Avery*, (1940) 305 Ill. App. 419, 27 N. E. (2d) 636; *Glennon v. Lincoln Inv. Corp.*, (1940) 110 F. (2d) 130; *Peora Coal Co. v. Ashcraft*, (1941) 123 W. Va. 586, 17 S. E. (2d) 444, discussed in 48 *West Virginia Law Review* 284 (1942); *Pelican Oil & Gasoline Co. v. Comr. of Int. Rev.*, (1942) 128 F. (2d) 561; *Shore Management Corp. v. Erickson*, (1942) 314 Ill. App. 571, 41 N. E. (2d) 972; *Woodbury Granite Co. v. U. S.*, (1945) 59 F. Supp. 150. See, however, *Dick v. Petersen*, (1931) 90 Colo. 83, 6 P. (2d) 923, stating that under the common law rule, dissolution did not impair the remedy against the corporation, its stockholders, directors, or officers, for liabilities incurred previous to dissolution. See also Marcus, "Suability of Dissolved Corporations—A Study in Interstate and Federal-State Relationships," 58 *Harvard Law Review* 675 (1945).

not make contracts,⁶⁶ and cannot exercise any other powers granted by its charter.⁶⁷ It no longer has a board of directors or a body of officers.⁶⁸ By express statutory provision in many states, however, the life of the corporation is extended for a limited period of time⁶⁹ after dissolution for the purpose of prosecuting and defending suits by or against it, paying, satisfying, and discharging existing liabilities,⁷⁰ disposing of and conveying its property, settling and closing its affairs, and dividing its assets.^{70a} During this grace period the corporation is not extinguished, but continues a qualified existence merely to wind up its affairs. It may not, however, continue to do business as a going concern,⁷¹ nor may its officers continue to exercise their functions as such or claim compensation.⁷²

A corporation that elects voluntarily to dissolve remains liable on its outstanding executory contracts.⁷³

Liquidation of corporation by trustees. The business of the corporation is in most states wound up by the directors who are constituted trustees for that purpose by statute. These statutory trustees must collect the outstanding debts,⁷⁴ liquidate the

The dissolution of a corporation abates a suit against the corporation, but does not annul a judgment, which may be enforced against individuals, such as stockholders, directors, officers, or corporate employees, who may be bound thereby. *Walling v. James V. Reuter, Inc.*, (1944) 321 U. S. 671, 64 S. Ct. 826.

⁶⁶ *Van Landingham v. United Tuna Packers*, (1922) 189 Cal. 353, 208 P. 973; *In re Solomon*, (1939) 16 N. Y. Supp. (2d) 472; *Arnold v. H. Piper Co.*, (1943) 319 Ill. App. 91, 48 N. E. (2d) 580.

⁶⁷ See *Bowe v. Minnesota Milk Co.*, (1890) 44 Minn. 460, 47 N. W. 151, in which this is enumerated as the common law rule.

⁶⁸ *Van Landingham v. United Tuna Packers*, (1922) 189 Cal. 353, 208 P. 973.

⁶⁹ In Kentucky, where the statute fixed no time, it was held that a reasonable time should be allowed to wind up the corporate affairs. *Holliday v. Cornett*, (1928) 224 Ky. 356, 6 S. W. (2d) 497.

⁷⁰ Contingent liabilities are considered existing liabilities. *Comm'rs of State Ins. Fund v. H. L. & F. McBride, Inc.*, (1949) 195 N. Y. Misc. 362.

^{70a} For provisions in the various states, see *Prentice-Hall Corporation Service*.

⁷¹ *Houston v. Utah Lake Land, Water & Power Co.*, (1919) 55 Utah 393, 187 P. 174; *Trower v. Stonebraker Zea Live Stock Co.*, (1937) 17 F. Supp. 687.

⁷² *Sullivan Timber Co. v. Black*, (1909) 159 Ala. 570, 48 So. 870.

⁷³ *Mayflower Realty Co. v. Security Savings & Loan Soc.*, (1937) 192 Wash. 129, 72 P. (2d) 1038; *Houston v. Drake*, (1937) 18 F. Supp. 693. See also *Wyoming-Indiana Oil & Gas Co. v. Weston*, (1932) 43 Wyo. 526, 7 P. (2d) 206; *Napier v. People's Store Co.*, (1923) 98 Conn. 414, 120 A. 295; *Okmulgee Window Glass Co. v. Frink*, (1919) 260 F. 159; *Kalkhoff v. Nelson*, (1895) 60 Minn. 284, 62 N. W. 332; *Schleider v. Dielman*, (1892) 44 La. Ann. 462, 10 So. 934; *In re Mullings Clothing Co.*, (1916) 238 F. 58, 252 F. 667 (dissolution of a corporation does not terminate its lease).

⁷⁴ See *Wyoming-Indiana Oil & Gas Co. v. Weston*, (1932) 43 Wyo. 526, 7 P. (2d) 206; *Hewson v. Charles P. Gillen & Co.*, (1928) (N. J. Ch.) 142 A. 250.

corporate assets, and make proper distribution among creditors and stockholders.⁷⁵ If the directors fail to perform the duties imposed upon them, they will be held chargeable for their neglect.⁷⁶ The statutes in some cases specifically render them liable to creditors and stockholders to the extent of the property that comes into their hands.⁷⁷ Their relation to the corporation and to its stockholders is a fiduciary one, and the trustees cannot deal with the property to their personal advantage.⁷⁸

In some states, the statutory trustees become vested with title to the corporate property.⁷⁹ In others, they do not acquire title but only the right to possession.⁸⁰ The rule also varies as to whether the corporation or the trustee is the proper party to a suit during the statutory continuation of existence.

Instead of placing the burden of liquidating the business upon the directors, some states provide for the appointment of a receiver or a trustee. Where no provision is made for the appointment of a trustee or a receiver, the corporation itself winds up the business and acts as trustee for the creditors and stockholders.⁸¹

Distribution of assets of dissolved corporation. Upon dissolution of the corporation, the assets must be distributed among

⁷⁵ *Gilna v. Barker*, (1927) 78 Mont. 357, 254 P. 174.

⁷⁶ See *Hewson v. Charles P. Gillen & Co., Inc.*, (1923) (N. J.) 142 A. 250, where the directors of a dissolved corporation were held chargeable as trustees for neglecting to collect the assets. See *State ex rel. Stoddart v. District, etc.*, (1939) 108 Mont. 51, 88 P. (2d) 34, as to remedy under Montana statute, and *Beatty v. Patterson-Garfield-Lodi Bus Co., Inc.*, (1939) 126 N. J. Eq. 472, 9 A. (2d) 686, as to liability of directors and stockholders upon distribution of assets in dissolution without making provision for payment of creditor. See also *Word v. Union Bank & Trust Co.*, (1940) 111 Mont. 279, 107 P. (2d) 1083, discussed in 54 *Harvard Law Review* 1234 (1941); *Young v. Blandin*, (1943) 215 Minn. 111, 9 N. W. (2d) 313.

⁷⁷ *Turp v. Dickinson*, (1926) 100 N. J. Eq. 417, 134 A. 888; *Wright v. Sutton*, (1927) 122 Kan. 771, 253 P. 225. See also *Cohen v. Pavlik*, (1938) 235 Ala. 289, 178 So. 435, and *Stock v. E. A. Fabacher, Inc.*, (1938) (La. App.) 185 So. 48.

⁷⁸ *Bisbee v. Midland Linseed Prod. Co.*, (1927) 19 F. (2d) 24. But see *Williams v. Yocum*, (1928) 37 Wyo. 432, 263 P. 607, wherein it was held that, where the directors were not trustees but were merely authorized by the stockholders to wind up the affairs of the corporation, the sale of assets of the company to one of the directors was not fraudulent.

A trustee in dissolution who speculates with corporate funds in his hands resulting in a loss is personally liable to the shareholder to whom distribution should have been made. *Young v. Blandin*, (1943) 215 Minn. 111, 9 N. W. (2d) 313.

⁷⁹ *Central Union Trust Co. v. Amer. Ry. Traffic Co.*, (1921) 198 N. Y. App. Div. 303, 190 N. Y. Supp. 674.

⁸⁰ *Crystal Pier Co. v. Schneider*, (1919) 40 Cal. App. 379, 180 P. 948.

⁸¹ *Big Sespe Oil Co. v. Cochran*, (1921) 276 F. 216.

the stockholders, for the assets of a corporation belong to them.⁸² Such distribution may not be made, however, before the debts of the corporation are paid and its obligations discharged.⁸³ If creditors are not paid before distribution of the assets to stockholders, a liability in favor of creditors may be created, not only against the stockholders who receive the assets,⁸⁴ but also against the directors of the corporation.⁸⁵

After creditors have been paid, all stockholders are entitled to share equally in the proceeds obtained upon liquidation of the assets,⁸⁶ unless the charter contains some contrary provision, or unless the stockholders agree to some different basis of distribution.⁸⁷

It is a common practice to issue preferred stock upon the agreement that it will be entitled to certain preferences in distribution upon dissolution, and this contractual obligation

⁸² *Jones v. Peck*, (1923) 63 Cal. App. 397, 218 P. 1030; *Cohen v. L. & G. Inv. Co.*, (1936) 186 Wash. 308, 57 P. (2d) 1042; *In re Herb's Estate*, (1937) 163 N. Y. Misc. 441, 296 N. Y. Supp. 491; *Hale v. Eberhardt*, (1936) 54 Ga. 395, 188 S. E. 53; *In re Montello Salt Co.*, (1936) 88 Utah 283, 53 P. (2d) 727. See also *Janssen v. Tate*, (1928) 94 Cal. App. 21, 270 P. 456; *Di Prete v. Vallone*, (1946) (R. I.) 48 A. (2d) 250.

For the disposition of unclaimed distributive shares of a dissolved corporation, see 45 *Yale Law Jour.* 720 (1936), discussing *In re Hull Copper Co.*, (1935) 46 Ariz. 270, 50 P. (2d) 560.

⁸³ See *Underwood v. Commissioner of Internal Revenue*, (1932) 56 F. (2d) 67. See also *In re Howell*, (1925) 6 F. (2d) 672; *In re Central New Jersey Land & I. Co.'s Dissolution*, (1933) 113 N. J. Eq. 332, 166 A. 705; *Wilson v. Lucas*, (1932) 185 Ark. 183, 47 S. W. (2d) 8; *Marshall v. Fredericksburg Lumber Co.*, (1934) 162 Va. 136, 173 S. E. 553; *In re Pacific Coast B. & L. Ass'n*, (1940) 15 Cal. (2d) 134, 99 P. (2d) 251; *Bloch v. Bell*, (1945) 63 F. Supp. 863; *Di Prete v. Vallone*, (1946) 72 R. I. 137, 48 A. (2d) 250; *Franklin v. Watson*, (1946) 69 N. Y. S. (2d) 444.

⁸⁴ Stockholders receiving substantially all the corporate property take it impressed with a trust in favor of unpaid creditors, any of whom may, to the extent of his claim, recover from any single stockholder the property so received or its value. *Bankers Trust Co. v. Hale & Kilburn Corporation*, (1936) 84 F. (2d) 401; *Gaskins v. Bonfils*, (1935) 79 F. (2d) 352. See also *Bankers Pocahontas Coal Co. v. Monarch Smokeless Coal Co.*, (1941) 123 W. Va. 53, 14 S. E. (2d) 922; *Kock v. U. S.*, (1943) 138 F. (2d) 850.

⁸⁵ *Fudickar v. Inabnet*, (1933) 176 La. 777, 146 So. 745; *United States v. Snook*, (1928) 24 F. (2d) 844; *Dick v. Petersen*, (1931) 90 Colo. 83, 6 P. (2d) 923; *Marshall v. Fredericksburg Lumber Co.*, (1934) 162 Va. 136, 173 S. W. 553; *Rochell v. Oates*, (1941) 241 Ala. 372, 2 So. (2d) 749; *N. J. Title Guarantee & Trust Co. v. Berliner*, (1945) 136 N. J. Eq. 162, 40 A. (2d) 790.

⁸⁶ Minority stockholders must receive their pro rata share of the property. *Lebold v. Inland S. S. Co.*, (1936) 82 F. (2d) 351. See also *Bacon v. Nat. Bank of Commerce*, (1924) (Tex. Civ. App.) 259 S. W. 244.

⁸⁷ *Williams v. Renshaw*, (1927) 220 N. Y. App. Div. 39, 220 N. Y. Supp. 532; *Drewry-Hughes Co. v. Throckmorton*, (1917) 120 Va. 859, 92 S. E. 818.

must be respected.⁸⁸ If a stockholder has not paid in full for his stock, he may share in the proceeds only in proportion to the amount actually paid.⁸⁹ In some states, the statutes fix the time within which distribution after dissolution is to be made, and indicate the order in which debts are to be paid.

⁸⁸ For a discussion of priorities on dissolution, see "Developments in the Law," 45 *Harvard Law Review* 1374, p. 1376, et seq. See also *Waldner v. Equitable Loan Soc.*, (1945) 60 F. Supp. 372.

⁸⁹ *Grone v. Economic Life Ins. Co.*, (1911) (Del. Ch.) 80 A. 809. But see *Penington v. Commonwealth Hotel Const. Corp.*, (1930) 17 Del. Ch. 188, 151 A. 228, aff'd (1931) 17 Del. Ch. 394, 155 A. 514, in which it was held that stockholders who have not fully paid for their stock must equalize their contribution before they can share pro rata with other stockholders of the same class in the distribution upon dissolution.

CHAPTER 36

RESOLUTIONS RELATING TO RECAPITALIZATION, REORGANIZATION, AND DISSOLUTION

RESOLUTIONS RELATING TO RECAPITALIZATION

No. 770

Resolution of directors calling meeting of stockholders to pass on proposal to readjust corporation in order to segregate various activities, and to organize holding company to control subsidiaries.

WHEREAS, this Corporation is engaged in the operation of manufacturing motorcars, cycles, bicycles, and other pleasure vehicles, and is interested in and controls, through stock ownership or otherwise, the "A" Corporation, the "B" Corporation, and the "C" Corporation, which corporations are engaged in buying, selling, and repairing automobile tires of all kinds and descriptions, and

WHEREAS, it is deemed desirable to place under the control of a separate corporate body the property of this Corporation devoted to the business of manufacturing motorcars, cycles, bicycles, and other pleasure vehicles, in order to ascertain definitely and accurately the separate results of the vehicle-manufacturing operations and the tire activities, and

WHEREAS, the Board of Directors believes that the best interests of this Corporation and its stockholders require a readjustment of its capital structure,

NOW, THEREFORE, BE IT RESOLVED:

1. That a new corporation be organized as a holding company under the laws of the State of, with a capital stock of not less than 200,000 shares without par value.

2. That the name, under which this Corporation has been operating, be included in the name of the new corporation.

3. That this Corporation sell to the aforesaid new corporation the stock of the "A," "B," and "C" Corporations aforementioned, owned

by this Corporation, and any other assets not required in the business of manufacturing motorcars, cycles, bicycles, and other pleasure vehicles.

4. That the stockholders of this Corporation accept, in lieu of and in exchange for the shares of stock of this Corporation held by them, the shares of stock of the new corporation, on the basis of two shares of new no par value stock for each share of stock of this Corporation with a par value of \$100.

FURTHER RESOLVED, That a special meeting of stockholders of this Corporation be called, to be held on the .. day of, 19.., at o'clock in thenoon, at the office of the Corporation at (Street), in the City of, State of, to consider and act upon the foregoing resolution and to appoint a readjustment committee, and that the Secretary of this Corporation be and he hereby is authorized and directed to send notices forthwith to all the stockholders of this Corporation, as required by the By-laws of this Corporation.

No. 771

Excerpt of minutes of special joint meeting of stockholders and directors authorizing voluntary rearrangement of stockholdings.

The Chairman then made a statement concerning the impairment of the Company's capital, and stated that by reason of losses sustained in the business of the Company in the year 19.., the Company's capital had been impaired to the extent of \$85,000, so that the net worth of the Company has been reduced from \$211,000 to \$126,000. He further stated that, in view of an outstanding agreement between *A* and *B* (the holders of the entire common stock of the Company), which provided for an apportionment of profits and losses, it had been decided to rearrange the stockholdings as follows:

1. *B* to surrender 1 share of common stock to *A* and 2 shares of common stock to the Company.

2. *A* to surrender to the Company 252½ shares of Class A preferred stock of the aggregate value of \$25,250.

3. *C* to surrender to the Company 252½ shares of Class A preferred stock of the aggregate value of \$25,250.

4. *B* to surrender to the Company 162½ shares of Class B preferred stock of the aggregate value of \$16,250.

5. *D* to surrender to the Company 162½ shares of Class B preferred stock of the aggregate value of \$16,250.

The Chairman further stated that, when all these surrenders have been effected, the Company's stock will be held as follows:

1. The Company will hold 2 shares of common stock, 505 shares of Class A preferred stock, and 325 shares of Class B preferred stock.

2. A will hold 12 shares of common stock and 630 shares of Class A preferred stock.

3. C will hold 630 shares of Class A preferred stock.

4. B will hold 6 shares of common stock.

Upon motion, duly made and unanimously carried, it was

RESOLVED, That the changes in the stockholdings hereinabove at this meeting outlined by the Chairman be and they hereby are approved in all respects insofar as they affect this Company, and that the President and the Secretary of the Company be and they hereby are authorized and directed to do and perform all things necessary or desirable to effectuate the purposes of these resolutions, and to consummate the said changes in stockholdings.

No. 772

Resolution of directors approving plan of readjustment.

RESOLVED, That this Board of Directors hereby approves the Plan and Agreement of Readjustments relating to the Company, dated, 19.., and hereby requests the Stockholders' Committee, consisting of, and others, created by the said Agreement dated, 19.., to carry the same into effect.

No. 773

Resolution of directors authorizing split-up of stock, and calling stockholders' meeting to approve split-up.

RESOLVED, That it is advisable to amend the Agreement of Consolidation under which this Corporation was formed by:

(a) Changing the number of the issued and outstanding shares of the capital stock, without par value, of the Consolidated Corporation, from $263,860\frac{32}{88}$ to $1,055,441\frac{40}{88}$, each of such $263,860\frac{32}{88}$ shares being thereby changed into four shares, such change to be effective at the close of business, 19.., without the capital of the Consolidated Corporation being increased or decreased by the transfer of surplus to capital account or the transfer of capital to surplus, or otherwise.

(b) Changing Article III of the Agreement of Consolidation, under which this Corporation was formed, to read as follows:

"The number of shares of the total authorized capital stock of the

Consolidated Corporation shall be one million five hundred thousand (1,500,000) shares without par value, all of one class.

“All the stock of the Consolidated Corporation without par value, whether now authorized or authorized by subsequent increase of capital pursuant to any amendment of this Agreement of Consolidation, may be issued from time to time for such consideration as may be fixed from time to time by the Board of Directors, and authority so to fix such consideration is hereby granted to the Board of Directors by the stockholders.”

RESOLVED, That Bank, as Transfer Agent of the shares of the capital stock of the Corporation, be and it hereby is authorized and directed to issue and, when countersigned and registered by Bank & Trust Company, as Registrar, to deliver from time to time after the close of business , 19.., in accordance with the order or orders of this Corporation evidenced by a writing or writings signed by its President or a Vice President, and countersigned by its Secretary or Treasurer, certificates for not exceeding 791,581 $\frac{8}{88}$ shares, without par value, of the capital stock of the Corporation, subject to the effective amendment of the Agreement of Consolidation under which the Corporation was formed, so as to permit the issuance of such shares as aforesaid; and further

RESOLVED, That Bank & Trust Company, of the City of, as Registrar of the shares of the capital stock of the Corporation, be and it hereby is authorized and directed to countersign and register the certificates for not exceeding 791,581 $\frac{8}{88}$ shares, without par value, of the capital stock of this Corporation, referred to in the next preceding resolution, when issued by Bank, as Transfer Agent.

RESOLVED, That it is advisable for this Corporation to authorize the issuance of \$10,000,000 in principal amount of debentures upon such terms, in such manner, and under such conditions as may be fixed by resolution of the Board of Directors prior to the issuance thereof.

RESOLVED, That it is advisable for this Corporation to issue and sell \$7,000,000 of the debentures authorized as aforesaid, convertible into capital stock without par value of this Corporation.

RESOLVED, That action be taken upon the foregoing proposals to amend the Agreement of Consolidation and for the authorization and issuance and sale of debentures at a special meeting of the stockholders to be held on the .. day of, 19.., at 11 o'clock in the forenoon, at the principal office of the Corporation, (Street), (City),, which meeting is hereby called for that purpose and for the transaction of such other business as may properly come before the meeting.

RESOLVED, That the date for the determination of the stockholders entitled to notice of and to vote at said meeting of the stockholders to be held on , 19.., is hereby fixed as , 19.., at the close of business on that day.

RESOLVED, That the Secretary be instructed to send to the stockholders entitled thereto appropriate notices and forms of proxies for use at the said stockholders' meeting, such notices and proxies to be in such form as the Secretary may with the advice of counsel deem necessary or advisable.

RESOLVED, That if the stockholders at the meeting of stockholders on , 19.., determine to change each share of the issued and outstanding shares of the capital stock without par value of this Corporation into four shares of such capital stock without par value, it is advisable that such change be made effective on , 19.., and that stockholders of record at the close of business on that date receive certificates for three additional shares for each share held, in effectuation of such change.

No. 774

Resolution of directors approving plan for revision of capital structure and amendment of certificate of incorporation.

RESOLVED, That the Board of Directors of the Company hereby proposes, adopts, and approves the following plan providing for a revision of the capital structure of the Company, and the issuance and exchange of shares of the capital stock of the Company, as follows:

1. Increase the present authorized capital stock to 283,000 shares, and reclassify all of said authorized shares into 3 classes, to consist of 240,000 shares of common stock without nominal or par value, 3,000 shares of 5% cumulative prior preference stock of the par value of \$100 each, and 40,000 shares of 5% cumulative preferred stock of the par value of \$100 each;

2. Exchange all of the presently issued and outstanding shares of common stock exclusive of treasury stock for shares of the new common stock, in the ratio of 1 share of present common stock for 6 shares of new common stock;

3. Exchange each share of the presently issued and outstanding 8% cumulative preferred stock, exclusive of treasury stock, with accrued dividends thereon, amounting to \$7 per share, for 1-7/100 shares of the new 5% cumulative preferred stock, and 1 share of the new common stock;

4. The amount of capital which will represent the aggregate number

of shares of new common stock to be issued pursuant to this plan shall be \$1,238,353.49;

5. Amend the Certificate of Incorporation of the Company to provide for said 3 classes of stock in lieu of the present common stock and the 8% cumulative preferred stock;

6. Further amend the Certificate of Incorporation with respect, among other things, to the preëmptive rights of the holders of all classes of stock, the powers of the Board of Directors, and the objects, purposes, and powers of the Company; and

7. Declare a dividend of \$7 per share on account of the arrears in dividends on the 8% cumulative preferred stock conditional upon the approval of the plan by the stockholders.

8. If the stockholders approve the foregoing plan and the amendments to the Certificate of Incorporation, all rights appertaining to the present common stock and the present 8% cumulative preferred stock, or accruing by virtue of the ownership thereof, shall cease and terminate, and the holders thereof shall surrender the certificates therefor to the Company for cancellation, and receive and accept in lieu thereof certificates of new stock in exchange for and in substitution of the present stock as above provided; and it is further

RESOLVED, That if the stockholders of the Company at a meeting to be called for that purpose approve the aforesaid plan for the revision of the capital structure of the Company and the amendments to the Certificate of Incorporation of the Company in connection therewith and the Company receives \$150,000 for the 1,500 shares of prior preference stock to be issued under said plan:

(1) There be appropriated and set aside out of the surplus of the Company the sum of \$150,556 as and for a dividend at the rate of \$7 per share on the present 8% cumulative preferred stock of the Company in part payment of accumulated dividends thereon, payable on or before, 19.., to holders of record of such stock on, 19..; and

(2) The 486 shares of common stock and 597 shares of preferred stock owned by the Company as treasury stock be cancelled and retired, and the Treasurer of the Company be authorized to make all necessary entries in connection therewith on the books of the Company; and it is further

RESOLVED, That the Board of Directors of Company declare it advisable and for the benefit of the Company that the capital stock of the Company be increased and reclassified so that in lieu and instead of the present authorized capital stock of 80,000 shares.

consisting of 40,000 shares of common stock, without any nominal or par value, and 40,000 shares of preferred stock of the par value of \$100 each, the capital stock shall consist of 283,000 shares divided into 240,000 shares of common capital stock without any nominal or par value, 3,000 shares of prior preference stock of the par value of \$100 each, and 40,000 shares of preferred stock of the par value of \$100 each, and that the preferences, rights, qualifications, limitations, and restrictions of said classes of stock shall be as set forth in the next following resolution, and that it is advisable and for the benefit of the Company that the Certificate of Incorporation of the Company be amended as set forth in the next following resolutions; and it is further

RESOLVED, That it is proposed to amend the Certificate of Incorporation of the Company by striking out Article Fourth in its entirety and inserting in lieu and instead thereof the following Article Fourth:

(Here insert capital stock clause.)

AND IT IS FURTHER RESOLVED, That a special meeting of stockholders of the Company be called to be held on the .. day of, 19.., at eleven o'clock in the forenoon, for the purpose of voting in respect to the foregoing resolutions and of considering the amendments to the Certificate of Incorporation.

No. 775

Resolution of directors authorizing president to execute definite form of agreement embodying plan of readjustment.

RESOLVED, That the Memorandum of Definitive Provisions now submitted to this Board of Directors be approved, and that the President of this Company be authorized to sign, in behalf of this Company, the said Memorandum of Definitive Provisions, in the form now printed thereon; that he cause the form of guaranty now submitted to the Board to be imprinted or inscribed on the certificates of stock which shall be returned to the present holders of certificates of deposit of Trust Company of, in lieu of any existing form of guaranty now inscribed or imprinted thereon; that he ascertain whether the Stock Exchange will require a new application to list the certificates of stock so inscribed or imprinted with the new form of guaranty; and, in case the Stock Exchange does require such an application, that the President of this Company cause such application to be made.

No. 776

Resolution of stockholders adopting plan of recapitalization recommended by directors, and approving offer to exchange stock.

RESOLVED, That the plan of recapitalization approved and recom-

mended by the Board of Directors be and the same hereby is adopted, and the offer of exchange made to the holders of First Preferred Stock and therein outlined be approved, so that the Corporation shall offer and issue to the holders of the First Preferred Stock, in exchange for each share of First Preferred Stock held, the following:

- (a) One share of new Prior Preference Stock, without par value.
- (b) One share of new Preference Stock, without par value.
- (c) Two shares of Common Stock, without par value.
- (d) The sum of \$4 in cash.

No. 777

Resolution of stockholders assenting to proposal to readjust corporation in order to segregate activities and to organize holding company to control subsidiaries.

WHEREAS, the Board of Directors of this Corporation has declared it desirable to place under the control of a separate corporate body the property of this Corporation devoted to the business of manufacturing motorcars, cycles, bicycles, and other pleasure vehicles, in order to ascertain definitely and accurately the separate results of the vehicle-manufacturing operations and the tire activities of this Corporation, and

WHEREAS, the Board of Directors of this Corporation has further declared that the best interests of the Corporation and its stockholders require a readjustment of the corporate capital structure, and

WHEREAS, the stockholders of this Corporation approve the plan to carry into effect the foregoing readjustment, submitted to them by the Board of Directors;

NOW, THEREFORE, BE IT RESOLVED:

1. That a new corporation be organized as a holding company under the laws of the State of, with a capital stock of not less than 200,000 shares without par value.

2. That the name, under which this Corporation has been operating, be included in the name of the new corporation.

3. That this Corporation sell to the aforesaid new corporation the stock of the "A," "B," and "C" Corporations, owned by this Corporation, and any other assets not required in the business of manufacturing motorcars, cycles, bicycles, and other pleasure vehicles.

4. That the stockholders of this Corporation accept in lieu of and

in exchange for the shares of stock of this Corporation held by them, the shares of stock of the new corporation on the basis of two shares of new no par value stock for each share of the stock of this Corporation with a par value of \$100.

FURTHER RESOLVED, That, and be appointed a Readjustment Committee to do all things and to perform all acts necessary to carry the foregoing resolution into effect.

No. 778

Resolution of stockholders authorizing directors to organize new company to take over business of old corporation and to conduct additional enterprise.

RESOLVED, That the Board of Directors be and it hereby is authorized to do all things necessary for the formation of a new corporation under the laws of the State of, with a capital of \$100,000, divided into 1,000 shares of common stock of the par value of \$100 each, with the object of purchasing or otherwise acquiring the entire undertaking and business of this Corporation and the property and liabilities thereof, and to carry on the business of advertising contractors and agents and any other business that may be usefully carried on in connection with such business; and it is

FURTHER RESOLVED, That the Board of Directors be and it hereby is authorized to enter into any agreements necessary to transfer the business of this Corporation to such new corporation, for a consideration to be determined by the directors, and to do all other things and to perform all acts necessary to carry the foregoing resolution into effect.

No. 779

Resolution of stockholders after expiration of charter, authorizing officers to take steps necessary for organization of new company and to transfer all assets and liabilities of old company to new company.

WHEREAS, the charter of this Company has expired, and

WHEREAS, the shareholders of the Company have unanimously requested the directors and officers to take such action as may be necessary to organize a new corporation for the purpose of continuing the business of the Company and taking over its assets, such new corporation to have a capital stock of (\$.....) Dollars and a duration of (.....) years, and

WHEREAS, application has already been made to the Secretary of

State of the State of for a charter for such new corporation; be it

RESOLVED, That the President and the Secretary of this Company be and they hereby are authorized and directed to take such steps as counsel may advise as necessary for the purpose of completely vesting in the proposed new corporation, when organized, the title to all the assets of every description belonging to this Company, and for the purpose of enabling said new corporation to continue the business of this Company;

BE IT ALSO RESOLVED, That a full, true, and just inventory of the assets of this Company be made for the purpose of determining the question of the value thereof in excess of all liabilities, in connection with the proposed transfer of said assets to said new corporation.

No. 780

Resolution of subscribers of new corporation accepting assets and liabilities of former company of same name and authorizing issuance of stock as soon as property is taken over.

WHEREAS, this Company was organized by the assent of all the subscribers to its stock, and also by the assent of the holders of all the shares of the stock of the former Company of the same name, for the purpose of acquiring the assets of said former Company and continuing its business, and

WHEREAS, the written statement, dated the .. day of .., 19.., of the assets and liabilities of said former Company, which statement has been transferred to this Company and is now on file in its principal office, has been heretofore thoroughly examined by the directors of this Company, and they have also examined and are familiar with such changes in the assets and liabilities as have taken place since said statement of the .. day of .., 19.., and they are fully informed as to the value of the assets of said former Company as the same existed on the said .. day of .., 19.., and today, and believe that the same then were and now are of greater value than (\$.....) Dollars;

NOW, THEREFORE, BE IT RESOLVED, That the proposition of the subscribers to the stock of this Company, which has been presented to the meeting, be and the same hereby is accepted, and that the assets and business of said former Company be taken over as of the .. day of .., 19.., as shown by the inventory above mentioned; and

RESOLVED FURTHER, That the President and the Secretary of this Company be and they hereby are authorized to issue to each of the subscribers to the stock of this Company certificates for the number

of shares subscribed, as soon as proper transfers, assignments, and conveyances shall have been made to this Company of all the assets of every description of said former Company, as mentioned in said proposition; and

RESOLVED FURTHER, That this Company assume and agree to pay all the liabilities of said former Company, and that the President and the Secretary be and they hereby are authorized to enter into such written agreement with the old Company as counsel may advise, covering the transactions referred to in these resolutions.

No. 781

Resolution of stockholders ratifying board's action in approving plan of readjustment.

RESOLVED, That the stockholders of the Railroad Company hereby ratify the action of the Board of Directors in approving the Plan of Readjustment of Company and the Company, dated the .. day of .., 19.., as modified by the Modifications dated the .. day of .., 19.., which Plan and Modifications are now submitted to this meeting.

RESOLUTIONS FOR REORGANIZATION UNDER CHAPTER X OF BANKRUPTCY ACT

No. 782

Excerpt of minutes of special meeting of the board of directors authorizing filing of voluntary petition for reorganization.

The President presented balance sheets and operating statements of Corporation, as of .., 19.., and on motion duly made, seconded, and unanimously carried, they were ordered filed as part of the minutes of this meeting.

On motion made by Mr. and seconded by Mr., the following resolutions were presented to the Board:

RESOLVED, That this Corporation file a voluntary petition under and in pursuance of the National Bankruptcy Act, commonly called the Chandler Act, for a reorganization, and

RESOLVED FURTHER, That this Corporation employ the firm of as counsel to represent this Corporation in the reorganization proceedings, and

RESOLVED FURTHER, That the President of this Corporation be and he hereby is authorized and directed to deliver to said

for payment to the Clerk of the United States District Court, the necessary filing fees.

The aforesaid resolutions were thereupon fully discussed and it was explained by Mr. that the purpose of these resolutions was to obtain the necessary restraining orders to prevent creditors who have commenced, or threaten to commence, suit against this Corporation from entering judgment, and to afford this Corporation an opportunity to reorganize for the preservation of its assets and the protection of all security holders, including creditors and stockholders.

The motion was thereupon carried, Mr. not voting, and Mr. not voting.

No. 783

Resolution of executive committee authorizing officer to file petition for reorganization under Chapter X of the Bankruptcy Act, and requesting attorneys to represent them in the proceedings.

RESOLVED, That in the judgment of the Executive Committee of the Board of Directors, it is desirable and in the best interests of this Corporation, its creditors, stockholders, and other interested parties, that a petition for reorganization of this Corporation be filed under the provisions of Chapter X of the Bankruptcy Act, and

RESOLVED FURTHER, That the form of petition for reorganization under said Chapter X presented to this meeting be and the same hereby is approved and adopted; that, Executive Vice President of this Corporation, be and he hereby is authorized and directed, on behalf of and in the name of this Corporation, to execute and file a petition in such form and to cause the same to be filed in the United States District Court for the District of; and

RESOLVED FURTHER, That & and, a member of said firm, are hereby severally authorized and requested to represent this Corporation before the United States District Court for the District of in connection with the foregoing, and

RESOLVED FURTHER, That the officers of the Corporation be and they hereby are authorized to execute and deliver all such instruments and do such other acts and things as they may deem requisite and desirable in furtherance of the purposes of the foregoing resolutions.

No. 784

Resolution of directors authorizing filing of petition for reorganization without trusteeship.

RESOLVED, That a petition for corporate reorganization without trusteeship, the corporation to be continued in possession of its business and assets, be filed in the United States District Court for the District of, under Chapter X of the National Bankruptcy Act, and that the Executive Committee be and it hereby is authorized and directed to cause the preparation of such petition and to execute and verify the same and thereupon cause the same to be filed in the United States District Court forthwith; and it is

FURTHER RESOLVED, That the Executive Committee of the Corporation be authorized and directed to take such other and further steps as may be necessary and proper in the course of reorganization proceedings, including the preparation of a plan of reorganization.

No. 785

Resolution of directors of debtor corporation, authorizing officers to admit allegations of involuntary petition for reorganization, except as to insolvency.

WHEREAS, a petition for reorganization of Corporation under Chapter X of the Bankruptcy Act was made by, as Trustee for the 5½% convertible bonds of the said Corporation under the trust indenture dated, 19.., and

WHEREAS, said petition was duly filed in the United States District Court for the District of, on the .. day of, 19.., and

WHEREAS, a copy of the said petition and subpoena was duly served upon, President of this Corporation, on the .. day of, 19.., and

WHEREAS, in the opinion of this Board of Directors, a reorganization of the Corporation is advisable and feasible; it is

RESOLVED, That the officers of this Corporation be and they hereby are authorized to admit the jurisdiction of the United States District Court for the District of, and the allegations of the petition of, Indenture Trustee filed in the said court on the .. day of, 19.., except as to insolvency, and

RESOLVED FURTHER, That the officers of this Corporation be and they hereby are authorized to join in a prayer for approval of the aforesaid

petition of the Indenture Trustee, and to take such steps in the proceeding for reorganization of the Corporation under Chapter X of the Bankruptcy Act, and to execute and deliver all such instruments, and to do such other acts and things as may be necessary and proper.

RESOLUTIONS RELATING TO REORGANIZATION THROUGH PROTECTIVE COMMITTEES

No. 786

Resolution of executive committee authorizing officers to execute reorganization agreement and management contract.

WHEREAS, it has become necessary, in order to reorganize the affairs of the Company, for the Company to be reorganized as a corporation, known as, Inc., and

WHEREAS, in order to insure the proper reorganization, it seems advisable for this Corporation to become a party to such Reorganization Agreement, including, as an exhibit thereto, the form of agreement which this Corporation will execute with said reorganized corporation for services in connection with the reorganization of said corporation,

NOW, THEREFORE, BE IT RESOLVED, That the President or a Vice-president of this Corporation be and he hereby is authorized and directed to execute and deliver, to, Inc., in as many counterparts as may be required, the Reorganization Agreement of the Company, dated, 19.., and the Secretary or an Assistant Secretary of this Corporation is hereby authorized and directed to attest such signature and the seal of this Corporation to such Reorganization Agreement, and be it

FURTHER RESOLVED, That the President or a Vice President of this Corporation be and he hereby is authorized to execute and deliver an agreement in the form of Exhibit "K," attached to and made a part of said Reorganization Agreement, covering the service of this Corporation to, Inc., and the Secretary or an Assistant Secretary of this Corporation is hereby authorized and directed to attest such signature and the seal of this Corporation to such service agreement in the form of Exhibit "K," attached to and made a part of said Reorganization Agreement, and be it

FURTHER RESOLVED, That a copy of said Reorganization Agreement, with all exhibits attached thereto, be entered in the minute book immediately following the minutes of this meeting.

No. 787

Resolution of bondholders' protective committee amending protective agreement.

RESOLVED, That the Bondholders' Protective Agreement under which this Committee was organized be and the same is hereby amended by adding an additional paragraph at the end of Section of said Agreement as follows:

(Here insert new paragraph.)

FURTHER RESOLVED, That the Committee hereby determines that said amendment herein made materially affects the rights of the bondholders, and that notice be given in the manner provided by Section of said Agreement.

No. 788

Resolution of committee to extend time for deposit of securities.

WHEREAS, considerably more than a majority of the preferred stockholders of the Company has assented to the Plan of Reorganization of the said Company, submitted by this Committee, dated, 19.., and only a comparatively small number of the common stockholders has assented thereto, be it

RESOLVED, That the time for receiving assents to the aforesaid plan be extended until o'clock,, 19.., and that the Secretary of the Committee be and he hereby is authorized and directed to give notice to the stockholders that this will be the last extension of time for participation in the benefits of the plan made by this Committee, and that the Committee will endeavor promptly, at the expiration of the aforesaid period, to have underwritten the full amount which may be required to carry out said plan for the benefit of the assenting stockholders.

No. 789

Excerpt of minutes of directors' meeting rescinding prior approval of reorganization agreement, and approving modified reorganization agreement.

The Chairman stated that the Reorganization Agreement approved by the Board of Directors on, 19.., had been modified and, as modified, had been executed by all of the parties thereto, and that an executed copy thereof had been delivered to each of the parties thereto. The Secretary thereupon presented a copy of the Reorganization Agreement as modified and executed. After full discussion, and upon motion duly made and seconded, it was unanimously

RESOLVED, That the resolutions adopted by this Board on
 . . ., 19.., approving the form of Reorganization Agreement submitted
 to this Board at such time, be and the same hereby are rescinded;

RESOLVED, That the action of the officers of this Corporation in exe-
 cuting the Modified Reorganization Agreement, dated
 19.., be and the same hereby is ratified, confirmed, and approved, and
 that a copy of said Modified Reorganization Agreement presented to
 this meeting be initialed by the Secretary and held in the records of
 the Corporation;

RESOLVED, That the officers of this Corporation be and they hereby
 are authorized to do all acts and things necessary, convenient, or expe-
 dient in the performance of said Agreement and in carrying out the
 intent of said Agreement and the foregoing resolutions.

No. 790

Resolution of committee declaring plan of reorganization operative.

WHEREAS, the assent of the holders of all of the Preferred Stock of
 "A" Company, Inc., and of all of the stock of "B" Company to the
 plan of reorganization of "A" Company, Inc., dated
 19.. (hereinafter called the "Plan") has been obtained, and

WHEREAS, the assent of the holders of 22,192 shares of Common
 Stock of "A" Company, Inc., has been obtained, and

WHEREAS, in the opinion of the undersigned members of the Commit-
 tee formed under the Plan, it is desirable to declare the Plan operative;

NOW, THEREFORE, the undersigned members of the Committee formed
 under the Plan of, 19.., hereby declare said Plan
 operative, and

FURTHER RESOLVED, That in compliance with the requirements of the
 New York Stock Exchange, the undersigned members of said Com-
 mittee hereby extend the time for deposit by the stockholders of the
 Common Stock of "A" Company, Inc., of such stock under such Plan
 to and including, 19...

No. 791

Minutes of committee declaring plan operative in part only.

The Stockholders' Committee constituted under the above-mentioned
 Plan and Agreement hereby declares the Plan operative so as to em-
 brace only the features of the Plan set forth in Articles I, II, and III
 thereof, reserving the right, however, hereafter to declare the Plan

operative so as to provide for the distribution of cash and common stock of the "New Corporation," as provided in Article IV of the Plan.

.....

 Stockholders' Committee

....., 19..

No. 792

Resolution of directors (or stockholders) authorizing sale of assets pursuant to terms of reorganization agreement.

RESOLVED, That the Company sell, assign, transfer, exchange, grant, and convey unto The, Inc., its successors and assigns, all its assets and property of every kind and character whatsoever, including (without limitation of the foregoing) its business as a going concern and the goodwill thereof, together with the right to the exclusive use of the name The Company, and also its interest in the leasehold from "X," dated, 19.., and recorded in Deed Book, page, of the Deed Records of County,, a description of the real estate included in said lease being as follows (*insert description*), in consideration for the issuance and delivery, in the manner and form set forth in paragraph of the Reorganization Agreement dated, 19.., by and between this Company, the Stockholders' Committee of The Company, & Co., Inc.,Service Corporation, Management, Inc., The, Inc., and others, of shares of the no-par capital common stock of said The, Inc., as follows:

1. shares shall be issued by The, Inc., to Management, Inc., provided that Management, Inc., enters into the agreement with The, Inc., at the request of The Company, as provided in paragraph of said Reorganization Agreement dated, 19...

2. shares shall be issued by The, Inc., to & Co., as nominee for certain persons named in Exhibit, attached to said Reorganization Agreement, in consideration of the entering into certain agreements by certain of the parties to said Reorganization Agreement for the purchase of notes, as provided in said Reorganization Agreement.

3. shares shall be issued by The, Inc., in

the name of & Co., and shall be deposited with Trust Company, as Escrow Agent under the escrow agreement annexed to the Reorganization Agreement as Exhibit, to be delivered by said Escrow Agent, together with notes, pursuant to the terms of said escrow agreement, at the rate of shares for each \$. principal amount of said notes.

4. shares shall be issued and delivered to the Stockholders' Committee of The Company, to be deposited by them in accordance with the Reorganization Agreement dated, 19.., hereinabove referred to.

No. 793

Resolution of directors of creditor corporation appointing attorney in fact to carry out terms of reorganization agreement.

WHEREAS, the "A" Company is indebted to this Corporation for materials sold and delivered in the sum of Fifty Thousand (\$50,000) Dollars, secured by eighty (80) bonds of the said "A" Company of the par value of One Thousand (\$1,000) Dollars each, and

WHEREAS, the said "A" Company has entered into a certain agreement dated the .. day of, 19.., with the Trust Company, the bondholders, certain creditors, and the receivers of the said "A" Company, for the purpose of reorganizing the said "A" Company, and

WHEREAS, it is advisable that this Corporation appoint an attorney in fact to do such things as may be necessary, for and in behalf of this Corporation, to carry out the terms and provisions of said agreement,

Now, THEREFORE, BE IT RESOLVED, That, Vice-president of the Trust Company, be and he hereby is appointed attorney in fact of this Corporation for it and in its name to:

1. Assign to the "B" Company, under the provisions of said agreement dated the .. day of, 19.., all the right, title, and interest of this Corporation in and to a certain bid dated the .. day of, 19.., made by the bondholders of the "A" Company to the receivers of the said Company.

2. Assign to said "B" Company, subject to the terms and conditions of said bid, all the right, title, and interest of this Corporation in and to said eighty (80) bonds of the "A" Company.

3. Receive from the said "B" Company the shares of its capital stock to which this Corporation is entitled.

4. Execute the voting trust agreement provided for in said agree-

ment, dated the .. day of, 19.., to transfer and deliver to the Trustee thereunder said shares of stock, and to receive and transmit to this Corporation the receipts therefor.

FURTHER RESOLVED, That the President of this Corporation be and he hereby is authorized, for and in behalf of this Corporation, to execute a proper form of power of attorney to the said, Vice President of the Trust Company, authorizing him to do and perform all things above mentioned.

No. 794

Resolution authorizing payment of charges and expenses in carrying out plan of reorganization.

RESOLVED, That the proper officers of this Corporation be and they hereby are authorized and directed to pay or cause to be paid any and all taxes, assessments, or other charges, printing bills, and other expenses of whatsoever kind and nature incurred in connection with the carrying out of the Plan and Agreement of Reorganization of Company, dated, 19.., and of the resolutions adopted by the stockholders and directors of this Corporation, including any and all taxes required to be paid in connection with the issue and transfer of bonds, notes, and stocks of this Corporation, and transfer of stocks acquired by this Corporation in such reorganization or otherwise.

No. 795

Resolution of reorganization committee providing for exchange of bonds for stock of new corporation.

RESOLVED, That the holders of the Company's 6 Per Cent First Mortgage Bonds, who sign underwriting papers for exchange of their bonds for shares of stock in the proposed Company, shall receive for each bond of One Thousand (\$1,000) Dollars, One Thousand (\$1,000) Dollars of preferred stock and One Hundred and Fifty (\$150) Dollars of common stock of the new company.

No. 796

Resolution of stockholders' committee approving plan of reorganization and action taken in carrying out plan.

The undersigned Committee under the Plan and Agreement for Reorganization of, Inc., dated, 19.., hereby, on Tuesday,, 19.., with the concurrence of both of its members, adopts the following written resolutions:

[Approval of Plan and Agreement]

RESOLVED, That the above-mentioned Plan and Agreement, dated

....., 19.., a copy of which is annexed hereto as Exhibit "A," said Agreement having been executed in triplicate by the members of this Committee and one executed counterpart having been deposited with each of the Depositaries and one with this Committee's counsel, Messrs., be and the same hereby is approved, and that the manner of carrying out said Plan as stated in detail in said Plan be and the same hereby is approved.

[Approval of letter from Committee to security holders]

RESOLVED, That the letter from this Committee to holders of common stock of, Inc., dated, 19.., a copy of which is annexed hereto as Exhibit "B," and which was executed in triplicate by the members of this Committee and an executed counterpart thereof deposited with each of the Depositaries and with this Committee's counsel, Messrs., be and the same hereby is approved.

[Approval of assent and proxy]

RESOLVED, That the form of assent to the Plan and of the stockholders' proxy and power of attorney, which is hereto annexed as Exhibit "C," be and the same hereby is approved.

[Confirmation of appointment of counsel]

RESOLVED, That the action of this Committee in appointing as its counsel Messrs., of the City of, be and the same hereby is approved and confirmed.

[Ratification of counsel's action in mailing Plan and Agreement to stockholders]

RESOLVED, That the action of this Committee's counsel in mailing, on, 19.., to each of the holders of common stock of the, Inc., residing in the State of at the close of business,, 19.., as certified to said counsel by Company, City,, transfer agent for said stock, a copy of the above-mentioned Plan and Agreement, letter and assent, and proxy be and the same hereby is approved, adopted, ratified, and confirmed.

[Approval of instructions to Depositaries]

RESOLVED, That the form of written instructions from this Committee to the Depositaries, annexed hereto as Exhibit "D," be and the same hereby is approved, and that the Committee sign written instructions in said form, in duplicate, and deliver one duplicate original thereof to each of the Depositaries.

[Confirmation of extension of time for deposits]

RESOLVED, That the action of the Committee in extending from time

to time the period within which deposits of, Inc. common stock might be made under said Plan and Agreement to noon on Tuesday,, 19.., and in declaring the time for making such deposits closed and terminated at that time, be and the same hereby is approved and confirmed.

[Election to direct transfer of deposited stock to another corporation]

RESOLVED, That the Committee hereby elects to direct the transfer of all of the deposited stock into the name of Corporation, the (*insert state*) corporation referred to in said Plan and Agreement.

[Ratification of Depositaries' action in furnishing list of depositors to counsel]

RESOLVED, That the action of the Depositaries in furnishing to the Committee's counsel lists of the depositors under said Plan and Agreement showing the number of shares deposited by each, be and the same hereby is approved, adopted, ratified, and confirmed.

[Approval of instructions from Committee to transfer agent]

RESOLVED, That the form of written instructions from this Committee to Trust Company as transfer agent for the common stock of, Inc., hereto annexed as Exhibit "E," be and the same hereby is approved, and that the Committee sign written instructions in said form and deliver the same to said transfer agent.

[Approval of offer for acquisition of stock deposited under plan]

RESOLVED, That the form of offer, dated, 19.., from this Committee to Corporation, hereto annexed as Exhibit "F," said offer providing among other things for the acquisition by said Corporation of the common stock of, Inc., deposited under said plan, and the issuance by it in exchange therefor, share for share, in the names of the several depositors under said plan (a list of whom is attached to said offer), of the common stock of said Corporation, be and the same hereby is approved, and that the Committee execute said offer in duplicate and deliver the same to as its agent, to be held and delivered by him in accordance with written instructions to be given to him by this Committee.

[Approval of appointment of agent for Committee]

RESOLVED, That the form of written instructions from this Committee to, (*Street*), (*City*),, constituting him this Committee's agent and attorney for the purposes and with the authority therein set forth,

which form is annexed hereto as Exhibit "G," be and the same hereby is approved, and that this Committee execute and deliver to said written instructions in said form.

[Call of meeting of stockholders of corporation which is to acquire stock deposited]

RESOLVED, That the form for the call of a special meeting of the stockholders of Corporation, hereto annexed as Exhibit "H," to be signed by this Committee as the agent and attorney in fact, and proxy for the depositors under the Plan and Agreement (who are to become stockholders of said Corporation), be and the same hereby is approved, and that this Committee sign a call in said form and deliver the same to, Vice President and Assistant Secretary of said Corporation, the same to become effective forthwith upon the issuance of the stock of Corporation in the names of the depositors under said plan; and that said and/or said, as the agents and attorneys of this Committee, be and they hereby are authorized to sign any such further or substitute call for a stockholders' meeting in or substantially in said form, and to take all such further action for the purpose of holding a stockholders' meeting of said Corporation or of evidencing the written consent of the stockholders thereof as they or either of them shall deem necessary or desirable in connection with the carrying out of the said Plan and Agreement.

[Execution of substitute proxies by Committee members]

RESOLVED, That the form of substitute proxy, hereto annexed as Exhibit "I," to be signed by the members of this Committee for the purpose of substituting, in place of each such member, under the proxies and powers of attorney given to them by the depositors, be and the same hereby is approved, and that each member of this Committee sign a substitute proxy in said form and deliver the same to the said and, to be used by them or either of them for the purpose of voting or taking other action as therein provided.

[Approval of organization records of new corporation]

RESOLVED, That the Certificate of Incorporation of Corporation, the records of the first meeting of its incorporators held, 19..., including the by-laws which are a part thereof, the records of the special meeting of the Board of Directors of said Corporation held, 19..., and the draft of records for a special meeting of said Board to be held, 19..., and for an adjourned session thereof to be held on the same day, and the records of the special meeting of the stockholders of said Corporation to be held on, 19..., and of an adjourned session

thereof to be held on the same day, all of the foregoing being annexed hereto as Exhibit "J," be and the same hereby are approved as being in proper form for the carrying out of said Plan and Agreement in the manner determined by this Committee.

[Written consent to sale of assets]

RESOLVED, That the form of written consent to the sale of all the assets of said Corporation, hereto annexed as Exhibit "K," to be signed by this Committee as agent and attorney in fact for all of the stockholders, be and the same hereby is approved, and that this Committee sign a written consent in said form and deliver the same to, Assistant Secretary of said Corporation, to be filed by him with the records of said Corporation.

[Approval of letter to depositors]

RESOLVED, That the form of letter, dated, 19..., from this Committee to the depositors under said Plan and Agreement, hereto annexed as Exhibit "L," be and the same hereby is approved, and that the action of counsel to this Committee in making arrangements for the mailing of the latter in said form to each such depositor with the Company stock (and scrip, if any) to which he shall be entitled under said Plan and Agreement, be and the same hereby is approved, adopted, ratified, and confirmed.

[Consent to dissolution of Corporation]

RESOLVED, That the form of written consent to the dissolution of said Corporation, hereto annexed as Exhibit "M," to be signed by this Committee as agent and attorney in fact for all of the stockholders of said Corporation, be and the same hereby is approved, and that this Committee sign a consent in said form in duplicate, and deliver the same to, Assistant Secretary of said Corporation, one duplicate to be filed by him with the records of said Corporation and the other to be filed in the office of the Secretary of State of

IN WITNESS WHEREOF, the members of said Committee have hereunto set their hands this .. day of, 19...

.....
.....
Committee

No. 797

Resolution of directors accepting offer pursuant to plan and agreement of reorganization to sell assets of reorganized company in consideration for stock.

WHEREAS, The Company, a corpo-

ration, has by written offer contained in the Plan and Agreement of Reorganization submitted to this meeting, offered to sell and deliver to this Corporation all of the assets of said Company, including its goodwill and corporate name, subject, however, to its liabilities, in consideration for the issuance and delivery in manner and form as provided in the Plan and Agreement of Reorganization, of 250,000 shares of the common stock of the Corporation, and

WHEREAS, The Stockholders' Committee of The Company has, in said Plan and Agreement of Reorganization, offered, in consideration of the said offer of The Company being accepted by this Corporation, to vote all of the preferred and common stock of the Company which has been deposited with it pursuant to the deposit agreement dated as of, 19..., in favor of the sale by said Company to the Corporation as hereinabove mentioned and for the consideration hereinabove mentioned, and generally to use its best endeavors to carry out all of the purposes of the Plan and Agreement of Reorganization,

NOW, THEREFORE, RESOLVED, That the offer of The Company be and the same hereby is accepted;

RESOLVED, That it is the judgment of the Directors of this Corporation that the personal and real property and/or leases to be acquired by this Corporation from The Company, subject to its liabilities, have a value equal to or in excess of the 250,000 shares of common stock without nominal or par value of this Corporation to be issued therefor pursuant to the following resolutions;

RESOLVED, That the 250,000 shares of said common stock when so issued are hereby declared and shall be taken to be fully paid stock and not liable to any further call, nor shall the holder thereof be liable for any further payments therefor;

RESOLVED, That the offer of The Stockholders' Committee of The Company hereinabove mentioned be and the same hereby is accepted;

RESOLVED, That the proper officers of this Corporation be and they hereby are authorized and directed to issue fully paid and nonassessable common stock of this Corporation pursuant to the terms of said Plan and Agreement of Reorganization—to wit:

(a) 127,500 shares of said common stock to or upon the order of, Inc., upon the execution and delivery to this Corporation of the agreement Exhibit, annexed to said Plan and Agreement of Reorganization, in the names and denominations requested by, Inc., all necessary Federal and State

original issue and transfer stamps having been duly affixed and cancelled;

(b) 37,500 shares of said common stock to & Co. as nominees for certain persons named in Exhibit, annexed to said Plan and Agreement of Reorganization, all necessary Federal and State original issue and transfer stamps having been duly affixed and cancelled, said shares to be deposited in escrow under the escrow agreement, said Exhibit

(c) 62,500 shares of said common stock to or upon the order of The Stockholders' Committee of The Company, with all necessary Federal and State original issue and transfer stamps duly affixed and cancelled, against the receipt of said Stockholders' Committee containing the following provisions:

(1) That said Stockholders' Committee shall tender to each of the stockholders of The Company, who was the record holder of shares of the preferred stock of said The Company on, 19..., and who dissented at a special meeting of the stockholders of The Company held on, 19..., that number of shares of common stock of this Company which bears the same proportion to the total number of shares of common stock of this Company to be delivered to said Stockholders' Committee—namely, 62,500 shares—as the total number of shares of preferred stock of The Company standing in the name of such dissenting stockholder on, 19..., bears to the total number of shares of preferred stock of said The Company issued and outstanding on, 19...

(2) That the number of shares of common stock of this Company not accepted by such dissenting stockholders pursuant to the offer mentioned in (1) of this subdivision (c) will be held for the account of this Company and returned to the treasury of this Company by said Stockholders' Committee forthwith upon the expiration of the twenty-day period after, 19..., provided in the Statutes of the State of as a period during which said dissenting stockholders may file notice of protest and demand for appraisal of their stock.

(3) The said Stockholders' Committee shall retain for the account of the stockholders of said The Company depositing with said Committee the balance of said 62,500 shares of common stock of this Company—to wit: the balance after deliveries to dissenting stockholders pursuant to the offer mentioned in subdivision (1) of this subdivision (c), and after returning to this Company the number of shares of common stock of this Company not

so delivered to such dissenting stockholders pursuant to said offer, for distribution to said depositing stockholders of said The Company on a basis deemed equitable by said Stockholders' Committee and in accordance with the authority conferred upon said Stockholders' Committee.

(d) 22,500 shares shall be issued in the name of & Co. and shall be deposited with Trust Company of New York as escrow agent under the escrow agreement attached to and made a part of the Plan and Agreement of Reorganization and designated as Exhibit "I," subject, however, to the approval of the execution of Exhibit "I" by this meeting, to be delivered by said escrow agent after registration in the appropriate name or names at the rate of 18 shares for each \$1,000 principal amount of notes of this Corporation sold pursuant to said Plan and Agreement of Reorganization.

No. 798

Resolution of stockholders authorizing sale of assets and assignment of lease to new corporation pursuant to reorganization agreement.

RESOLVED, That The Company sell, assign, transfer, exchange, grant, and convey unto The, Inc., its successors and assigns, all its assets and property of every kind and character whatsoever, including (without limitation of the foregoing) its business as a going concern and the goodwill thereof, together with the right to the exclusive use of the name The Company; and also its interest in the leasehold from, dated as of, 19.., and recorded in Deed Book, page of the Deed Records of (County),, a description of the real estate included in said lease being as follows—to wit:

(Here follows description.)

in consideration for the issuance and delivery in the manner and form set forth in Paragraph Fourth of the Reorganization Agreement dated, 19.., by and between this Company, The Stockholders' Committee of The Company, & Co., Inc., Corporation,, Inc., and others, of 250,000 shares of the no-par capital common stock of said The, Inc., as follows—to wit:

(a) 127,500 shares shall be issued by The, Inc., to, Inc., in consideration of, Inc., entering into the agreement with The, Inc., at the request of The Company, as provided in Para-

graph Eleven of said Reorganization Agreement dated
..., 19...

(b) 37,500 shares shall be issued by The, Inc., to & Co. as nominee for certain persons named in Exhibit "I" attached to said Reorganization Agreement, in consideration of the entering into certain agreements by certain of the parties to said Reorganization Agreement for the purchase of notes, as provided in said Reorganization Agreement.

(c) 22,500 shares shall be issued by The, Inc., in the name of & Co., and shall be deposited with Trust Company of as escrow agent under the escrow agreement annexed to the Reorganization Agreement as Exhibit "I," to be delivered by said escrow agent together with notes pursuant to the terms of said escrow agreement at the rate of 18 shares for each \$1,000 principal amount of said notes.

(d) 62,500 shares shall be issued and delivered to The Stockholders' Committee of The Company to be deposited by them in accordance with the Reorganization Agreement dated
..., 19..., hereinabove referred to.

FURTHER RESOLVED, That the Board of Directors of this Company be and it hereby is authorized to empower the President and Secretary of this Company to execute and deliver to The, Inc., a Bill of Sale granting, conveying, transferring, and assigning unto said The, Inc., its successors and assigns, all its assets and property of every kind and character whatsoever, including (without limitation of the foregoing) fixtures, furniture, accounts and bills receivable, shares of stock, securities, cash in bank, moneys, patents, contracts, orders, trade-marks, and other properties and assets of every kind, whether or not herein specified, belonging to the Company and/or pertinent to the business conducted by it and shown on its books and records as of 19...; and also said business as a going concern and the goodwill thereof, together with the right to the exclusive use of the name The Company; provided, however, that in said instrument The, Inc. shall agree to take over and assume all the Company's outstanding contracts and accept the foregoing assets, property, business, and goodwill subject to, and assume and agree to pay and discharge, all the debts and liabilities of the Company as of 19..., including (but not by way of limitation) the obligations of the Company, and perform the covenants agreed to be performed by The Company under the mortgage and deed of trust to Trust Company of, as Trustee, dated 19..., securing an issue of \$1,000,000 principal amount of First Mortgage

Leasehold 6½% Sinking Fund Bonds, and under a certain indenture of lease from to The Company, dated, 19...

FURTHER RESOLVED, That the Board of Directors of The Company be fully authorized to empower the President and Secretary of this Company to execute and deliver to The, Inc., a deed and/or assignment of the lease of, lessor, to The Company, dated as of, 19.., recorded in Deed Book, page of the Deed Records of (County),, substantially in accordance with the Reorganization Agreement between this Company, The Stockholders' Committee of The Company, & Co., Inc., Corporation,, Inc., and others, dated, 19...

FURTHER RESOLVED, That the Board of Directors of The Company empowers the President and Secretary of this Company to perform and carry out all matters incident or pertinent to the matters and things adopted at this meeting and/or incident or pertinent to the Reorganization Agreement between this Company, The Stockholders' Committee of The Company, & Co., Inc., Corporation, and others, dated, 19.., approved at this meeting, including the execution and delivery of all instruments in writing deemed by said officers, or either of them, to be necessary or desirable to carry into effect the matters and things hereinbefore set forth and/or adopted at this meeting and/or said Reorganization Agreement.

FURTHER RESOLVED, That any and all action heretofore taken by any of the officers of this Company, including the execution and delivery of all instruments in writing deemed by said officers, or any of them, to be necessary or desirable to carry into effect the matters and things hereinbefore set forth and/or adopted at this meeting and/or said Reorganization Agreement, be and the same hereby is ratified, confirmed, and approved.

No. 799

Resolution of stockholders of new corporation ratifying and adopting agreement made by reorganization committee.

WHEREAS, and were on the day of, 19.., duly appointed by the bondholders, the creditors, and the stockholders of the Corporation as a Committee to effect a reorganization of the said corporation, and were duly clothed with full power to do all things deemed necessary and advisable by them to that end, and

WHEREAS, pursuant to the power so conferred upon them, the said Reorganization Committee did cause all the assets of the said corporation to be transferred to this corporation, organized for the purpose of taking over the business and undertaking of the said Corporation, and did effect a reorganization of the said Corporation as authorized, and

WHEREAS, the said Reorganization Committee, in effecting the said reorganization, did enter into a certain agreement with the B Corporation to purchase all the machinery of the said B Corporation now located at No. in the City of, State of, in exchange for (.....) shares of the common stock without par value of this corporation, be it

RESOLVED, That the said agreement entered into between the said Reorganization Committee and the B Corporation be and hereby is in all respects adopted, ratified, and confirmed, and that, the President, and, the Treasurer, of this corporation be and hereby are authorized and directed to purchase the machinery aforesaid and to issue in exchange and as payment of the purchase price thereof (.....) shares of the common stock without par value of this corporation.

RESOLUTIONS RELATING TO DISSOLUTION

No. 800

Resolution of directors recommending dissolution and calling meeting of stockholders to take action upon resolution.

RESOLVED, That in the judgment of this Board of Directors, it is deemed advisable and for the benefit of the Corporation that said Corporation should be dissolved; and to that end, as required by law, it is ordered that a meeting of those stockholders of said Corporation having voting power, to take action upon this resolution, be and it hereby is called, to be held at the principal office of said Corporation, at (Street), in the City of, County of, State of, on the .. day of, 19.., at o'clock in the noon, and that the Secretary of this Corporation be and he hereby is authorized and directed, within (.....) days after the adoption of this resolution, to cause notice of the adoption of this resolution to be mailed to each stockholder of this Corporation residing in the United States, and also within (.....) days after the adoption of this resolution, to cause a like notice to be inserted in a newspaper published in the County of, State of, once a week, for at least (.....) successive weeks next preceding the time appointed as aforesaid for said meeting of stockholders.

No. 801

Resolution of stockholders consenting to dissolution of corporation, authorizing officers to file necessary papers, and empowering directors to wind up affairs.

RESOLVED, That the Corporation surrender its charter to the State of and that it cease to be and exist as a corporation; and

FURTHER RESOLVED, That, the President, and, the Secretary, of the said Corporation, be and they hereby are authorized and directed to file the necessary certificate of dissolution of this Corporation with the Secretary of State of the State of, and with the County Clerk of the County of; and it is

FURTHER RESOLVED, That the Board of Directors of this Corporation be and it hereby is authorized, empowered, and directed to do all things necessary and requisite to settle the affairs of the Corporation, to collect the outstanding debts, to provide for the payment of the liabilities and obligations of the Corporation, to distribute its assets, and to do all other things necessary to carry into effect the foregoing resolution.

No. 802

Resolution of directors to dissolve corporation on written consent of all stockholders.

WHEREAS, the Corporation has completely discontinued and closed its business, and has paid all its debts, obligations, and liabilities, and

WHEREAS, all the stockholders of the Corporation having voting power have consented in writing to a dissolution of the said Corporation, be it

RESOLVED, That the Corporation abandon its corporate authority, surrender its charter, and dissolve; and that, the President,, the Secretary, and, the Treasurer, be and they hereby are authorized to file in the office of the Secretary of State of the State of the written consent of the stockholders as aforesaid, together with a list of the names and residences of directors and officers of this Corporation, duly certified, to record in the office of the Recorder of the County of the certificate of dissolution to be issued by the Secretary of State of the State of, and to do all other things necessary to carry into effect the foregoing resolution.

No. 803

Resolution of stockholders authorizing officers to file papers for dissolution, the consent of more than two thirds in interest of stockholders having been obtained.

WHEREAS, more than two thirds in interest of the stockholders of Corporation having voting power have consented in writing to a dissolution of the said Corporation, be it

RESOLVED, That Corporation abandon its corporate authority, surrender its charter, and dissolve, and that, the President,, the Secretary, and, the Treasurer, be and they hereby are authorized to file in the office of the Secretary of State of the State of the written consent of the stockholders to the dissolution of said Corporation as aforesaid, together with a list of the names and residences of directors and officers of this Corporation, duly certified, and that said officers be further authorized to record in the office of the Recorder of the County of, State of, the certificate of dissolution to be issued by the Secretary of State of the State of, and to do all other things necessary to effect the dissolution of said Corporation; and

BE IT FURTHER RESOLVED, That the Board of Directors of this Corporation be and it hereby is authorized and empowered, without further action by the stockholders of this Corporation, to take any and all action and to do any and all acts and things which may, in the judgment of said Board, be necessary or proper to wind up the affairs of said Corporation, and to distribute in cash among its stockholders ratably, according to their respective interests, the remaining assets of the Corporation.

No. 804

Resolution of stockholders dissolving corporation, authorizing directors to convert property into cash and to distribute it, and directing officers to publish notice of dissolution.

RESOLVED, That this Corporation forthwith discontinue business as a corporation and surrender its charter and corporate franchises to the State of; and further

RESOLVED, That the property and assets of this Corporation shall, under the order and direction of the Board of Directors of this Corporation now in office, be subject to the payment of the liabilities of this Corporation and the expenses of winding up its affairs; and that the surplus, if any, then remaining shall be distributed among the stockholders according to their respective interests, provided that no

distribution is made to the stockholders until after the publication of the notice hereinafter referred to; and further

RESOLVED, That the property and assets of this Corporation so to be distributed to the stockholders of this Corporation shall be distributed in cash, or in property, or partly in cash and partly in property, as said Board of Directors may in its sole discretion determine; and further

RESOLVED, That the Board of Directors of this Corporation be and it hereby is authorized and empowered, without further action by the stockholders of this Corporation, to convert all or any part of the property and assets of this Corporation into cash, and to take any and all action and to do any and all acts and things which may, in the opinion of counsel or in the judgment of said Board, be necessary or proper to dissolve this Corporation and wind up its affairs, and carry out the intent and purposes of the foregoing resolutions; and further

RESOLVED, That the President or a Vice-president of this Corporation be and he hereby is authorized and directed to cause notice of the adoption of the foregoing resolutions to be given immediately by advertisement in some newspaper of general circulation, published near the principal office or place of business of this Corporation, once in each week for at least (.....) successive weeks; to certify a copy of the foregoing resolutions to the Secretary of State of the State of; and to deliver to said Secretary of State a certificate showing the publication of said notice as required by law.

No. 805

Resolution of stockholders dissolving corporation which has fulfilled purposes for which it was incorporated.

WHEREAS, the Company has fulfilled the purpose for which it was incorporated, and

WHEREAS, the said Company has paid all its indebtedness and has no liabilities whatsoever outstanding against it; be it

RESOLVED, That the Company be dissolved, and that the Board of Directors of said Company immediately take all necessary steps, by proceedings in court and otherwise, to consummate the dissolution of the Company.

No. 806

Resolution of directors authorizing petition for dissolution of corporation.

WHEREAS, the directors of the Corporation have discovered that the property and effects of the Corporation have been

reduced to such an extent by losses that the said Corporation will be unable to pay all just demands against it or to offer a reasonable security to those who deal with it, and

WHEREAS, all the directors deem it beneficial to the interests of the stockholders that the said Corporation be dissolved; be it

RESOLVED, That this Corporation be dissolved, and that the directors, or a majority of them, be and they hereby are authorized to petition to the Supreme Court of the District for the dissolution of the Corporation, and to do all other things necessary to carry the foregoing resolution into effect.

No. 807

Resolution of directors recommending that application for dissolution be addressed to court, and calling meeting of stockholders.

WHEREAS, the Board of Directors of this Corporation deems it to be to the best interests of this Corporation and its stockholders that the said Corporation be dissolved, it is

RESOLVED, That a special meeting of the stockholders of this Corporation be called to convene on the .. day of, 19.., at o'clock in thenoon, at the office of the Corporation at (Street), in the City of, State of, to consider and pass upon the advisability of petitioning to the Court for the dissolution of the Corporation, and it is

FURTHER RESOLVED, That the Secretary of this Corporation be and he hereby is directed to send notices of the aforesaid meeting forthwith to all the stockholders, in the manner provided by the By-laws of this Corporation.

No. 808

Resolution of stockholders authorizing officer to employ attorney to prepare and file petition in court for dissolution of corporation.

WHEREAS, all the indebtedness, liabilities, and obligations of this Corporation have been paid, satisfied, and discharged, and

WHEREAS, the Corporation has ceased to carry on the business for which it was organized, and

WHEREAS, the stockholders of this Corporation deem it to be for the best interests of this Corporation that the said Corporation be dissolved, and that its assets be distributed among its stockholders, be it

RESOLVED, That, the President of this Corpora-

tion, be and he hereby is authorized and directed to employ a competent attorney to prepare and file in the proper court (*or, insert the words "in the Court of the County of, State of"*) a petition requesting the dissolution of this Corporation, and to carry on all proceedings and to do all things and to perform all acts necessary to prosecute the said application to final judgment.

No. 809

Resolution of directors authorizing employment of counsel to oppose creditor's application for dissolution.

WHEREAS, the Company, a creditor of this Corporation, has instituted an action in the Court, praying for the dissolution of this Corporation on the ground of its insolvency, and

WHEREAS, this Corporation is not insolvent and is fully able to pay all just claims against it, and

WHEREAS, it is the belief of the directors of this Corporation that the said action was instituted by the Company in bad faith, and solely for the purpose of harassing and annoying this Corporation in the peaceful conduct of its affairs; it is

RESOLVED, That, the President of this Corporation, be and he hereby is authorized and directed to employ as counsel to interpose a defense in behalf of this Corporation to the action aforesaid, to do all things necessary to carry on the proceedings to oppose the said creditor, and to defeat its aforesaid application for the dissolution of this Corporation, the compensation of the said attorney to be agreed upon between him and, the President of this Corporation, subject to the approval of this Board of Directors.

No. 810

Resolution of directors authorizing application to set aside cancellation and forfeiture of charter on expiration of existence and to renew charter.

WHEREAS, this Corporation is actually engaged at the present time in business within the State of, and

WHEREAS, the charter of the Corporation, granted on the .. day of, 19.., for a period of (.....) years, did expire on the .. day of, 19.., and

WHEREAS, this Corporation has inadvertently allowed its charter to be forfeited and cancelled by lapse of time, but without any intention to surrender its corporate privileges or retire from business, and

WHEREAS, this Corporation has been continuously engaged in carry-

ing on the purposes of its incorporation since the forfeiture and cancellation of its charter as aforesaid;

NOW, THEREFORE, BE IT RESOLVED, That the present President and Secretary be and they hereby are authorized and directed to make application to the (*insert proper authority*) of the State of, to set aside the said forfeiture and cancellation, to renew the charter for a period of (.....) years, and to accompany the same with a certified copy of this resolution, with the payment of all corporate fees owing to the state, and with the report as required by the laws of the State of

No. 811

Excerpt of minutes of stockholders' meeting authorizing sale of assets and dissolution upon reorganization.

Upon motion of Mr., seconded by Mr., the following resolution was unanimously adopted:

RESOLVED, That the President and the Secretary of this Company be and they hereby are authorized and empowered to sell all the assets of the Company of whatsoever kind and wheresoever situated, including all accounts receivable, patents, machinery, equipment, stock of merchandise, and goodwill, to, and, of, at a price equal to the net value of all the assets of this Company, said net value to be determined by the books of this Company as of the .. day of, 19...

RESOLVED FURTHER, That the President and the Secretary of this Company be and they hereby are authorized to make such arrangements as to the time and manner of payment upon the sale aforesaid as they in their judgment shall deem advisable, and to execute and deliver, in behalf of this Company, any and all agreements, bills of sale, and other instruments necessary to effectuate the said sale.

RESOLVED FURTHER, That the President and the Secretary of this Company be and they hereby are authorized and empowered to take all necessary steps to wind up its affairs, to pay all its debts and obligations, to distribute the remaining assets among the stockholders in proportion to their holdings in the Company, and to execute and file all instruments and to do all things necessary to dissolve this Company in the manner provided by law.

No. 812

Resolution of stockholders authorizing dissolution on consummation of sale of entire assets.

WHEREAS, this Company has this day, by resolutions passed and

adopted by this meeting, authorized and approved the giving of an option of sale of all the assets of this Company, and has likewise authorized the distribution of the proceeds of such sale among the stockholders, as a liquidation distribution of the assets of this Company, be it

RESOLVED, and voted by the stockholders of the Company, at a special meeting duly called and held, that if said option shall be exercised, and if and when said sale shall be consummated, it is the desire of the stockholders to surrender the charter and to dissolve the Company, and the President and the Secretary of the Company are authorized and directed to file in the office of the Secretary of State a sworn certificate showing the adoption by the stockholders of such resolution aforesaid; and that the expense incident to preparing and filing such certificate be paid out of the treasury of this Company.

No. 813

Resolution of stockholders approving agreement setting forth plan for complete liquidation of corporation.

RESOLVED, That the stockholders of the Corporation hereby approve the dissolution of this Corporation; and further

RESOLVED, That the stockholders of this Corporation hereby approve the Agreement dated as of, 19.., between this Corporation and, a corporation, setting forth the Plan for the Complete Liquidation of this Corporation, in the form presented to this meeting; and further

RESOLVED, That the proper officers of this Corporation be and they hereby are authorized and directed to do or cause to be done all such acts and things and to file or cause to be filed all such documents as, with the advice of counsel, they may deem necessary or advisable in order to carry into effect the dissolution of this Corporation, the Plan for the Complete Liquidation of the Corporation (as set forth in the Agreement dated as of, 19.., between the Corporation and), and, generally, the purposes and intent of these resolutions.

No. 814

Resolution of stockholders appointing liquidators on dissolution and providing for compensation.

RESOLVED, That and be and they hereby are appointed liquidators for the purpose of winding up the business of this Corporation, and

FURTHER RESOLVED, That the compensation of the said liquidators

for their services in the winding up of the business as aforesaid shall be fixed (*insert either one of the following*):

1. at the sum of (\$.....) Dollars, in addition to their disbursements and expenses.

2. at a sum equal to (.....%) per cent of the amount of assets recovered by them in winding up the business during their period of office.

No. 815

Resolution of stockholders appointing liquidator on expiration of charter.

WHEREAS, the charter of the Corporation will expire on the .. day of, 19.., and

WHEREAS, it has become necessary to have all the assets of the Corporation, of every character, sold for the purpose of paying its debts and distributing the surplus, if any, among the stockholders, and

WHEREAS, it is impossible properly to advertise and sell said property by the of next;

THEREFORE, BE IT RESOLVED:

First. That the Trust Company be and it hereby is appointed liquidator of the affairs of the Corporation, with directions to operate, for the use of the stockholders, the affairs and business of said Corporation as they have been operated, until the property can be properly advertised and sold and the possession thereof delivered to the purchaser.

Second. That, prior to the said sale, the liquidator shall cause to be made, for the use of the stockholders, a comprehensive statement of the assets and liabilities of the Corporation, and shall furnish said stockholders with a copy of said statement.

Third. That the said liquidator shall, in its advertisement, specify the nature of the articles to be sold, shall make such sale for cash, to be paid on the delivery of possession, and shall require the purchaser to deposit a certified check for an amount equal to one third of the total purchase price, which the liquidator shall hold and credit upon the purchase price when the sale is consummated, or, if for any reason it shall be set aside, the liquidator shall return it to the bidder. If the said bidder to whom the property is knocked down shall fail at once to deliver to the liquidator the certified check as herein provided, the liquidator shall immediately resell the property and refuse to receive bids from said former bidder.

Fourth. Said liquidator may, in his discretion, employ an auctioneer or other agent necessary or proper to be used in the sale of the property.

Fifth. Until said sale, and during the operation of said property, said liquidator is given full authority and permission to employ such agents and persons as may be necessary properly, conveniently, and economically to operate the property, to keep an account of all its expenses, and to take vouchers therefor. After the property has been fully administered, said liquidator shall make out a comprehensive account of its acts and doings, and shall furnish a copy thereof to each of the stockholders.

Sixth. The said liquidator shall, from the proceeds of the sale of the property, pay all debts of the Corporation, and the balance, if any, shall be distributed among the stockholders according to their legal rights.

No. 816

Resolution of stockholders directing trustees in dissolution to sell remaining assets to new corporation in exchange for stock.

WHEREAS, a resolution was duly adopted by the directors and stockholders of the Corporation, on the .. day of, 19.., to dissolve the said Corporation, and

WHEREAS, and were duly appointed trustees to wind up the business of the said Corporation, and

WHEREAS, all the debts of the said Corporation have now been paid, and there are no liabilities whatsoever outstanding against it,

NOW, THEREFORE, BE IT RESOLVED, That and, trustees as aforesaid, be and they hereby are authorized to sell all the remaining assets of this Corporation, both real and personal, of whatsoever kind and nature, and wheresoever the same may be located, to Company, a corporation organized on the .. day of, 19.., under and by virtue of the laws of the State of, and to accept in full payment thereof, (.....) shares of the common stock of the said Company having a par value of (\$.....) Dollars each, amounting in the aggregate to (\$.....) Dollars; and it is

FURTHER RESOLVED, That the said trustees be and they hereby are authorized and empowered to make, execute, and deliver, for and in behalf of the Corporation, all deeds of conveyance and other instruments, and to do all other things necessary to transfer the property aforesaid to the said Company, upon receipt of the stock as aforesaid; and it is

FURTHER RESOLVED, That said stock to be received in payment for the sale of assets hereinabove authorized be distributed upon receipt thereof among the stockholders of the Corporation, in proportion to their respective holdings in the Corporation.

No. 817

Resolution of trustees in dissolution to proceed to wind up affairs.

RESOLVED, That, immediately upon the completion of the publication of the certificate of the Secretary of State, issued on the .. day of, 19.., in the matter of the voluntary dissolution of this Corporation, pursuant to the laws of the State of, this Board of Trustees shall proceed to adjust and wind up the affairs of the Corporation; and that, beginning with the .. day of, 19.., no contracts or agreements of any kind shall be entered into, except such as shall be necessary to liquidate the affairs of the Corporation.

No. 818

Resolution of trustees in dissolution authorizing officers to continue in office.

RESOLVED, That the present officers of the Corporation continue in their respective offices during the liquidation and winding up of the Company's affairs, and that their salaries be continued during the liquidation at the same rates as heretofore.

No. 819

Resolution by trustees in dissolution authorizing appraisal of property and arranging for conference with appraisers.

RESOLVED, That an appraisal of the real and personal property of the Company be made immediately, and that the following-named persons be invited to appear before the Board of Trustees of the Company, at its next meeting, to be held on the .. day of, 19.., at (Street), in the City of, State of, to confer with the said Board in regard to the qualifications of said persons as appraisers and in regard to the compensation to be paid them for the appraisal of the property of the Company, now in the process of liquidation:

(Here insert names and addresses of appraisers.)

IT IS FURTHER RESOLVED, That, the Chairman of this meeting, be and he hereby is authorized and directed to cause notice of the adoption of this resolution to be mailed forthwith to the aforementioned appraisers.

No. 820

Resolution of trustees in dissolution authorizing payment for legal services.

WHEREAS,, a member of this Board of Trustees, who is an attorney and counselor at law, has conferred with the trustees since the .. day of, 19.., when the dissolution of Company was proposed, in regard to important questions of law and procedure relative to the liquidation of said Company's business and affairs, and

WHEREAS, the opinions and advice of said, communicated to this Board of Trustees, have proved of great assistance and value to the Board in winding up the affairs of this Company, and

WHEREAS, this Board of Trustees is of the opinion that the said should receive compensation for his services, it is

RESOLVED, That, the Treasurer of this Company, be and he hereby is authorized and directed to pay to the said the sum of (\$.....) Dollars, as compensation for such professional services as he has rendered to the Trustees of this Company in connection with the dissolution of this Company and the liquidation of its affairs.

No. 821

Resolution of directors accepting offer of trust company to act as depositary of assets for payment of creditors on dissolution.

WHEREAS, the stockholders of the Corporation have duly resolved to dissolve the Corporation after payment of the claims of all creditors, and

WHEREAS, the Trust Company has offered to act as depositary of the assets of the Corporation, to be distributed among the creditors of the Corporation on dissolution, free of charge,

NOW, THEREFORE, BE IT RESOLVED, That the said offer be and it hereby is accepted, it being agreed and understood that the said Trust Company is acting solely as agent and trustee for the Corporation and its creditors, and that it does not assume any responsibility for the accuracy or validity of the claims against the Corporation; and it is

RESOLVED FURTHER, That the said Trust Company is hereby expressly authorized to accept the list, furnished by the Treasurer of the Corporation, of the names of the

creditors of the Corporation and the amounts due to each as accurate and complete, without further inquiry on the part of the said Trust Company; and it is

RESOLVED FURTHER, That, the Treasurer of the Corporation, be and he hereby is authorized and directed to convert forthwith into cash all the assets of the Corporation, to collect all the outstanding accounts of the Corporation, and to deposit with the said Trust Company all sums received through such conversion of the assets into cash, through collection of the accounts due the Corporation, or in any other manner, said sums to be held in trust for the creditors of the Corporation; and it is

RESOLVED FURTHER, That distribution of the amount so placed on deposit with the Trust Company be made by it pro rata among the creditors of the Corporation, on the .. day of, 19..; that subsequent distributions be made on the first day of each and every month thereafter among the creditors pro rata, until the full amount of the claims with interest at the rate of 6 per cent per annum shall have been paid; and that, when the full amount of the creditors' claims, with interest as aforesaid, has been paid, the officers of the Corporation be and they hereby are authorized to execute all papers and to do all other acts and things necessary to effect a dissolution of the Corporation.

RESOLUTIONS RELATING TO ASSIGNMENT FOR BENEFIT OF CREDITORS AND RECEIVERSHIP

No. 822

Resolution of directors assigning property to trustee for benefit of creditors.

WHEREAS, this Corporation has contracted liabilities and obligations to numerous persons, firms, and corporations, in large amounts, some of which are past due and remain unpaid, and

WHEREAS, although this Corporation is wholly solvent, its property consists mainly of slow assets, with the result that it is unable immediately to discharge the aforesaid liabilities and obligations without material loss to the Corporation, and

WHEREAS, it is the opinion of the Board of Directors of this Corporation that the interests of the creditors and the stockholders of this Corporation would best be served by conveying all the produce, income, and assets of the Corporation of every kind and nature and wheresoever situated, to, of the City of, as Trustee,

to operate and control the business, and out of the proceeds to pay the said liabilities and obligations of this Corporation, and thereupon to reconvey the said property and assets to the Corporation; be it

RESOLVED, That the President, or the Vice President, and the Secretary of this Corporation be and they hereby are authorized and directed to execute and deliver to, of (Street), in the City of, as Trustee, in the name and in behalf of this Corporation and under its corporate seal, a deed of trust in substantially the form submitted to the Board of Directors at this meeting.

(If the statute requires the consent of the stockholders to effect an assignment for the benefit of creditors, omit the last paragraph and add the paragraphs given below.)

RESOLVED, That a special meeting of the stockholders of this Corporation be called, to be held on the .. day of, 19.., at o'clock in thenoon, at the office of the Corporation at (Street), in the City of, State of, to consider and act upon the advisability of authorizing the officers of this Corporation to execute and deliver to, of (Street), City of, as Trustee, in the name and in behalf of this Corporation and under its corporate seal, a deed of trust in substantially the form submitted to the Board of Directors at this meeting.

RESOLVED FURTHER, That the Secretary of this Corporation be and he hereby is authorized and directed to send notices of the aforesaid special meeting forthwith to all the stockholders of this Corporation, as required by the By-laws of this Corporation.

No. 823

Resolution of directors recommending assignment for benefit of creditors and calling meeting of stockholders to obtain their consent.

WHEREAS, this Corporation is financially embarrassed and is unable to meet its obligations in the ordinary course of business, and

WHEREAS, this Corporation has assets which might, if sold, result in material loss, and

WHEREAS, the assets of the Corporation can best be conserved by assigning them to a trustee for the benefit of creditors; be it

RESOLVED, That it is deemed advisable and for the best interests of the Corporation that an assignment of all the property of the Corporation be executed for the benefit of creditors, and that a meeting of the

stockholders of this Corporation to take action upon this resolution be called for the .. day of, 19.., to be held at the office of the Corporation at (Street), in the City of, State of, at o'clock in thenoon; and it is

FURTHER RESOLVED, That the Secretary of the Corporation be and he hereby is authorized and directed to cause notice of the adoption of this resolution and of the aforesaid meeting to be mailed forthwith to each of the stockholders of this Corporation.

No. 824

Resolution of stockholders assenting to assignment for benefit of creditors and authorizing officers to execute assignment.

WHEREAS, this Corporation is indebted to divers persons for considerable sums of money, which sums it is at present unable to pay in full, and

WHEREAS, the Board of Directors has recommended that it would be to the best interests of this Corporation to convey all the property of the Corporation for the benefit of its creditors without any preference or priority, and

WHEREAS, has consented to act as assignee for the benefit of the creditors of this Corporation; it is

RESOLVED, That the stockholders of this Corporation hereby assent to the execution of such assignment of all the property of the Corporation for the benefit of its creditors, and it is

FURTHER RESOLVED, That the President, or the Vice President, and the Secretary of this Corporation be and they hereby are authorized and directed to execute and deliver, in the name and in behalf of this Corporation and under its corporate seal, a deed of trust in substantially the form exhibited both to the meeting of the Board of Directors held on the .. day of, 19.., and to this meeting conveying all the assets of the Corporation of whatsoever kind and wheresoever situated, to, of City, as Trustee, and authorizing the said Trustee to take possession of all the property of the Corporation, to operate and control the business of the Corporation, to sell or otherwise dispose of as much of the property of the Corporation as shall be necessary to pay the claims of all creditors of this Corporation, and, after the said claims have been fully paid, satisfied, and discharged, to reconvey the remaining assets to the Corporation upon the conditions and under the terms of the deed of trust aforesaid.

No. 825

Resolution of directors recommending appointment of receiver.

WHEREAS, this Corporation is unable to meet its obligations as they mature, and it is the opinion of this Board of Directors that a receiver is necessary to preserve and administer its assets for the benefit of all concerned, be it

RESOLVED, That, Secretary of the Corporation, be and he hereby is authorized and directed to interpose an answer in any suit that may be filed in the United States District Court for the District of, to have a receiver appointed for the property of this Corporation, all of which property is situated in said District of, to consent to the immediate appointment of such suitable person as the Court may appoint to take charge of, administer, and sell the property of this Corporation, and to do any other act necessary for the immediate appointment of a receiver by the United States District Court.

No. 826

Resolution of directors recommending appointment of receiver (another form).

RESOLVED, That it is the opinion of the Board of Directors that it would be for the best interests of the creditors of this Company that either a receiver in equity or a receiver in bankruptcy be appointed therefor.

No. 827

Resolution of stockholders accepting appointment of receiver.

WHEREAS, on the .. day of, 19.., a Receiver was appointed for this Company by Hon., a Judge of the Court, State of, and

WHEREAS, the appointment of said Receiver is deemed to be for the best interests of this Company; now, therefore, be it

RESOLVED, That the action of said Court in so appointing a Receiver is hereby approved, and, insofar as this Company may do so, the said action of said Court is hereby ratified and affirmed, and be it further

RESOLVED, That no officer of this Company shall oppose such receivership proceedings, but shall give all possible aid to said Court and said Receiver in collecting the assets of this Company, the same to remain in the custody of the Receiver, subject to the further orders of the Court.

RESOLUTIONS RELATING TO BANKRUPTCY

No. 828

Resolution of directors authorizing filing of voluntary petition in bankruptcy.

RESOLVED, That, as Treasurer of the Company, and, as a Director of the Company, or either of them, be and they hereby are authorized to make, execute, acknowledge, verify, seal, and file a petition at any time prior to, 19.., praying that this Company be adjudicated a voluntary bankrupt, and that necessary schedules and other documents and schedules accompany the same; to retain counsel in connection with the foregoing; to make such necessary arrangements for the payment of counsel fees, expenses, and costs as the situation requires; and to do any and all other acts and things to make, execute, acknowledge, verify, seal, deliver, and file any and all other instruments, documents, and papers as may be necessary, proper, or advisable in connection with the foregoing.

No. 829

Resolution of directors recommending filing of voluntary petition in bankruptcy and calling of stockholders' meeting.

WHEREAS, it appears that this Corporation is unable to meet maturing obligations as they fall due in the usual course of business, and can no longer profitably continue in business, and

WHEREAS, numerous creditors have threatened to prosecute their claims against this Corporation; be it

RESOLVED, That, in all fairness to its creditors, this Board of Directors deems it advisable and for the best interests of the Corporation to file a voluntary petition in bankruptcy; and

FURTHER RESOLVED, That a special meeting of the stockholders of this Corporation be and it hereby is called, to be held on the .. day of, 19.., at o'clock in thenoon, at the office of the Corporation at (Street), City of, State of, for the purpose of considering the advisability of filing a voluntary petition in bankruptcy; and it is

FURTHER RESOLVED, That the Secretary of this Corporation be and he hereby is instructed and directed to send notice to all the stockholders of this Corporation of the said special meeting, in accordance with the By-law requirements of this Corporation.

No. 830

Resolution of stockholders consenting to filing of voluntary petition in bankruptcy.

WHEREAS, the Board of Directors of this Corporation has adopted a resolution declaring it advisable to file a voluntary petition in bankruptcy, and has called a special meeting of stockholders to consider and act upon the said resolution, and

WHEREAS, it appears that the property of this Corporation is insufficient to pay all its debts and just demands for which the Corporation is liable, and that numerous creditors are threatening to prosecute their claims against this Corporation, to the prejudice of other creditors of the Corporation; now, therefore, be it

RESOLVED, That the stockholders of this Corporation do hereby assent to the filing of a voluntary petition in bankruptcy, and do hereby authorize and direct the officers of the Corporation to execute the required petitions and schedules and all other instruments necessary to carry this resolution into effect; and

RESOLVED FURTHER, That the President be and he hereby is authorized and directed to employ a competent attorney to represent the Corporation in the aforesaid bankruptcy proceedings.

No. 831

Resolution of stockholders recommending that directors file petition in bankruptcy.

WHEREAS, legal proceedings have been instituted by some of the creditors of the Corporation, which will in all likelihood result in lengthy and expensive litigation, and

WHEREAS, it is deemed to be to the best interests of the said Corporation and its creditors to wind up the affairs of the said Corporation as speedily as possible, and sell the property of the said Corporation within the next few months; be it

RESOLVED, That the stockholders of the Corporation do hereby acknowledge that said Corporation cannot pay its debts, and that it is willing to be adjudged a bankrupt; and

RESOLVED FURTHER, That the directors be and they hereby are authorized and directed to take the necessary steps to file a petition in bankruptcy and to have the affairs of the Corporation wound up forthwith.

No. 832

Resolution of directors admitting inability to pay debts and willingness to be adjudged bankrupt.

WHEREAS, an involuntary petition in bankruptcy was filed against this Corporation on the .. day of, 19.., in the United States District Court, of the District of, and

WHEREAS, this Board of Directors believes that this Corporation is insolvent and wholly unable to pay its debts, and that it is to the best interests of the Corporation and its stockholders that the said petition in bankruptcy be unopposed; be it

RESOLVED, That the Corporation hereby declares its inability to pay its debts and obligations and its willingness to be adjudged a bankrupt.

No. 833

Resolution of stockholders ratifying acts of directors in admitting inability to pay debts and willingness to be adjudged bankrupt.

WHEREAS, the Board of Directors of this Corporation did, on the .. day of, 19.., adopt a resolution admitting that this Corporation is unable to pay its debts and declaring the willingness of said Corporation to be adjudged a bankrupt, and

WHEREAS, the creditors of this Corporation did, on the .. day of, 19.., file a petition in bankruptcy against it;

NOW, THEREFORE, BE IT RESOLVED, That the aforesaid action of the Board of Directors in admitting the Corporation's inability to pay its debts and declaring its willingness to be adjudged a bankrupt be and it hereby is ratified and confirmed, and the officers of this Corporation are hereby authorized and directed to file a schedule of the property and a list of creditors of the Corporation, to execute all necessary instruments, and to do any and all other acts and things required to be done by law.

No. 834

Resolution of directors authorizing officer to make offer of composition in bankruptcy proceedings.

WHEREAS, an involuntary petition in bankruptcy was filed against this Corporation on the .. day of, 19.., and

WHEREAS, this Corporation was duly adjudicated a bankrupt on the .. day of, 19.., and

WHEREAS, schedules of the Corporation's property and a list of its creditors have been duly filed, and

WHEREAS, it is deemed for the best interests of this Corporation to make an offer in composition to the creditors, and a substantial number of creditors in amount and number have signified their willingness to accept an offer in composition; be it

RESOLVED, That the officers of this Corporation be and they hereby are authorized to offer a composition to creditors, in full satisfaction and discharge of their respective claims, of (.....¢) Cents for each and every dollar of indebtedness, to be paid as follows: one half in cash to be paid upon execution of the composition agreement, and one half in notes of this Corporation, payable three months from the date of the composition agreement; and the officers of this Corporation be and they hereby are authorized to execute all documents and to do all things necessary and proper to carry the foregoing resolution into effect.

No. 835

Resolution of directors authorizing officers to employ counsel to interpose answer to petition in bankruptcy and to oppose proceedings.

WHEREAS, an involuntary petition in bankruptcy was filed against this Corporation on the .. day of, 19.., in the United States District Court for the District of, upon the ground that this Corporation did, within four months of the filing of the petition, and while it was insolvent, transfer property to creditors, with intent to prefer such creditors, and

WHEREAS, it is the opinion of the directors that this Corporation is wholly solvent and is fully able to meet all its obligations and pay all just claims against it, and

WHEREAS, this Corporation did not transfer property to any creditors with intent to prefer them, within four months of the filing of the aforesaid petition or at any other time; be it

RESOLVED, That an answer to the aforesaid petition in bankruptcy be interposed in behalf of this Corporation, denying the allegations contained therein, and that the officers of this Corporation be and they hereby are authorized and directed to employ, an attorney, of (Street), City of, to represent this Corporation in the aforesaid proceeding, to do all things necessary to defend this Corporation, to oppose the proceedings brought against it as aforesaid, and to pay all reasonable expenses thereof and disbursements therefor.

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